



LEGAL DEFENSE TRUST TRAINING BULLETIN

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“OFFICIAL DUTIES” TEST BARS FIRST AMENDMENT LAWSUIT BY POLICE DETECTIVE WHO DISCLOSED COLLEAGUES’ ABUSE

Dahlia v Rodriguez, filed August 7, 2012
United States Court of Appeals, Ninth Circuit
by
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Angelo Dahlia (“Dahlia”), a police detective in the City of Burbank Police Department, alleged in a lawsuit that he was placed on administrative leave pending investigation, four days after he disclosed details about abusive interrogation tactics and unlawful conduct at the Burbank Police Department to the Los Angeles Sheriff’s Department. Dahlia asserted the action by the Department was in retaliation for his protected speech. The United States Court of Appeals for the Ninth Circuit determined that Dahlia could not bring a First Amendment retaliation claim based on his disclosure of alleged abusive interrogation tactics. The Court held that the speech of Dahlia was made

pursuant to his “official duties” as a member of law enforcement and therefore the speech could not have First Amendment protection.

The United States Supreme Court held in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), that public employee speech made pursuant to “official duties” does not have First Amendment protection, and cannot form the basis for a retaliation claim. The court in *Garcetti* contrasted the situation with that in *Pickering v. Board of Education*, 391 U.S. 563 (1968), where it held that a public employee could not be disciplined for writing a letter to the editor, in a private capacity. For police, if *Dahlia* remains the law, the

scope of their “official duties”, at least in California, will now include much of what usually forms the basis for a whistleblower claim. The *Dahlia* Court stated this rule was created in a prior Ninth Circuit case, *Huppert v City of Pittsburg* (9th Cir. 2009) 574 F.3d 696, where the court had determined that a police officer’s disclosures of alleged department corruption to outside agencies fell within “official duties”, because California law imposes broad duties on the police to report illegal conduct. The *Dahlia* Court reasoned that it had no choice but to follow the *Huppert* case rule for “official duties” and bar Dahlia’s claim.

Courts almost always write opinions that articulate the soundness of the rule they are applying. In *Dahlia*, the Court made it clear that it did not agree with *Huppert*, declaring that it “appears to be incorrectly decided, conflicts with the Supreme court’s First Amendment public employee speech doctrine, and chills the speech of potential whistleblowers in a culture that is already protective of its own.” The Court added, “We feel compelled, like the district court, to follow *Huppert*, despite our conclusion that it was wrongly decided and unsupported by the sole authority it relies upon. If *Huppert*, who independently cooperated with the FBI to expose and

investigate corruption and memorialized that corruption against his superiors’ orders, was acting ‘pursuant to his professional duties’, then Dahlia, who cooperated with a Los Angeles Sheriff’s Department investigation of police misconduct, must also have been acting pursuant to his professional duties.”

Comment: The Court’s criticism of *Huppert* might be used by Dahlia to support a request for en banc review by a larger panel of the Ninth Circuit (which would have the authority to overrule *Huppert*), and maybe even the Supreme Court might want to use this case to clarify “official duties” in the context of the police officer as whistleblower in First Amendment retaliation claims. This is certainly a decision to watch.

Stay Safe!

Muna Busailah and Robert Rabe