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FEATURED CASE:

Tenth Circuit Grants Qualified Immunity in 'Perceived Speech' Retaliation Case

Avant v. Doke, No. 23-7060 (10th Cir. June 11, 2024)

The Tenth Circuit granted qualified immunity to a county commissioner who fired an employee for perceived speech criticizing county operations, which the employee denied making. The court found that existing case law did not clearly establish how officials should evaluate the public concern element of the Garcetti/Pickering test in perceived speech cases, leaving reasonable officials without fair warning. This decision highlights the complexities in applying First Amendment protections to perceived speech scenarios and underscores the need for clearer legal guidance in such novel situations.

Background: Gary Avant ("Avant") worked as a truck driver for Muskogee County, Oklahoma. County officials believed Avant was criticizing the county's road plan and the assignment of a registered sex offender to work near a school. Avant met with his supervisor and County Commissioner Ken Doke (Doke"), where he was told to stop spreading these stories. Months later, after hearing Avant had continued, Doke fired him.

Avant sued Doke under 42 U.S.C. § 1983, claiming First Amendment retaliation. During litigation, Avant denied making the statements, invoking a theory of "perceived speech" retaliation. The district court denied Doke's motion for summary judgment based on qualified immunity. Doke appealed to the Tenth Circuit, which remanded for further record development. On remand, the district court again denied summary judgment, leading to this second appeal.

Questions of Law:

1. Does the court have jurisdiction to consider Doke's argument that Avant failed to adequately plead a perceived speech claim?
2. In assessing qualified immunity for perceived speech retaliation, was it clearly established that Avant's alleged statements involved a matter of public concern?

3. Did clearly established law require Doke to conduct an investigation before firing Avant based on his perceived speech?

Holdings:

1. The court lacks jurisdiction to consider the adequacy of Avant's pleadings in this interlocutory appeal.
2. It was not clearly established that Avant's perceived speech involved a matter of public concern, entitling Doke to qualified immunity.
3. Clearly established law did not require Doke to conduct an investigation before firing Avant for his perceived speech.

Analysis: The court first addressed its jurisdiction, concluding it lacked authority to review the adequacy of Avant's pleadings on interlocutory appeal. The court rejected Doke's argument that the previous panel had implied jurisdiction over this issue, noting that jurisdiction cannot be inferred when not explicitly discussed.

On the merits of qualified immunity, the court focused on whether it was clearly established that Avant's perceived speech involved a matter of public concern. The court noted that most precedent involves actual rather than perceived speech, leaving officials without clear guidance on how to assess the context, form, and purpose of speech the employee denies making. The court emphasized that even speech about potential illegal conduct does not automatically constitute a matter of public concern if the primary motive is personal.

The court identified three potential approaches that a reasonable official might consider when evaluating the primary motive behind perceived speech. The first approach involves considering the commissioner's viewpoint on the employee's primary motive. For instance, the court suggested that an official might consider whether the commissioner believed that Avant genuinely thought his stories about the road plan and work assignment were true. The second approach focuses on the commissioner's process upon learning about the suspected statements. This would involve examining who the commissioner consulted and what information he gathered. The third approach would involve examining the perspective of the individuals who reportedly heard the employee's statements. In this case, it would mean looking at who the community members were that reported Avant's stories and the context in which they heard them.

The court emphasized that there was no clear guidance from case law on which of these approaches, or what combination of them, a reasonable official should use. This lack of clarity was central to the court's analysis of qualified immunity. Regarding qualified immunity, the court's analysis focused on whether the law was "clearly established" at the time of the incident. The court noted that for a right to be clearly established, there must be sufficiently similar precedent that would put a reasonable official on notice that their conduct violated the Constitution.

The court found that the existing case law provided little guidance for officials in situations involving perceived speech. Most precedents deal with actual speech, where the context, form, content, and purpose of the speech are more easily discernible. In cases of perceived speech, where the employee denies making the statements, these factors become much more ambiguous. The court also addressed the question of whether speech about potential illegal conduct always constitutes a matter of public concern. It concluded that even in such cases, the primary motive of the speaker must be considered. If the primary purpose was to air a personal grievance rather than to expose misconduct, the speech might not be protected.

Given these complexities and the lack of clear precedent dealing specifically with perceived speech, the court determined that a reasonable official in Doke's position would not have had fair warning that firing Avant under these circumstances violated clearly established law. This analysis led the

court to conclude that Doke was entitled to qualified immunity. The court's reasoning underscores the challenges that public officials face when dealing with suspected employee speech, particularly in novel situations where existing case law may not provide clear guidance. Based on this analysis, the court reversed the denial of qualified immunity and remanded for the district court to grant summary judgment to Doke in his personal capacity on the First Amendment retaliation claim based on perceived speech.

Avant v. Doke

SHORT SUMMARIES:

4th Circuit – Public Records – First Amendment – Federal Jurisdiction

I may have said this before, but if not will say it now- Raleigh has a great legal department. I this case a media company sought various records from the city involving traffic accidents, etc. The company claimed that NC law required disclosure. The City defended on among other bases that the Drivers Privacy Protection Act precluded disclosure. The media moved its case to federal court asserting jurisdiction because of the DPPA. The City sought to dismiss as no diversity was sought and the only basis for the media's claim of entitlement arose from the state law. The court dismissed. The complaint did not and could not identify a federal question; rather, the court noted that there may be a federal question but it is "lurking in the background". Congratulations also to the Cities of Kannapolis and Salisbury who were also named in the suit.

Capital Broadcasting Systems v. City of Raleigh

4th Circuit – Landlord Tenant – Property – Due Process

States handle evictions and property left by tenants in varying ways. In Maryland, the law tells the landlord to remove the property that is considered abandoned upon eviction and in general the landlord moves the property to the public right of way where anyone can take from the pile whatever they choose. Because the number of evictions in Baltimore escalated to the point that in 2006 over 7000 evictions were occurring each year. The city was spending almost $1Million to deal with all the property left on its rights of way but could not keep up. The city adopted a law that changed things. The new law continued to provide that the property was abandoned, but put responsibility on the landlord to dispose of the property as the landlord's own and prohibited the landlord form putting it in the right of way. A draft of the law provided a 3 day reclamation period for the tenant and required notice. As adopted however, the law offered no reclamation period and notice varied including no provision of notice for holdover tenants. The 4th Circuit concluded that the lack of notice created due process issues that could not be overcome. The court also found that the process did not include any opportunity for the tenants to enjoy a hearing before losing their property interests. The court concluded by determining that the City could be held liable under Section 1983 to the tenants.

Note: The difficulty I have with this decision rests not with its analysis of due process in the context of notice and a hearing, but rather with its avoidance of discussion of the tenants' property interests other than to cite a case that I suggest has no bearing on that question. The case cited involved

peaceable self help to recover property and evict a trespasser/tenant. It did not involve judicial process. Common law and Maryland law both determine that the property of an evicted tenant left on the property following a warrant of restitution to be abandoned. The city didn't really change the effect of how a warrant of restitution creates an abandonment and if the city's law is held to violate the constitution wouldn't it be void and if void, the law revert to the existing law which held the property abandoned? Thoughts?

Todman v. Baltimore

8th Circuit – Animal Control – Due Process – Euthanasia

Daisy bit her playmate the child of Daisy's family in the face. The family alerted the Animal Control and there the facts find some dispute. Regardless of all of the varying factual elements, what was not in dispute is that the husband of Daisy's owner signed a form authorizing euthanasia which the Animal Control agency undertook. The mother of the child, Daisy's owner, sued asserting the agency seized the dog and violated her rights under the Constitution. The signed form blocked any recovery she might have sought. Dismissed. Affirmed.

Losing a family pet is tragic and it appears that under very trying circumstances that Animal Control did what was necessary to document the direction given to it.

Bulfin v. Rainwater

8th Circuit – Prolonged Detention/Incarceration

This case raised arguments that a person held in custody after having been released by the court made asserting various claims under the Constitution. The case is a bit complex, so rather than go into what would surely be a poor analysis, I suggest those of you facing similar claims read it. Immunity was granted to the officials on appeal reversing a decision by the lower court which the panel noted failed to apply "controlling Supreme Court law".

Jones v. St. Louis

9th Circuit – COVID – Religious Accommodation – First Amendment

Applying strict scrutiny to the requirement by the city that all firefighter in the employ of the city be vaccinated against Covid (during the pandemic), the panel concluded that the city did not reasonably accommodate the religious objection of firefighters who were dismissed for failing to get vaccinated. A dissent reasoned that rational basis should have applied. The major hurdle for the city seemed to be that it continued to work with other fire departments that did not require vaccination of their employees and used the employees of those departments to fill the gaps created by the dismissed firefighters. More difficult to swallow was the panel's reasoning that the city could have adopted less restrictive means to protect health and safety by requiring masks and taking

temperatures, etc. Certainly, easy to conclude thus now, but at the time of the pandemic, maybe not so easy to determine what policies were necessary for health and safety. But it's the 9th Circuit and as best I can tell those judges know better than any elected official how best to run a government.

Bacon v. Woodward

10th Circuit –Warrantless Inspection Regimes – Closely Regulated Businesses – Kennels

Kansas enacted a measure that required businesses and people who care for animals to meet various requirements generally including consent to be inspected without a warrant whether the business was housed in a commercial setting or at a home. The law applies to several different types of establishments and business operations. The challenge in this case came from people who board animals for others but who are not otherwise engaged in any of the other types of businesses. The law established that accepting the license acted to consent to inspections, and the inspections (by law) could not occur with advance notice. The challenge to the law asserted that because the inspections could occur at any time, the inspections violated the right to travel and because they were warrantless, they violate the 4th Amendment. The lower court dismissed the challenge. The panel on appeal affirmed on the challenge to the right to travel, but reversed on the 4th Amendment challenge. Quite a good discussion of the issue of warrantless administrative inspections and the court remanded to the lower court for a determination as to whether the business is "closely regulated" for purposes of 4th Amendment coverage.

Johnson vs. Smith