Personnel and Employment

Whistleblowers and Speech Rights

Abdur-Rahman and Petty worked as compliance inspectors in the public works department for DeKalb County, Georgia. They were instructed by their supervisors to draft ordinances dealing with the disposal of certain types of wastes. Although this did not require the inspectors to review data about sewer overflows, they requested this data. Their supervisors refused to provide it, stating that the inspectors were being "too scientific" and "too thorough." The department eventually expanded the inspectors' scope of work to include investigations of sewer overflows, and the inspectors, in turn, reported concerns that overflows were not being properly addressed. Soon after, the supervisor in charge of the two inspectors fired them both, citing "unsatisfactory work performance." In response, the inspectors filed a 42 U.S.C. section 1983 claim against their former supervisors, alleging a violation of the whistleblower provision in the Clear Water Act, 33 U.S.C. section 1367, and the First Amendment. The plaintiffs claimed that, while the County "commissioned" them to report about the "causation" of sewer overflows, it did not commission them in respect of the "reporting, remediation, or posting" of sewer overflows. The district court, however, granted judgment on the pleadings in favor of the defendants.

The U.S. Court of Appeals for the Eleventh Circuit addressed both the Clear Water Act and First Amendment claims. Citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (the comprehensive remedies of the Clean Water Act foreclose a private right of action under 42 U.S.C. §1983), the court held that Section 1983 did not provide for a private right of action for supposed violations of the Clear Water Act. Second, the inspectors were not protected by the First Amendment because, in making their reports about the sewer overflows, they were not speaking as citizens on a matter of public concern. To establish a First Amendment claim against a public employer, a public employee was required to show that he "spoke as a citizen on a matter of public concern." In this case, the inspectors, by their own admission, did not dispute that they researched sewer overflows as part of their assigned duties – to "write a better and more effective [ordinance]." In addition, the court relied on evidence that the inspectors only reported their findings to their direct supervisor, rather than to someone in another unit of the public works department. This, according to the court, showed that "the inspectors did not believe that raising concerns about sewer overflows was exclusively the responsibility of someone else in some other unit of their department," and confirmed that the job duties of the plaintiffs were not so narrow that they encompassed only a portion of the reports their job precipitated. Accordingly, the district court's judgment was affirmed. *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009).

Employee Speech

Robinson, a sergeant with the Los Angeles County of Public Safety (CPS), brought a 42 U.S.C. section 1983 action against Los Angeles County and several CPS officers, alleging a violation of his First and Fourteenth Amendment rights. He claimed that he had been denied a promotion after reporting misconduct by others in his department, misconduct that included another CPS officer working for another employer while on duty for CPS, officers who drank alcohol during work hours, cases of potential battery or excessive force, and others. When he did not receive what he considered to be an adequate response, Robinson e-mailed internal affairs and discussed the details of his complaints with superior officers. He claimed that they told him to stop, as "maybe that would help in terms of getting promoted to lieutenant." Robinson did take a promotional exam for lieutenant and, despite placing in the highest band of candidates and receiving favorable work reviews, was not promoted. He sued, alleging that the denial of promotion occurred in retaliation for his exercise of his First Amendment rights. The defendants argued that Robinson's reports were not protected speech because they were made as part of his professional duties or because he failed to present the reports through the chain of command, as required by a written department policy. The district court disagreed, finding there were genuine issues of material fact regarding the scope of Robinson's job duties, and holding that a violation of a written chain of command policy was not dispositive.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. To warrant First Amendment protection, "an employee's speech must address a matter of public concern." In this case, Robinson's reports of CPS officer misconduct were matters of public concern, based on *Thomas v. City of Beaverton*, 379 F.3d 802 (9th Cir. 2004) ("unlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern"). Dealing with the defendants' argument that Robinson's internal reports arose out of his official job duties and, therefore, were not protected by the First Amendment pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the court held that "[w]hen there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment ... until after the fact-finding process." Given the evidence that the defendants "may have been more concerned with the nature and frequency of Robinson's reports of misconduct than his adherence to the formal chain of command, a fact-finder could conclude that Defendants' application of the chain of command policy was pretextual and not based on Defendants' interest in avoiding workplace disruption. If a fact-finder did so conclude, then Robinson's speech interests would outweigh Defendants' interests" under the balancing test in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968). Where the *Pickering* test was to be applied and there were "underlying factual issues regarding the extent of office disruption," it was proper to deny a motion for summary judgment. *Robinson v. York*, 566 F.3d 817 (9th Cir. 2009). **ML**