Employment: Legitimate Grounds for Disciplinary Action Do Not Overcome Causal Connection Between Protected Speech and Retaliatory Action

Smith v. County of Suffolk, no. 13-1230 cv (2d Cir. Jan. 14, 2015)

The presence of various independent factors which would justify disciplinary employment action are insufficient to overcome a finding that protected speech bears a causal connection to such action, according to a recent Second Circuit decision.

Raymond Smith served as an officer on the Suffolk County, New York Police Department from 1981 through his retirement in 2008. In 1997, 2000 and again in 2006, he was reprimanded for using his office computer for personal purposes. In 2007, after he claimed that he was late for a hearing because he needed to find certain files on his computer, the Department searched the computer.

It found e-mails indicating that Smith had repeatedly communicated with newsmedia (including Jeffrey Toobin of CNN) about a celebrated murder conviction that had recently been overturned. In a "tip" emailed to Toobin, Smith contended that the Department's homicide detective may have helped plan the murder and orchestrated a cover-up, that the district attorney appeared to have an ethical conflict and was protecting the actual murderers, and that there was a history of documented abuses committed by the Suffolk County Police Homicide Squad.

The Department assigned Smith to a lesser-paid position and cited him for various infractions, including expressing his personal opinion in a manner tending to discredit the Department, sending e-mails discrediting the Department, using Departmental email to conduct non-Departmental business, accessing non-work related websites, using profanity in his emails, and failing to refer media inquiries to the Department's Public Information Section. Rather than fight the disciplinary proceeding, Smith retired.

Two years later he brought a Section 1983 claim against Suffolk County and its police commissioner, alleging that they retaliated against him for expressing his First Amendment rights.

The District Court determined that Smith's communications the media constituted speech made in his capacity as a citizen on a matter of public concern, and as such were protected under the First Amendment. The court also found that Smith suffered adverse employment actions including the initiation of disciplinary proceedings, his reassignment and reduction in pay. The court held, however, that Smith failed to demonstrate a sufficient connection between his speech and the adverse actions he suffered. He appealed.

HELD: The Second Circuit reversed, finding a sufficient nexus between Smith's constitutionally-protected speech and the Department's disciplinary actions.

DISCUSSION: To sustain a retaliatory employment action claim, the employee must establish that [1] he has engaged in protected First Amendment activity, [2] he suffered an adverse employment action, and [3] there was a causal connection between the protected activity and the adverse employment action. *Dillon v. Morano*, 497 F.3d 247, 251 (2d Cir. 2007). To

demonstrate a causal connection "a plaintiff must show that the protected speech was a substantial motivating factor in the adverse employment action." *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 167 (2d Cir. 2006) (internal quotation marks omitted). A plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action. *Cobb v. Pozzi,* 363 F.3d 89, 108 (2d Cir. 2004) (internal citation omitted). Since a direct showing requires plaintiff to provide "tangible proof" of retaliatory animus, "conclusory assertions of retaliatory motive" are insufficient. Once the employee has established a prima facie case, the employer may still be entitled to summary judgment by demonstrating "by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence of the protected conduct.'" *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

Because the Department had specifically referenced Smith's communications with the media, the Circuit Court found that "reasonable juror could conclude that the Department's actions were motivated, at least in part, by a retaliatory animus. Smith has presented direct evidence, which, if credited by a jury, could prove a causal connection between his protected speech and the adverse employment actions."

However this was not the end of the analysis. Under the so-called *Mt. Healthy* rule, the existence of a causal connection is not determinative if there are sufficient additional grounds to justify the disciplinary action. Here, defendants presented considerable evidence of extensive misconduct that was separate and distinct from the protected First Amendment speech. This included: using office computers to send emails to outsiders, disclosing an arrestee's charges; discussing a real estate deal; and accessing numerous non-work related internet websites while on duty for his own personal use and entertainment.

While acknowledging such alternate justifications for the County's taking disciplinary action, the Circuit Court was unpersuaded that they constituted sufficient independent grounds to overcome the retaliatory employment action charge. It reversed and remanded.

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