



SCOTUS Ruling on Personnel Decision Based upon Perceived Political Affiliation Impacts Public Employers

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The U.S. Supreme Court recently ruled on a matter involving perceived affiliation, bringing clarity to the matter, where the circuits provided discordant rulings. As a result, personnel actions based upon even mistaken beliefs are actionable.

The **issue** was whether a First Amendment retaliation claim may lie where a **public employer** holds a mistaken belief about an employee's political affiliation. The case, *Heffernan v. City of Paterson*, further defines the scope of First Amendment protection for public employees. Public employers should refrain from making any personnel decisions based upon an employee's political affiliation, whether real or perceived.

The Facts

The plaintiff, Jeffrey Heffernan, was a Paterson, NJ police detective who knew Lawrence Spagnola, a candidate vying to unseat the incumbent mayor. Although not affiliated with the campaign, at his mother's request, Heffernan arranged with Spagnola's campaign to pick up a replacement campaign sign. A fellow Paterson police officer, who happened to be on the incumbent mayor's security staff, saw Heffernan speaking with Spagnola's campaign manager when Heffernan picked up the sign. The very next day, Heffernan was demoted because of his perceived involvement in the election.

Heffernan sued for violation of his First Amendment rights for demoting him in retaliation for his exercise of free speech. Ultimately, after multiple rounds, the Third Circuit affirmed summary judgment in the defendants' favor. The Circuit court held, in part, that Heffernan had not exercised his First Amendment free speech or free association rights when he picked up the sign for his mother and that city officials' mistaken

belief that he had exercised those rights could not be the basis of a First Amendment claim.

The Circuit court also considered Heffernan's alternative theory that his rights were violated based on the mistaken perception that he had exercised those rights. The court held that the free speech claim was foreclosed by an earlier Third Circuit case, *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 496 (3d Cir. 2002), that rejected claims based on perceived protected speech. The court then extended that holding to bar free association claims.

The U.S. Supreme Court Resolved a Disagreement among Circuits

The Third Circuit's holding in *Heffernan* was at odds with holdings from other circuits. It conflicts with the Sixth Circuit's opinion in *Dye v. Office of the Racing Commissioner*, 702 F.3d 286, 300 (6th Cir. 2012). There, employees of the Michigan racing commission claimed that they were mistreated on the basis of their alleged support for a political party. The Sixth Circuit held the employer's mere assumption of an affiliation, whether founded or not, was sufficient for the plaintiffs' claim to proceed.

The holding was also in disagreement with cases from the Tenth and First Circuits holding that retaliation based on a public employee's political neutrality is equally as actionable as retaliation based on an employee's actual political affiliation.

With the *Heffernan* ruling, the Supreme Court resolved any disagreement. Citing its holding in *Waters v. Churchill*, 511 U.S. 661 (1994), the Court ruled that it is the employer's motive that matters. So, a First Amendment retaliation claim lies where an employer takes an adverse action against an employee based upon protected activity, even where belief that the employee had engaged in protected activity was mistaken. The Court supported its ruling by stating: 1) that a rule of law finding liability tracks the First Amendment, which focuses on the Government's activity; 2) the constitutional harm---discouraging employees from exercising their free speech and association rights---is the same whether or not the employer's actions rest upon a factual mistake; and 3) such a ruling is not likely to impose significant costs upon the employer, as the employee bears the burden of proving an improper motive.

Impacts of Heffernan

For public agencies, the law is now clear: Do not make personnel decisions based either on your employees' affiliations or what your managers perceive those affiliations to be. Employers will certainly need to steer clear of any personnel decisions involving a supervisor's perception that an employee has engaged in oppositional politics.

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