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TRAINING BULLETIN

Vol. 2014, Issue No. 2

MARCH 2014

THE *DAHLIA* CASE: POLICE WHISTLEBLOWERS AND THE FIRST AMENDMENT IN THE NINTH CIRCUIT

U.S. Supreme Court Declines To Hear City's Appeal In Retaliation Case

By Michael P. Stone, Esq. and Muna Busailah, Esq.

On February 24, 2014, the U.S. Supreme Court denied the City of Burbank's petition to grant hearing (certiorari) in *City of Burbank v. Angelo Dahlia*, No. 10-55978. Thus, the Ninth Circuit's *en banc* (9-2) decision in *Dahlia v. Rodriguez* 689 F.3d 1094 (9th Cir. 2012) becomes the law of the Circuit and a powerful precedent elsewhere in the country in understanding *how* and *when* the First Amendment protects police officers who make good faith reports about police corruption existing within their own agencies, from retaliation by their employers.

In 2006, the U.S. Supreme Court backpedaled on 38 years of federal courts' First Amendment protection for public employee "protected speech" in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Since 1968 (*Pickering v. Board of Education*, 391 U.S. 563 [1968]) when the Court first embraced the principle that a public employee could not be punished or retaliated against for speech about a matter of important public

concern, there followed an unbroken line of Supreme Court and federal appellate court decisions that hued faithfully to the *Pickering* principles. But in *Garcetti*, the Court took public employee First Amendment law in a new direction, and in the process, gutted the constitutional protection for "protected speech" that occurs within the employee's core job duties. According to *Garcetti*, if the employee speaks as part of his or her job duties, he cannot be "speaking as a citizen" (hereafter, "the *Garcetti* rule").

The *Garcetti* rule has forced the federal appellate and trial courts in every case, to embark upon a quest in every case, to search out the essential functions and duties of the employee's job. The anomaly created for the police profession is this: "If, as a police officer, you want constitutional protection from retaliation for your revelations of internal corruption, do not report to your chain of command or to any official within your agency in pursuit of your duty to report

misconduct; rather make your report to the electronic or print media.” Then, you will be acting as a “citizen,” because no job duty requires you to “go public” with your revelations. This is surely an unwelcome precedent on a public policy level, for our profession. Employees who actually fear employer retaliation will not invite it by reporting corruption to supervisors. And, many employees simply will not go to the media because it is counterintuitive to loyalty to the profession, which is after all, what motivates them to report corruption. These employees are not renegades, and going to the media seems to them to be a betrayal of the code of conduct they swore to uphold.

These are precisely the circumstances that confronted Burbank Police Detective Angelo Dahlia. Dahlia did not suffer from some undefined, abstract fear of retaliation for reporting the brutality and excessive force he witnessed. Instead, he and his family were threatened, intimidated and harassed to not report what he saw, by the corrupt officials who were responsible for the misconduct and for covering it up,

As described at length in the *Dahlia* case, Detective Angelo Dahlia witnessed shocking incidents of beatings and excessive force during a robbery investigation. He was immediately subjected to a pattern of threats and intimidation by a corrupt chain of command in the Burbank Police Department and a relief from duty (assignment to home with pay). The pattern of harassment and threats continued unabated through internal, Sheriff’s Department, and FBI investigations. Unable to abide any more, Dahlia sought the help of his association president, and reported the assaults to the sheriff’s department and the FBI. Four days

after his sheriff’s report, he was relieved of duty, and ultimately fired for “dishonesty.”¹ Dahlia filed suit in U.S. District Court in Los Angeles. He sued for retaliation in violation of the First Amendment, and supplemental state law claims.

The District Court judge dismissed his federal claims based on his alleged “duty” to report criminal misconduct to every (any) law enforcement agency. Thus, whether he reported to the FBI or to another state or local agency, he was fulfilling a core duty of his job and could not therefore, be acting as a “citizen,” reasoned the judge. Therefore, his reports were stripped of First Amendment protection.

Dahlia’s appeal was first heard by a 3-judge panel of Circuit judges, who *reluctantly upheld* the District Court judge, affirming the dismissal, based upon an earlier Ninth Circuit case, *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), which inexplicably held that a police officer’s report to the FBI about internal corruption within the Pittsburg, California Police Department was part of his *core duties*, and therefore lacked constitutional protection.

Dahlia’s counsel, Michael Morguess, and a public interest law firm in Washington, D.C., named Public Citizen Litigation

¹ *A new department administration fired Dahlia purportedly because he failed to tell what he knew to Burbank police investigators first, while under the fear of threats and intimidation, that the Ninth Circuit judges found was “shocking and intolerable,” and easily capable of deterring protected speech.*

Group, sought rehearing *en banc* (by the full court) in the Ninth Circuit. The Riverside Sheriffs' Association and its Legal Defense Trust, recognized that the *Dahlia* case provided an excellent opportunity to (1) restore some of the constitutional protection for the nation's police whistleblowers, laid waste by the *Huppert* decision, and (2) to bring the rule of *Garcetti* into common sense application. Commissioned by the Riverside Sheriffs' Association (RSA) and the Legal Defense Trust, the authors of this paper sought leave from the Ninth Circuit to join in the case as *Amicus Curiae* ("friend of the Court"), which was granted. RSA's *Amicus* brief asked the *en banc* Ninth Circuit to do four (4) things:

1. Overrule the *Huppert* case as bad law;
2. Find that placement on administrative leave, even *with pay*, is a sufficiently adverse action to constitute retaliation;
3. Find that the question of an officer's job duties is one of fact for the jury, contrary to *Huppert*; and
4. Find that *Dahlia's* report to the Los Angeles County Sheriff's Department or the FBI was *protected speech*; thus, the *Garcetti* rule should only be applied where a police officer's report of corruption is *through the chain of command*, in support of the *duty to report misconduct to a superior*.

The Ninth Circuit's *en banc* 9-2 decision embraced each of these points.

The Supreme Court's rejection of Burbank's petition means that Burbank has exhausted its legal options to overturn the Ninth

Circuit's opinion in *Dahlia*. The case is nothing short of a landmark along the pathway of public employee constitutional law development. Police members can now rest in the assurance that when they make reports of internal cooperation voluntarily to outside law enforcement agencies, they are, once again, protected by the First Amendment from retaliation.

Michael P. Stone and Muna Busailah are the founding partners of Stone Busailah, LLP and participated in the Dahlia v. Rodriguez decision as amicus curiae. Michael P. Stone teaches First Amendment law for the Americans for Effective Law Enforcement (AELE) in Chicago. They are General Counsel for the Riverside Sheriffs' Association and the Legal Defense Trust.