

CLIENT NEWS BRIEF

Ninth Circuit Clarifies Standards for First Amendment Retaliation Involving Speech Relating to Union Grievances

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In *Ellins v. City of Sierra Madre* (Mar. 22, 2013) __ F.3d__ (2013 WL 1180299), the Ninth Circuit Court of Appeals considered whether John Ellins, a police officer for the City of Sierra Madre (City), had sufficiently alleged a First Amendment retaliation claim, where Ellins claimed that the delay in his salary increase constituted retaliation for his exercise of free speech rights by way of leading an employee union no-confidence vote against the Chief of Police. The Ninth Circuit held that Ellins had established a prima facie case of First Amendment retaliation against the Chief of Police, but not against the City.

Ellins served as President of the Sierra Madre Police Association (SMPA). In 2008, he led the SMPA in a vote of no confidence against the Chief of Police, Marilyn Diaz. Ellins contended that the SMPA initiated the vote of no confidence due to Diaz's "lack of leadership, wasting of citizens' tax dollars, hypocrisy, expensive paranoia, and damaging inability to conduct her job." Ellins led the vote, as it is the SMPA President's role to lead votes of no confidence. After the vote, SMPA issued two press releases regarding the no-confidence vote and criticizing Diaz's management style. Diaz read these press releases; she later testified that she believed that Ellins, as SMPA President, was involved in the press releases.

Contemporaneously with the no confidence vote, Ellins was the subject of three internal affairs investigations for prior misconduct. In October 2008, Diaz initiated a criminal investigation by the Los Angeles County District Attorney's Office into Ellins' alleged misconduct, although no charges resulted from the investigation. Subsequently, in February 2009, Ellins submitted an application to Diaz for an Advanced Peace Officer Standards and Training (P.O.S.T.) certificate; to receive the certificate, applicants were required to be of good moral character. Ellins would receive a 5% pay raise upon receipt of the certificate. When Diaz did not immediately approve Ellins' application, Ellins filed suit against the City and Diaz alleging that Diaz's delay in approving his certificate was in retaliation for Ellins leading the no-confidence vote. Diaz subsequently approved Ellins' application in hopes that he would forgo his lawsuit.

The lower court granted the Defendants' motion for summary judgment and held that: Ellins had not established a prima facie claim of First Amendment retaliation; Diaz individually was entitled to qualified immunity; and the City was not liable. Ellins appealed, and the Ninth Circuit reversed the lower court in part.

To prevail on a First Amendment retaliation claim, the plaintiff employee must show that his or her speech was a matter of public concern, the employee spoke as a private citizen and not as a public employee, and the employee's protected speech was a substantial or motivating factor in the employer's alleged adverse employment action. On summary



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judgment, as was the case in this litigation, the employee need only introduce evidence sufficient to create a genuine issue of material fact as to the elements of his or her First Amendment retaliation claim. If the employee makes such a showing, then the government employer must establish that it had an adequate justification for treating the employee differently than other members of the general public and that it would have taken the adverse employment action even in the absence of the employee's protected speech.

The Ninth Circuit stressed that collective personnel grievances introduced by unions can be matters of public concern. The no confidence vote against Diaz led by Ellins was a *collective* grievance relating to the police union's trepidation about Diaz's leadership style and other related issues. There was thus sufficient evidence that Ellins' speech related to a matter of public concern. Next, the Ninth Circuit determined that there was sufficient evidence demonstrating that Ellins' speech was spoken in his capacity as a private citizen, not as a public employee, because Ellins had no official duty as a police officer to initiate the no-confidence vote or to issue the corresponding press releases. The Court further concluded that when a police officer speaks as a *representative of the police union*, the police officer is not acting in furtherance of his responsibilities as a public employee. Additionally, the temporary deprivation of Ellins' salary increase, due to Diaz's delay in approving Ellins' application, constituted an adverse employment action. Lastly, the Ninth Circuit determined that Ellins had produced sufficient evidence to show that his protected speech was a substantial motivating factor for the adverse employment action. The Court highlighted the close temporal link between his protected speech and the pay increase delay, as well as Diaz's statements in opposition to Ellins' speech.

The Court thus determined that despite Ellins' disciplinary record and the ongoing investigations by the District Attorney, there was sufficient evidence suggesting that Diaz would have approved Ellins' application in the absence of the no-confidence vote. The Court also determined that Diaz was not entitled to qualified immunity, as a reasonable official would have known that her conduct violated Ellins' First Amendment rights. Finally, the Ninth Circuit affirmed the lower court's holding that the City was not liable for Diaz's conduct because the City did not have an official policy or custom of retaliatory delay in approving P.O.S.T. certificates. Also, the City's final policymaker, who approved Diaz's decision to delay accepting Ellins' application, was not aware of Diaz's alleged retaliatory motive. Consistent with these rulings, the Court remanded the case to the lower court for further proceedings against Diaz under Ellins' First Amendment retaliation claim.

This decision clarifies that expression by an employee relating to a collective grievance brought by a union or association may constitute protected speech and thus underpin a First Amendment retaliation claim. Employers should distinguish such expression, however, from an individual employee's speech relating to individual personnel grievances, which normally constitutes unprotected speech in the context of First Amendment retaliation claims.

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