

LEGAL AND REGULATORY NOTES, JUNE 2016

**U.S. Supreme Court Rules in Favor of Police Officer
in Political Free Speech Retaliation Claim**

“I have zero tolerance for betrayal, which they will soon indelibly learn.”

–Frank Underwood, *House of Cards*

Fans of the Netflix’s original series *House of Cards* take note: political retribution is not without its risks, even if it’s mistaken. This was the warning delivered by six of the U.S. Supreme Court’s eight Justices in the case of *Heffernan v. City of Paterson, New Jersey*, 578 U.S. ___ 2016, which held that,

[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action ... even if ... the employer makes a factual mistake about the employee’s behavior.

This case introduces us to Jeffrey Heffernan, a police officer in Patterson, New Jersey. Officer Heffernan’s boss, Chief of Police James Wittig, was appointed by the mayor of Patterson, Jose Torres. Mayor Torres was running for reelection against Lawrence Spagnola, a good friend of Officer Heffernan. At the request of his bedridden mother, Officer Heffernan, who was off-duty at the time, went to Spagnola’s campaign offices to pick up a campaign sign to replace the one that had been stolen from her yard. Word got back to Officer Heffernan’s office that he was there, sign in hand, talking to campaign workers. The next day, Officer Heffernan was demoted under the mistaken belief that he was overtly involved in Spagnola’s mayoral campaign, when in fact all he was trying to do was help his mother.

Officer Heffernan responded by bringing a civil rights lawsuit against the City of Patterson in federal court. Federal law allows people to sue the government when it violates their constitutional rights. “Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...” 42 U.S.C. § 1983. Officer Heffernan alleged in his lawsuit that the City retaliated against him for exercising his First Amendment rights of political speech. Both the District and Third Circuit Court of Appeals disagreed, ruling against Officer Heffernan on the grounds that, though the City thought that he had engaged in constitutionally protected conduct, Officer Heffernan hadn’t actually done so. As Officer Heffernan himself claimed, he wasn’t speaking in support of the Spagnola campaign. He was just doing an errand for his mother.

On appeal, the question for the U.S. Supreme Court became whether a claim could be brought against a government employer for taking an adverse employment action against an employee under a mistaken belief that the employee was exercising a constitutionally-protected right. Justice Thomas, who wrote the dissenting opinion, didn’t think so. Neither did Justice Alito, who joined his dissent. They argued that federal law doesn’t provide a right to sue the government when one’s constitutional rights haven’t actually been violated. For them, the violation is a necessary prerequisite to the cause

of action remedying it. When employees bring a free-speech retaliation claim, “public employees like Officer Heffernan must allege that their employer interfered with their right to speak as a citizen on a matter of public concern ... [i]f the employee did ... speak as a citizen on a matter of public concern, then the Court looks to ‘whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.’” However, the dissenters noted, if the employee didn’t speak on a matter of public concern, then he hasn’t exercised his First Amendment right of free speech and he consequently has no cause of action based upon his employer’s response to it. Officer Heffernan’s demotion may be considered “callous,” wrote Justice Thomas, but it wasn’t unconstitutional.

Justice Breyer, who wrote the majority opinion, and the remaining Justices saw things differently. Finding no answer to the question before them in the wording of the law itself, Justice Breyer turned to Court precedent (prior Court decisions) for guidance, where he settled upon *Waters v. Churchill*, 511 U.S. 661 (1994). In that case, an employer fired an employee on the mistaken belief that the employee had engaged in workplace gossip (not constitutionally protected speech) when in fact the employee had spoken on a matter of public concern (constitutionally protected speech). The Court in that case ruled in favor of the employer because its motive was pure and its mistake reasonable. If motive was the determinative factor in that case, Justice Breyer reasoned, the same should hold true in the Heffernan case. “After all, in the law, what is sauce for the goose is normally sauce for the gander.” The Court found that the City’s motive behind demoting Officer Heffernan was to prevent him from engaging in the campaign, an activity protected by the First Amendment, and therefore Officer Heffernan had a right to sue the City under federal law.

In supporting its decision, the Court also pointed to the anticipated real world consequences of the case by emphasizing that an employer’s mistaken assumption about an employee engaging in protected speech doesn’t protect the employee from the risk of retaliation in the workplace. On the other hand, extending to Officer Heffernan and others the right to sue based upon their employers’ improper motive will encourage rather than discourage employees from engaging in protected activities.

It is important to point out what was not decided by this case. The Court only found and ruled upon the City’s “improper motive.” This case was just about the right to bring a free speech retaliation lawsuit against a government employer. It did not address the question of whether its retaliatory actions were unconstitutional. That decision would require determining whether it had acted pursuant to a “different and neutral policy prohibiting police officers from overt involvement in any political campaign.” The Court remanded the case to the lower courts to resolve that issue. For a more complete treatment of the how courts will review the constitutionality of free speech retaliation claims, see: <http://www.vlct.org/assets/Resource/LRN/2013/LRN-free-speech.pdf>.

The *Heffernan* case is archived [here](#).

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