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LEGAL AND REGULATORY NOTES

Second Circuit Court Rules that Free Speech Rights are not "Absolut"

What started out as a bit of political office humor ended up with less than humorous results for three prison officers. The facts of the case are reminiscent of children getting caught passing around an unflattering picture of their teacher in class.

Plaintiffs Corporal Kent Singer and Correction Officers Thomas Nollner and Jonathan Decker were all employed at the Ulster County Jail (the UCJ) in Ulster County, New York. While at work, Singer commented on what he perceived to be preferential employment practices, favoritism, and selective enforcement actions in disciplinary matters by playing on the ubiquitous Absolut Vodka advertisements: he added pictures of four other UCJ officials above the caption "Absolut Corruption." He showed it to five of his co-workers, including Nollner and Decker, and then threw it in the trash. Another employee retrieved it and eventually the picture made the rounds to two UCJ supervisors, Christopher Ferro and Jon Becker, two of the defendants whose pictures appeared in the parody. What followed, allege the plaintiffs, was a series of retaliatory actions meant to punish the exercise of their civil rights. Shortly following the parody's circulation, Singer's supervisor Becker assigned him to prisoner transport after he had been excused from this type of duty so that he could remain at the UCJ in case he needed to tend to his sick mother. Becker took Singer off transport after he complained, but not before telling him that he knew he created the parody. Decker and Nollner faced similar treatment. Shortly after the parody, Decker's request to go home sick one day was denied by Ferro, his supervisor, who added that he heard Decker had something to do with the parody and that they settle it "the old fashioned way" by taking it outside. Both Decker and Nollner also lost out on promotions to two leadership positions on the Sheriff's Emergency Response Team (SERT) to less senior officers.

The plaintiffs brought a civil rights suit for violation of their rights under the federal constitution in the U.S District Court for the Northern District of New York pursuant to 42 U.S.C. § 1983. This federal statute authorizes the imposition of liability when an individual is deprived of his or her civil rights. Specifically, the plaintiffs contend that the actions taken against them violated their First Amendment rights to freedom of speech and political association. The District Court disagreed and granted summary judgment for the defendants on all claims. The U.S. Court of Appeals for the Second Circuit, which has appellate jurisdiction over the federal district courts in Connecticut, New York, and Vermont, affirmed the District Court's ruling.

The Court's analysis of this case derives from a litany of U.S. Supreme Court cases culminating in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) which we originally wrote about here in the July 2006 *VLCT News*.

The Free Speech Clause of the First Amendment to the U.S. Constitution protects one's right to communicate ideas and opinions. This freedom, however ,is not

absolute as "public employment does substantially curtail the right to speak freely in a government workplace." See *Mandell v. County of Suffolk*, 316 F.3d 368, 382 (2nd Cir. 2003). The U.S. Supreme Court has acknowledged an interesting dichotomy that occurs when the citizens enter government employment. On the one hand, the government as "employer" has far more power than it does when acting as the "sovereign" because, like other employers, it needs to control its employees' words and actions in order to provide efficient services. On the other hand, a citizen employed by the government is still a citizen and subject to the protections of the First Amendment. The only way to make this distinction work therefore and protect the interests of the government as "employer" and the rights of its employees as "citizens" is to distinguish between expressions made pursuant to employees' work duties and those made by employees in their capacity as private citizens. What follows then is the general rule that government employers cannot take adverse action against employees for exercising their constitutionally protected right to speak as citizens on matters of public concern. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline").

The first step for the Court in evaluating whether the plaintiff's speech warranted protection from retaliation therefore involved deciphering whether the speech was a matter of "public concern." A matter of public concern is one that "relat[es] to any matter of political, social, or other concern to the community." By negative implication, this rules out any speech "calculated to redress personal grievances..." To determine which category the speech falls into requires looking at the content, form, and context of the statements. If the employee wasn't speaking as a citizen to a matter of public concern then the analysis stops there and the employee has no First Amendment cause of action based on his or her public employer's restriction of the speech. If the speech *does* touch upon a matter of public concern, the next step would be to conduct a delicate balancing of "the interests of the employer in providing effective and efficient public services against the employee's First Amendment right to free expression" (i.e. the "Pickering balancing test").

Singer argued that the subject of his parody was a public concern because it involved alleged corruption in a government institution. Though acknowledging that corruption could constitute a matter of public concern, the Court interpreted the types of practices Singer parodied (minor payroll discrepancies, isolated promotions, discipline) as lacking in both scope and degree of the kind demanding public attention. The Court then turned to examining the form and context of the parody, which it found was more private than public in nature, considering its meaning "was comprehensible only to others who worked at the prison, and only in the most vague manner." Furthermore, regardless of the potential breadth of its message, the only people who ever saw it were five fellow employees. Singer himself admitted he had no intention of conveying his parody to the public, which was supported by the fact that he threw it away in the trash. The Court's conclusion that Singer's parody wasn't the sort of speech deserving Constitutional protection from retaliation ended up being poisonous to co-plaintiffs' Decker's and Nollner's expressive association claims as well. Amongst the rights that the First Amendment confers upon its citizenry is the freedom to associate with those of their own choosing. The

problem for Decker and Nollner was the same for Singer in that a "public employee bringing a First Amendment freedom of association claim must persuade a court that the associational conduct at issue touches on *a matter of public concern*." (Emphasis added.) The Court already ruled that the parody wasn't a matter of public concern. In essence, because Singer's claim failed, so too must those of Decker and Nollner.

As was the case for the U.S. Supreme Court in *Garcetti*, the irony that more serious allegations geared and distributed to a broader public audience would possibly have furthered Singer's claim was not lost on the Second Circuit Court. The take-away message from this case is the same as in *Garcetti*: "[a] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public." Hopefully, it'll also keep them from making parodies of you on the town computer.

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