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IMLA NEWS
Issue 18 – October 18, 2019

Speech: At-Will Employee has no Protectible Job Interest, but Does Have First Amendment Protection When Reporting Crime

Javitz v. County of Luzerne, no. 18-2389 (3d Cir. Oct. 10, 2019).

Reversing in part, the Third Circuit holds that a county employee whose responsibility to report a crime to her supervisors only arose due to a general ethics guideline applicable to all employees—and not due to any specific duties in her employment description—was acting as a private citizen on a matter of public concern.

Donna Davis-Javitz (Javitz) was hired as the Director of Human Resources for Luzerne County, Pennsylvania (County), as an "exempt" and "at will" employee in August 2014. Among her responsibilities were dealing with employee complaints, responding to grievances, and conducting investigations. Javitz participated in two investigatory meetings with the American Federation of State, County, and Municipal Employees (AFSCME), which eventually resulted in ASFSCME filing an unfair labor practices suit in March 2015. Javitz claimed that a document filed in the ASFSCME lawsuit was a transcript of the investigatory meetings in which she participated. She suspected that another county employee had recorded the meeting without Javitz's consent—a crime under Pennsylvania law.

Javitz reported her concern to her supervisor, who agreed that the meeting may have been recorded. They two met with the District Attorney, who indicated that she would refer the matter to the Office of the Attorney General due to a conflict of interest. But,

Javitz claims, the County Manager intervened and instructed the District Attorney to drop the matter. No further action was taken.

After making her report to the District Attorney, Javitz alleges that county employees retaliated against her--her supervisor assigned work to her subordinates and cut her out of assignments for which she would have been responsible. In October 2015, she was fired.

Javitz filed a Section 1983 claim for violation of her Fourteenth Amendment right to procedural due process and for retaliation in violation of her First Amendment rights. The district court granted summary judgment in favor of the defendants, finding that Javitz did not have a property interest in her employment, and that her speech was that of a public employee, and not a private citizen. private citizen, stating: "[Javitz] became aware of the information through her employment, was encouraged to report the information by the policies of her employer, and reported the information only to other County employees."

The Third Circuit agreed with the lower court's due process analysis. To have a protectible property interest in a job, a person must have "a legitimate entitlement to such continued employment." Under Pennsylvania law, employees are at-will by default; a contract or applicable state law must be shown to rebut this default status and establish a property right. The terms of Javitz's employment clearly defined her position as "Exempt," and her employment as "At Will." The Circuit affirmed on this point.

But the Circuit did not agree as to the First Amendment result below. It reviewed Supreme Court standards under *Pickering, Garcetti,* and *Lane v. Franks*: "To prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983, a plaintiff must prove that (1) he engaged in constitutionally protected conduct, (2) the defendant engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link [existed] between the constitutionally protected conduct and the retaliatory action." Because the district court had ruled that Javitz's communication about the crime was not constitutionally protected speech—by finding that she spoke as a public employee and not a private citizen—the Circuit focused only on the first factor. The fact that she had acquired her knowledge of the crime in her capacity as a public employee was not dispositive: "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech;" the "critical question" is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

The Circuit concluded that "*Who* Javitz spoke to, *what* she spoke about, and *why* she spoke at all each fall outside the scope of her primary job duties and evidence citizen speech." While she had access to high-ranking officials as a function of her employment and could readily interface with them, her job duties did not include reporting an alleged crime committed against her—that obligation only arose under a County Ethics Code that encouraged reporting of wrongdoing by all public employees:

> Javitz was allegedly the victim of a crime, which she reported. The crime, subsequent contact with local authority figures regarding that crime, and the lack of any formal duty to report that crime are evidence that she was not experiencing or acting within the primary functions of her employment. Thus, we hold that Javitz's speech was that of a citizen speaking to a matter of public concern.

The First Amendment holding below in favor of the County was reversed.

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