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Speech: County Not Liable Under First Amendment for Firing Subcontracted Security Officer Who Reported Off-Site Excessive Force Incident

Reeves v. Horace Graham and Miami Dade County, No. 12-15669 (11th Cir. Jan. 6, 2014).

Dennis Reeves provided security services to Metrorail stations in Miami-Dade County. He was not a government employee, but rather worked for a government subcontractor. While working on night he observed what he interpreted as a police officer using excessive force during a traffic stop across the street from the station. Reeves used his own cell phone to call police dispatch and report this activity – not his employer-issued equipment. He called his supervisor, he testified, only to be relieved of work while he spoke with the internal affairs investigators. Moreover, he testified that it was part of his job to monitor only the sidewalk and street adjacent to the metro station and that his job did not require he report off-premises incidents. Contrary to Reeves on this point, one of his supervisors testified that Reeves was mandated to report "serious" off-premises incidents to his own company so they could alert the proper authorities. It was undisputed that Reeves had to report on-premises criminal activity, by two-way radio to his own company.

Within 15 days of reporting the excessive force incident, Reeves was removed from his job on the order of a mid-level Miami-Dade Transit Agency employee. The contract between the Agency and the private company authorized this mid-level employee to remove Reeves, not his position within the county itself.

Reeves sued the employee that removed him – Horace Graham – and Miami-Dade County alleging retaliatory discharge in violation of the First Amendment. Reeves contended he was fired specifically because he reported the excessive force incident. Graham and the county moved for summary judgment, which the district court granted as to both defendants because Reeves reported the activity "pursuant to his official duties" and not as a citizen. Reeves timely appealed.

HELD: The Eleventh Circuit affirmed the district court, but on the alternative grounds, holding that Graham was entitled to qualified immunity and that Reeves failed to establish municipal liability.

DISCUSSION: Under *Garcetti* the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as

citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Thus to determine Graham's liability the Eleventh Circuit first assumed *arguendo* that Graham violated Reeves' First Amendment rights by firing him. It then noted that Reeves had the burden to prove Graham was not entitled to qualified immunity, a task he failed to achieve according to the Circuit Court. It held Graham was performing a discretionary duty and did not violate a clearly established law, thus he was shielded from civil liability. Reeves' argument that the law "clearly established" that he made the report as a citizen – citing the facts that he was not required to report off-premises criminal incidents, that he reported it outside the chain of command, and that he used his own cell phone to make the call – was unpersuasive to the Eleventh Circuit. It noted its own precedent commands that when an employee's speech "owes its existence" to his official responsibilities then an employee "not required to speak at all" speaks pursuant to those official duties. The Eleventh Circuit characterized Reeves' three facts as "procedural deviations," and deemed them insufficient to put Graham on notice that Reeves reported the incident as a citizen rather than a security guard.

As for municipal liability for Miami-Dade County, the Circuit Court again assumed Reeves established a First Amendment violation and again found Reeves failed to establish the county was liable for it. It cited its own precedent holding that a single illegal act by a single municipal agent can establish liability for the municipality itself, but that in order to do so, the single agent must have final policymaking authority over the subject matter at issue. That policymaking authority can be delegated either through positive law or customs and practices that have the force of positive law.

In this case, the Eleventh Circuit held that Reeves failed to prove these elements because Graham was only a mid-level employee with his decisions were subject to review by county decision makers above him, despite the fact that the he was the "designee" in the contract between the county and subcontractor. Second, the court found Reeves failed to establish any custom or practice of deferring to Graham's decisions such that they had the force of law. Reeves countered these points by highlighting Graham's own testimony wherein he referred to himself as the "decision-maker" who had "final approval" power over decisions. But the Eleventh Circuit rejected these arguments; it noted that these comments by Graham were made within the context of the contract only, not within the "county hierarchy," where superiors could override Graham's decisions.

http://www.ca11.uscourts.gov/unpub/ops/201215669.pdf (last accessed Jan. 23, 2014).