

Free Speech Protection in Personnel Disputes

The U.S. Ninth Circuit Court of Appeals addressed an issue of protected speech in the workplace in *Desrochers v. City of San Bernardino*, 572 F. 3d 703 (2009). The case concerns an escalating series of personnel grievances in San Bernardino's police department that resulted in a lawsuit against the city. The city prevailed on summary judgment in the U.S. District Court for the Central District of California and the plaintiffs appealed.

San Bernardino police officers Desrochers and Lowes filed grievances against a Lieutenant Kimball. One officer was transferred to another department and the other was the subject of a disciplinary action. The lawsuit alleges these actions were retaliation for engaging in speech (i.e. grievances) protected by the First Amendment.

There is a five-step series of questions the courts consider when dealing with a First Amendment retaliation claim against a government employer. The first step is whether an employee spoke on a matter of public concern. The plaintiffs did not make it past the first step before the trial court and therefore this step was the sole issue on appeal.

Plaintiffs alleged that Lieutenant Kimball created a hostile work environment in the course of various interactions with police staff and by failing to nurture better relations with partner police departments from neighboring cities. This initial, informal grievance was filed pursuant to city policy and included requests for removal of Kimball from his current command, formal investigation of the charges contained therein and special monitoring of Kimball's employment status and job performance in various ways. Kimball's request for transfer, filed immediately upon his learning of the grievance, was granted.

Plaintiffs then filed a formal grievance. This second grievance expanded upon the former by adding more detailed allegations against Kimball and by the inclusion of the chief and captain for their handling of the informal grievance. The grievance sought the city's acknowledgment that Kimball's actions were at odds with the department's policies and core values, an agreement to monitor Kimball and a commitment to develop additions to the department's core values that reflect a culture of respect between all employees. The department denied the grievance. Plaintiffs filed a complaint with the city's human resources department, again expanding the scope of the complaints and the number of parties involved. Plaintiffs added Lieutenant Boom, Kimball's replacement, out of fear of his being used as a tool for retaliation and for his contribution to a hostile work environment. Plaintiffs were denied the relief they requested and subsequently filed their lawsuit.

In its analysis, the 9th Circuit noted that no precise definition of "public concern" exists, however the clear question in making a determination is whether the speech is grounded in a "public" or "private" interest. Plaintiffs argued that their speech is a matter of public concern because it relates to the effectiveness of a public safety department. The city's argument hinged on the notion that these are personnel matters of a private interest and only marginally related to issues of public concern.

The 9th Circuit ultimately sided with the city. For an employee's speech to amount to a public interest or be deemed a "public concern," its substance must address issues that would enable the public to make informed decisions about government's core duties and operations. The court held that ordinary personnel issues (such as those present in this case) do not rise to that level except in the rarest of circumstances.

In coming to a decision, the majority also took issue with a discrepancy between plaintiffs' grievances and their post-hoc characterizations, the latter being more favorable in terms of satisfying the requirements for protection. Add to this the fact that the form of the speech was an internal document instead of a form of expression in the public eye, and the court fell even more firmly behind the city's argument. The court determined that plaintiffs' claims of altruistic intentions to improve the department for the good of the public failed to convert the issue into one of public concern and therefore they were not entitled to First Amendment protections for their grievances. As such, the court affirmed summary judgment for San Bernardino.

The dissenting opinion drew its alternate conclusion that this is an area of public concern based on several factors. They included the police department's functionality being an inherent public concern, the plaintiffs having appropriately framed it as such throughout the process and their continuing with the grievance after their personal needs were met with the transfer of Kimball. Finally, the dissent disagreed with the appropriateness of making a determination of "public" versus "private" concern based on the speech taking the form of an initial, internal complaint instead of a publicly delivered message.

On first blush, this case demonstrates that internal grievances aren't protected speech under the First Amendment in many circumstances. However, upon closer examination it becomes evident, both by virtue of the dissenting opinion and the ill-defined definition of "public concern," that the facts of a given dispute are critical and that this is not an area of the law where public officials should assume that bright lines exist. As with all employment matters in the public arena, close consultation with legal counsel is advised before disciplinary action is taken.