

Personal Versus Political Loyalties

In *Nichols v. Dancer*, 567 F.3d 423 (2009), the U.S. Ninth Circuit Court of Appeals was presented with a question of application of the patronage dismissal doctrine in immunizing an employer from First Amendment claims by employees terminated for a perceived lack of loyalty.

Kathleen Nichols was employed by the Washoe County School District as the assistant to then General Counsel Jeffrey Blanck. In the course of the District's consideration and eventual termination of Blanck it became the opinion of Assistant Superintendent Laura Dancer that Nichols had a personal loyalty to Blanck. Nichols was transferred to another position during the course of the District's consideration process and, despite assurances made to Nichols otherwise, not offered an opportunity to return to the General Counsel's office after the termination was complete. Additionally, the District imposed a one-year salary freeze. Nichols alleges that Dancer expressed doubt about her loyalty and inquired about her retirement as an alternative solution to employment placement. Nichols did finally opt for retirement despite it being, what she described as, a severe financial detriment.

Nichols sued Dancer, Superintendent James Hager and the District for First Amendment retaliation and claimed that her First Amendment right to associate had been violated as a result of her terminated employment. The District court granted summary judgment in favor of the defendants based on the patronage dismissal doctrine.

It is established law that a public employer may not unduly abridge an employee's First Amendment rights. It is, however, equally well established that government employers have more authority to restrict the speech of their employees than that of their constituents. The process for determining the appropriate circumstance for this restriction must come from finding a balance between the interests of an employee as a citizen and those of the government, as an employer, in performing its public services. This is commonly referred to as a *Pickering* balancing test. However, there are certain instances in which an employer need not conduct this test at all, such as when the patronage dismissal doctrine permits public employers to terminate certain employees on the basis of their political beliefs and loyalties.

A series of cases frame the proper application of this doctrine to a fairly narrow set of circumstances in terms of the employee's office and the types of beliefs and loyalties. In order for an employee's discharge to be based on this doctrine it must be demonstrated that their political affiliation is an appropriate requirement for the performance of the office. One case in point is when a Democratic public defender, appointed by a legislature with a new Democratic majority, tried unsuccessfully to fire two Republican assistant public defenders. Similarly, a court did not permit a newly elected Democratic sheriff to require that his subordinate Republican employees switch party affiliations. Courts have further explained that in cases of these kinds the free functioning of the electoral process suffers without any furthering of a vital government end. A case showing the proper application of this doctrine is a District Attorney who fired an Assistant District Attorney who unsuccessfully ran against him in an election.

The Ninth Circuit found in the *Nichols* case that the loyalty of Nichols to Blanck was not political in nature, but personal. The Court held, as a result of this finding, that the patronage

dismissal doctrine did not apply at all because the seminal cases are uniformly premised on political beliefs. The court reversed the district court's ruling on summary judgment and remanded the case for reconsideration of the claims under the traditional First Amendment government employee analysis. The Ninth Circuit declined the parties' request to perform this analysis itself on appeal because the District court had never reached the issue in its initial ruling on summary judgment.

Cities are advised to be very wary of terminating an employee on patronage grounds. The doctrine is fairly narrow in what types of terminations it will immunize. Prior consultation with legal counsel and the city's insurer is essential if it is believed that the patronage dismissal doctrine may be applicable in a given case.