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# Ninth Circuit Establishes Preliminary Framework for First Amendment Familial Antiretaliation Claims

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In *DeFrancesco v. Robbins* (9th Cir. 2025) 136 F.4th 933, the United States Court of Appeals for the Ninth Circuit held that university officials were entitled to qualified immunity in an action brought by a former employee alleging violation of his First Amendment right to be free from retaliation for his husband's allegedly protected whistleblowing speech. In so holding, the court left unanswered the question of whether public employees have constitutional protections from retaliation based on a close family member's speech.

### Qualified Immunity

Qualified immunity is a legal doctrine that protects public officials from personal liability in civil lawsuits for actions taken within their official capacity, unless their conduct violates "clearly established" statutory or constitutional rights.

### *DeFrancesco v. Robbins* Background Facts

Plaintiff Anthony DeFrancesco was the Senior Director of Operations at the University of Arizona Health Sciences (University). DeFrancesco's husband, Greg Goldman, was a Senior Vice President and Chief Financial Officer for the University.

In 2017, the president of the University, Robert Robbins, put a search committee together to find a new Senior Vice President. Goldman volunteered to serve as co-chair of the committee. Robbins requested that the University use Russell Reynolds, a particular executive search firm, to assist the search committee. Several high-ranking employees of Russell Reynolds were close personal friends of Robbins. Further, Robbins encouraged defendant Michael Dake to apply, whom he called his "longest, best and dearest friend."

Dake applied late and did not do well during his first interview. Goldman told Robbins that Dake did not do well at his interview, and the committee would likely not move forward with him. In response, Robbins said he was not concerned because it was "taken care of that Dake would be hired."

In March of 2018, Robbins offered Dake the position. Goldman expressed concerns about the integrity of the hiring process and stated he believed the

entire process was pre-planned by Robbins. After Dake was hired, Robbins told Dake that Goldman had firmly advocated against Dake's candidacy. Robbins also told Dake that Goldman's husband was a University executive and that Dake had the authority to fire him.

Shortly thereafter, Dake began to subject Francesco to targeting and harassment. In October 2018, Dake refused to promote DeFrancesco to a position whose responsibilities he was already performing. Dake undermined DeFrancesco in meetings, ignored him, and circumvented him by communicating directly with his subordinates. Dake finally terminated DeFrancisco on June 30, 2019.

In January 2020, DeFrancesco sued Robbins and Dake alleging that they infringed upon DeFrancesco's First Amendment right to be free from retaliation for his husband's allegedly protected whistleblowing speech.

Robbins and Dake moved to dismiss DeFrancesco's complaint, invoking qualified immunity, and arguing that First Amendment protection of public employees from retaliation because of a close family member's speech is not clearly established. The district court agreed and dismissed DeFrancesco's complaint. DeFrancesco appealed.

## Ninth Circuit Opinion

In assessing whether qualified immunity applies, the Ninth Circuit Court of Appeals applied the familiar two-part test: (1) whether the plaintiff alleged a violation of a constitutional right, and (2) whether the constitutional right was "clearly established" at the time of the alleged misconduct. To meet the "clearly established" requirement, the law at the time of the misconduct must have been "sufficiently clear" that every reasonable official would have understood that what he or she is doing is unlawful. A constitutional right may be "clearly established" by controlling authority (e.g., such as another Ninth Circuit opinion) or a robust consensus of cases of persuasive authority (i.e., case law from several appellate circuits). The court explained that existing precedent must have placed the statutory or constitutional question beyond debate.

The court assessed controlling and persuasive authority that existed at the time Dake and Robbins allegedly retaliated against DeFrancesco, using the date of DeFrancesco's termination, which was June 30, 2019. The court noted it is settled law that, as a general matter, public employees enjoy protection from retaliation based on their *own* protected speech, but that same principle cannot be applied to the facts of this case.

After examining a variety of case law, the court determined that there was enough uncertainty among appellate and district courts in June 2019 that the First Amendment protection from retaliation for a family member's speech was not "beyond debate." The court noted that there was authority favoring the recognition of the protection that DeFrancesco claimed; however, at the time of his firing, it was not "settled law."

## Takeaways

While the court left unanswered the question of whether public employees have constitutional protections from retaliation based on a close family member's speech, the court noted that authority

existed favoring the recognition of such protection, thereby creating a preliminary framework for future familial antiretaliation claims. While the protection is not yet “clearly established,” public employers should still avoid taking adverse action against an employee in retaliation for *any* constitutionally protected speech, whether that speech belongs to the employee or anybody else.

If you have any questions about *DeFrancesco v. Robbins*, its impacts, or any of the issues discussed in this Client News Brief, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [X \(formerly Twitter\)](#) and [LinkedIn](#) or download our [mobile app](#).

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