Chicago Daily Law Bulletin®

Volume 162, No. 103 Serving Chicago's legal community for 161 years

First Amendment protections get broader for government employees

Reality doesn't bite, rather our perception of reality bites. — Anthony J. D'Angelo

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Generally, the Constitution's First Amendment protections prohibit a government employer from discharging or demoting an employee because the employee supports a particular political candidate.

Recently, in *Heffernan v. City of Paterson, N.J., et al.*, 2016 WL 1627953 14-1280, 2016 WL 1627953 (U.S. April 26, 2016), the U.S. Supreme Court expanded on this protection by ruling that where an employer demoted an employee out of a desire to prevent the employee from engaging in protected political activity, the employee can claim violation of his First Amendment rights even if his conduct was not constitutionally protected speech or association.

Plaintiff Jeffrey Heffernan was employed as a detective with the Paterson (N.J.) Police Department and assigned to the chief of police. The chief was appointed by Mayor Jose "Joey" Torres, who at the time of the events at issue was running for re-election against Lawrence Spagnola.

During the campaign, some fellow officers saw Heffernan, who was off duty, holding a large Spagnola campaign sign and talking with Spagnola's campaign workers. The next day, Heffernan was demoted to patrol officer and assigned to walk a beat based upon the police department's belief that his conduct demonstrated "overt involvement" in Spagnola's campaign.

While Heffernan was a good friend of Spagnola's, he denied any involvement in, support of or association with Spagnola's campaign and stated that he retrieved the sign from campaign workers solely for and at the request of his bedridden mother, who supported Spagnola.

Heffernan filed a federal lawsuit alleging that he was demoted because he had engaged in conduct that (in the police department's mistaken view of the facts) constituted protected speech.

The trial court's dismissal of Heffernan's lawsuit was affirmed by the 3rd U.S. Circuit Court of Appeals, which found that Heffernan admittedly did not actually engage in any conduct protected by the First Amendment and that it is not enough to claim a violation based upon the police department's perception of his involvement in the Spagnola campaign.

Specifically, the appeals court wrote, "a free-speech retaliation claim is actionable under Section 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."

The U.S. Supreme Court accepted the case to answer whether the First Amendment prohibits a government employer from demoting an employee based on a perception that the employee supports a political candidate.

For purposes of its opinion, the Supreme Court assumed that the activities that the police department believed Heffernan engaged in were of the kind that the police department cannot constitutionally prohibit or punish (supporting a particular political candidate).

The Supreme Court's decision potentially broadens First Amendment protections for government employees to not only include the employee's actual expression or association, but also the employer's perception of the employee's expression or association.

After reviewing the relevant federal statute (42 U.S.C. Section 1983) and existing case law, the Supreme Court concluded that the police department's reason for demoting Heffernan ("overt involvement" in Spagnola's campaign) is what counts, not whether Heffernan's actual conduct was constitutionally protected (doing a favor for his mother).

Specifically, if an employer demotes or discharges an employee out of a desire to prevent the employee from engaging in political activity protected by the First Amendment, the employee is entitled to challenge that action "even if, as here, the employer makes a factual mistake about the employee's behavior."

The Supreme Court noted that the same kind and degree of constitutional harm occurs whether the employer's belief is accurate or mistaken (e.g., inhibiting protected belief and association of all employees).

This case is not over. Since the Supreme Court remanded it to the trial court to determine whether the police department had a different and neutral policy prohibiting police officers from overt involvement in any political campaign, whether the police department was following that policy when it demoted Heffernan and whether the policy complies with constitutional standards.

The Supreme Court's decision potentially broadens First Amendment protections for government employees to not only include the employee's actual expression or association, but also the employer's perception of the employee's expression or association.

When considering discipline or adverse consequences for an employee as a result of the employee's speech or association, government employers must be mindful of the specific factual circumstances surrounding the employee's speech or association as well as how the employer interprets the employee's conduct, how the employer communicates the reason for any discipline or adverse consequence and how the employer's actions will be perceived by the employee and other staff members.