LEGAL UPDATES

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Supreme Court Rules That Public Employer's Motive Determines Liability in Protected Speech Cases

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The U.S. Supreme Court ruled on April 26, 2016, that a public employer can be held liable for taking adverse employment actions against an employee who the employer believes is engaged in activity protected by the First Amendment, even if the employee never actually engaged in protected speech. The decision, which applies to public colleges and universities, confirms the need for public employers to carefully evaluate whether employee conduct is protected by the First Amendment before taking any employment actions.

A Case of Mistaken Activity

In this decision, *Heffernan v. City of Paterson*, the Court considered the case of Jeffrey Heffernan, a police officer in Paterson, New Jersey. While off duty, Heffernan picked up a campaign sign supporting a challenger in the town's mayoral race, and many officers on the police force became aware of this event. The next day, Heffernan's supervisor demoted him from detective to patrol officer because the supervisor believed Heffernan was overtly involved in the campaign. As it turns out, however, Heffernan was merely picking up the sign for his mother, whose similar sign was stolen from her front yard. Thus, Heffernan was demoted because of the department's mistaken belief about his actions.

A difficult legal question arose because Heffernan sued the police department under 42 U.S.C. § 1983, which allows an individual to recover damages for the "deprivation of any rights, privileges, or immunities secured by the Constitution." The police department argued that because Heffernan was not truly engaging in any First Amendment activity, he could not assert a claim under § 1983. The trial court and the court of appeals both agreed.

In a 6-2 decision, the Supreme Court reversed. For purposes of the Court's analysis, it assumed that the conduct for which Heffernan was demoted would have been protected by the First Amendment and that his demotion was due only to the police department's mistaken belief that he engaged in this activity. The Court's primary analysis then focused on its prior decision in *Waters v. Churchill*, 511 U.S. 661 (1994), where the Court confronted the inverse situation. In *Waters*, the public employer disciplined an employee when it reasonably believed that the employee did not engage in any protected First Amendment activity. In reality, however, the employee's activity was protected, unbeknownst to the employer. The Court held that as long as the employer's belief was reasonable, no liability could attach.

Turning to Heffernan's case, the Court said: "If the employer's motive (and in particular the facts as the employer reasonably understood them) is what mattered in *Waters*, why is the same not true here?" Accordingly, the Court held that if an employer takes an adverse action against an employee "out of a desire to prevent the employee from engaging in political activity that the First Amendment protects," the employee may challenge that action even if the actual activity was not protected.

The Campus Connection

Similar factual scenarios commonly arise at colleges and universities. For example, a chancellor, university president or dean may believe that a professor is involved in a political campaign. Assuming the professor's activities would be protected by the First Amendment, whether the professor actually engaged in the activity is immaterial. If the college or university punishes the professor, it can be liable for damages.

The Court found the propriety of this rule to be bolstered by the language of the First Amendment, which similarly focuses on the actions of the government actor. ("Congress shall make no law … abridging the freedom of speech.") Additionally, the Court described how this rule achieves the deterrent purpose of dissuading public employers from punishing employees for activity the employer believes is protected by the First Amendment. "The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake."

What This Means to You

Heffernan reinforces the importance of colleges and universities carefully analyzing employee activities that are potentially protected by the First Amendment—especially before taking any adverse action. As the Supreme Court confirmed, it is the motive of the employer that is at issue when employment actions are challenged.

Determining whether employee speech is protected by the First Amendment is frequently a challenging and uncertain exercise. Previous cases have established that public institutions of higher education must evaluate, among other things, whether the employee was speaking "as a citizen" and on a "matter of public concern." These difficult inquiries are even more important in light of the Court's decision in *Heffernan*.

Public colleges and universities should take appropriate precautions to ensure they understand and can readily apply the relevant legal tests necessary to determine whether instances of employee speech are protected by the First Amendment.

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