



Ninth Circuit Dismisses First Amendment Claim Based on Public Employee Speech Made in Course of Official Duties

The claims of two former police officers were denied in Huppert v. City of Pittsburg (July 21, 2009), ___ F.3d ___, 2009 WL 2151344, when the Ninth Circuit Court of Appeals determined that the employees were acting in their official capacity by investigating corruption within the police department and, thus, their speech was not protected by the First Amendment.¹

The two officers alleged that they were passed over for promotion, transferred to less desirable assignments, and ultimately terminated due to their participation in various investigations of misconduct in the department. For example, they had written a report revealing improper conduct by other officers such as gambling and possible illegal drug activity, provided information to the district attorney's office and FBI, and testified before a grand jury.

The First Amendment protects a public employee from retaliation by his employer when he speaks as a citizen on a matter of public concern. In Huppert, the court applied the following five-part test to determine whether the officers' speech was protected and caused a retaliatory response:

- (1) Whether the employee spoke on a matter of public concern;
- (2) Whether the employee spoke as a private citizen or public employee;
- (3) Whether the employee's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) Whether the employer had adequate justification for treating the employee differently from other members of the public; and
- (5) Whether the employer would have taken the adverse employment action even absent the protected speech.

Each prong of the test is applied sequentially, and failure to meet one step concludes the court's inquiry. Regarding the first prong, unlawful conduct by a government employee or illegal activity by a government agency is a matter of public concern. Thus, the officers' investigation and communications about potential corruption in the department was clearly a matter of public concern.

As for the second prong, the plaintiff bears the burden of showing his speech was spoken as a private citizen and not as a public employee. Whether the speech was pursuant to the employee's official duties requires a practical inquiry beyond the job description to the duties the employee actually performs. The court provided several guidelines and examples to identify whether the speech falls outside the ambit of an employee's job duties and would be protected by the First Amendment. Speech which owes its

¹ This is the tenth published decision from the Ninth Circuit applying and interpreting the United States Supreme Court decision of Garcetti v. Ceballos (2006) 547 U.S. 410. Garcetti was a significant departure from the longstanding Pickering v. Bd. of Ed. of Township High Sch. Dist. (1968) 391 U.S. 563, standard that protected public employee speech whether made as a private citizen or in the course of one's duties as a public employee.

existence to an employee's professional responsibilities is not protected. Whether the employee was paid for the speech (e.g., drafting a memorandum, creating a report, advising a supervisor, etc.), was following the direct orders of a supervisor, or was formally assigned to the task may indicate a job function. Other potential indicators are whether the speech has any official significance and whether the individual is communicating within the agency or to persons outside the workplace. The court cited a previous decision where a female prison guard's reports of sexual harassment to her superiors and documentation of the prison system's response to her complaints were deemed unprotected speech. However, when she communicated with her state senator and the appointed inspector general, the speech was protected because she was exercising her right to complain to an elected public official and to an independent state agency as a private citizen. (*Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528.)

In *Huppert* the speech of the two former police officers was not protected because it was made pursuant to their official job duties to investigate illegal activity, disclose the findings to their supervisors by writing reports, and testify regarding their findings. One of the officers had been asked by the department to participate in the investigation conducted by the district attorney's office, which subsequently became a formal assignment. Regarding the officer's participation in the FBI's investigation, the court noted that in California, a police officer's official duties include investigating corruption, so as to prevent the commission of crime and assist in its detection. Thus, the officers were acting within their duty as a police officers and their speech was not protected by the First Amendment. As a result, the court issued a decision in favor of the employer.

The *Huppert* decision illustrates that in order for the speech to be protected, the employee must show that his speech was made as a private citizen, and not pursuant to his official duties. In cases where this threshold inquiry can be met, the court will consider the remaining prongs of the test to determine whether the protected speech caused a retaliatory response by the employer. Please note that employees may still be able to successfully challenge retaliation under the state whistleblower laws.

Should you have any questions regarding this case and its impact, please contact one of our four offices.

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