

Supreme Court Rules Improper Motive Good Enough for First Amendment Violation

Labor & Employment Law Update

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"The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected activity. In this case a government official believed, but *incorrectly* believed, that the employee had supported a particular candidate for mayor." So begins Justice Stephen Breyer's decision in *Heffernan v. City of Paterson*, which the United States Supreme Court issued on April 26, 2016.

Heffernan was a police officer working for the Paterson Police Department in New Jersey. His supervisor and the Chief of Police had both been appointed by the City's incumbent mayor, who was running for re-election. The challenger in the mayoral race, Lawrence Spanola, was a friend of Heffernan. Although Heffernan was not directly involved in campaigning, his bedridden mother asked him to pick up a Spagnola yard sign for her. While at Spagnola's campaign distribution point, fellow police officers saw Heffernan holding the yard sign in hand and word of it spread throughout the Department. The next day Heffernan was demoted as punishment for his "overt involvement" in Spagnola's campaign. Heffernan filed suit claiming the Department violated his constitutional right to free speech.

The District Court found that because Heffernan had not actually engaged in any First Amendment conduct he had not been deprived of any constitutionally protected rights. On appeal, the Third Circuit affirmed and noted that Heffernan could have maintained his lawsuit only if his demotion had been prompted by Heffernan's "*actual*, rather than *perceived*, exercise of constitutional rights."

The U.S. Supreme Court, however, disagreed and concluded that the Department's motivation for demoting Heffernan was the critical issue. Thus, "when an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment...even if, as here, the employer's actions are based on a factual mistake about the employee's behavior." The Supreme Court remanded the case to the lower courts for a determination as to whether Heffernan was demoted in adherence to a neutral

policy prohibiting police officers from engaging in political activity and whether such policy is constitutional.

Heffernan's victory may be short-lived as the policy prohibiting political activity may indeed pass constitutional muster. To minimize potential liability, public employers should: 1) adopt and publish a neutral, constitutionally compliant policy regarding political activity; 2) conduct a proper investigation in the event of a violation of that policy; and 3) issue reasonable, fair and consistent discipline if a violation is found.

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