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TRAINING BULLETIN

VOL XII ISSUE No. 5

May 2016

FIRST AMENDMENT PROHIBITS OFFICER'S DEMOTION BASED ON PERCEPTION HE ENGAGED IN CONSTITUTIONALLY PROTECTED ACTIVITY

Heffernan v. City of Paterson, decided April 26, 2016
Supreme Court of the United States, No. 14-1280

By: **Robert Rabe, Esq.**

In *Heffernan v. City of Paterson*, the Supreme Court reaffirmed the general rule that the First Amendment prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. In *Heffernan*, the Chief of Police demoted a police officer because he believed the officer had supported a particular candidate for mayor. As it turns out, the Chief was wrong - the officer was actually politically neutral. The question in this case is whether the factual mistake makes a critical legal difference.

Jeffrey Heffernan was a police officer in Paterson, New Jersey. He worked in the office of the Chief of Police, James Wittig. At the time, the mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola, the former Chief of Police. Torres had

appointed Chief Wittig to his current position. Heffernan was a good friend of Spagnola's. During the campaign, Heffernan's mother, who was bedridden, asked Heffernan to drive downtown and pick up a large Spagnola sign. She wanted to replace a smaller Spagnola sign, which had been stolen from her front yard. Heffernan went to a Spagnola distribution point and picked up the sign. While there, he spoke for a time to Spagnola's campaign manager and staff. Other members of the police force saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the force. The next day, Heffernan's supervisors demoted Heffernan from detective to patrol officer and assigned him to a "walking post." In this way they punished Heffernan for what they thought was his "overt involvement" in Spagnola's campaign. In fact, Heffernan was not involved in the campaign at all, but had

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First Amendment Prohibits Department From Demoting Police Officer

picked up the sign simply to help his mother.

Heffernan filed a 42 U.S.C. §1983 lawsuit in federal court. He claimed that Chief Wittig demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech. They had thereby "depriv[ed]" him of a "right . . . secured by the Constitution." "The District Court found that Heffernan had not engaged in any "First Amendment conduct" and, for that reason, the Chief had not deprived him of any constitutionally protected right. The Court of Appeals for the Third Circuit affirmed. It wrote that "a free-speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."

The U.S. Supreme Court reversed the judgment and concluded that the government's **reason** for demoting Heffernan is what counts. "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. §1983-even if, as here, the employer makes a factual mistake about the employee's behavior." The Court noted a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of

constitutional harm, whether that belief does or does not rest upon a factual mistake.

Officers must be warned however, that not all political activity is protected by the First Amendment. A neutral and appropriately limited policy may prohibit law enforcement officers from engaging in partisan activity (real or perceived). (See: *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564 (1973).) Be sure to know and understand your Department's policy before becoming overtly involved in any political campaign.

Finally - during oral argument in Heffernan, former Justice Scalia stated: "[Heffernan] was not expressing any First Amendment view whatever. I mean, he was fired¹ for the wrong reason, but there's no constitutional right not to be fired for the wrong reason." Justice Scalia's opinion would not have changed the decision in this case because six justices, including Chief Justice Roberts, voted to allow Heffernan's lawsuit to proceed.

Stay Safe!

Robert Rabe is an associate attorney in the firm. He has been a member of the California Bar for almost 40 years, specializing in criminal law,

¹ Justice Scalia wrongly believed Heffernan had been terminated. Heffernan was not "fired" - he was demoted from Detective to patrol officer.

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