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# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## YOU, YOUR DEPARTMENT AND THE FIRST AMENDMENT

### *A New U.S. Appeals Court Decision Outlines First Amendment Protection From Retaliation For Police Officers*

by

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On August 21, 2013, an 11-judge panel of the United States Court of Appeals for the Ninth Circuit sitting *en banc* published its 9-2 decision in a much-watched and eagerly-awaited case, which considered whether police officers have any First Amendment protection from retaliation by their employers when they go outside their agencies to make official reports of internal corruption to other law enforcement agencies.

The Riverside Sheriffs' Association (RSA) and the RSA Legal Defense Trust (RSA-LDT) participated in this important case as *amicus curiae* ("friends of the court") in support of Burbank Police Detective Angelo

Dahlia (Dahlia) in *Dahlia v. Rodriguez* (9<sup>th</sup> Cir., August 21, 2013), No. 1055978. Over the past several years that the case has been pending in the Court, it has been the subject of a number of law review articles across the country because it offered this Court a golden opportunity to overturn bad precedent, and set a national standard for the protection of police officers who report internal corruption outside their chains of command to other law enforcement agencies such as a sheriff's department or the FBI.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the U.S. Supreme Court drastically altered public employees' First Amendment protections from

retaliation for whistleblowing by holding that reporting corruption *within* the chain of command bears no constitutional protection from employer retaliation because by reporting wrongdoing up the chain of command, the employee is performing a regular or core duty of his or her position for which each is paid, and is not therefore acting in the role of citizen, where protection against employer retaliation would exist under First Amendment jurisprudence. *Garcetti* created an anomaly in the law for public employees: if you want First Amendment protection for reporting corruption, do not report wrongdoing internally; rather, go outside to another agency or to the news media. In the latter situation, the Constitution affords you maximum protection from employer retaliation for your “citizen” reports. But the *Garcetti* case made clear that internal reports were stripped of constitutional protections against employer retaliation.

Since *Garcetti*, various federal appellate courts have tried to apply the holding in a variety of contexts. One such case was decided by a 2-1 majority of the Ninth Circuit in 2009. In *Huppert v. City of Pittsburg*, 574 F.3d 696 (9<sup>th</sup> Cir. 2009), the panel held that a police officer (Huppert) had no First Amendment protection for reporting corruption within the Pittsburg, CA. Police Department to the FBI. The majority based this astounding ruling on its assessment of

the duties of California police officers and sheriffs’ deputies, relying upon an old California case, *Christal v. Board of Police Commissioners* (1939) 92 P.2d 416. *Christal* dealt with the conflict between Officer Christal’s Fifth Amendment rights against self-incrimination and his duty to testify before the grand jury about his official (on-duty) conduct. The case held that while Christal retained his constitutional rights, *duty* required him to testify. Thus, if he exercised his rights to remain silent, he would forfeit his job. Of course, police officers are no longer faced with this impossible dilemma. Now, if an officer is compelled by his employer to testify about self-incriminating facts, his statements are protected by use immunity from any use against him in a criminal prosecution, as a result of refinements in Fifth Amendment law following the Supreme Court’s decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

However, in arriving at its decision, the *Christal* court set forth an extended passage about the “duties of a police officer” in the broadest terms possible, which the *Dahlia* Court wrote, “reads like a civics textbook.” *Slip Op. at 20, fn.9.*

**“The duties of police officers are many and varied. Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of**

**maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grant jury. It is for the performance of these duties that police officers are commissioned and paid by the community.”**

The *Huppert* court seized upon this same passage from *Christal* to hold that Huppert’s official and core duties required him to report corruption to any law enforcement agency available to him, without constitutional protection for his “speech.”

The great majority of the legal and academic literature that reviewed *Huppert* and the first *Dahlia* decision argued that they went too far off the track in failing to afford constitutional protection to officers who make their reports of corruption to outside entities, whether they be the FBI, or the *Los*

*Angeles Times*, or *Eyewitness News*. Legal scholars urged the Court to grant rehearing *en banc* of the first *Dahlia* decision.

RSA and RSA-LDT recognized that the *Dahlia* case was, and is, the most important constitutional case for law enforcement officers and RSA members to come up since *Garcetti v. Ceballos*. Accordingly, RSA and RSA-LDT authorized General Counsel Michael Stone and Muna Busailah to file an application with the Ninth Circuit *en banc* panel, for leave to file an *amicus curiae* brief in support of *Dahlia*, urging the Court to hold that *Dahlia*’s reports of corruption in the Burbank Police Department (BPD) to the Los Angeles County Sheriff’s Department (LASD) and later to the FBI, were “constitutionally protected speech”. RSA and RSA-LDT were the *only* police organizations to step up in this important “peace officer constitutional rights” case. Their *amicus curiae* brief was the only one filed despite the intense national interest in the *Dahlia* case, which was somewhat of a surprise. Chief Judge Alex Kozinski granted RSA’s and RSA-LDT’s application to join as *amici* and to participate in the decision in this case.

### **The Background of the *Dahlia* Case**

Detective Angelo *Dahlia* was assigned with Detective Pete Allen as the case

detectives on a high-profile take-over robbery at Porto's, a popular Burbank eatery and bakery. The armed suspects, reported MS-13 gang members, entered through a back door left open for them by a female employee after closing, and terrorized employees before stealing cash receipts.

Burbank Police (BPD) responded by mobilizing a large contingent of officers and detectives who worked around the clock to identify and round up suspects. Included in the mobilization were Lieutenant Omar Rodriguez (Rodriguez) and members of the specialized units who were self-styled and variously known as "the A-Team" and "the Gunslingers." Dahlia and Allen complained that their case was taken over by the specialized units. They were barred from attending interviews of suspects.

In the days that followed the December 27, 2007 robbery, Detectives Dahlia and Allen observed a pattern of physical abuse and beatings of suspects in interview rooms at BPD. At one point, Dahlia saw Rodriguez place his gun under a suspect's eye after violently "C-clamping" the suspect's throat and yelled, "How does it feel to have a gun in your face, motherfucker?" As Dahlia looked on in disbelief, Rodriguez caught Dahlia's stare, and slowly lowered his pistol to his side.

Before long, word of this event spread throughout BPD, and an internal investigation was commenced. According to the complaint, there followed a continuous pattern of threats and intimidation of Dahlia to "keep his mouth shut" by Rodriguez and various supervisors. Dahlia tried to report the abuses on two or three occasions to his boss, Lieutenant Jon Murphy, who was in overall command of the investigation. Murphy reportedly rebuffed Dahlia, and told him, "Stop your sniveling." Dahlia and Allen were systematically excluded from and prevented from entering in, all of the interviews of the suspects whose booking photos betrayed evidence of physical abuse, including one suspect with a fractured eye socket.

The internal investigation was overseen by a deputy chief who obstructed the course of the interviews such that no charges against anyone resulted. Ultimately, Dahlia and Allen reported fully to the LASD and later, the FBI. Both were ultimately terminated. At the time of this writing a federal grand jury is taking evidence on the scandal. Ultimately 10 BPD members and supervisors were terminated, including the deputy chief.

Dahlia sued under 42 USC §1983 on the basis that his assignment to home with pay during the investigation constituted retaliation for his First Amendment-protected report to LASD,

because it was an “adverse employment action in retaliation” for his LASD report.

A federal judge dismissed Dahlia’s complaint on two grounds: (1) assignment to home was not an adverse action sufficient to constitute retaliation; and (2) Dahlia’s report was his “duty” pursuant to *Huppert* and *Christal*, and therefore he acted as an employee, and “not as a citizen.” The 3-judge panel in the first *Dahlia v. Rodriguez*, 689 F.3d 1094 (9<sup>th</sup> Cir. 2012) voted 2 to 1 to reluctantly uphold the trial court, following *Huppert* because it was binding precedent, however allowing that it was “wrongly decided”, which clearly invited Dahlia, without expressly saying so, to seek rehearing *en banc* (by the full Court).

Upon Dahlia’s application, a majority of the Ninth Circuit’s active judges voted to rehear the case *en banc*.

### The New *Dahlia* Opinion

RSA’s and RSA-LDT’s *amicus curiae* brief sought to persuade the Court to make *three important rulings*, for the benefit of all law enforcement members:

1. To overrule *Huppert v. City of Pittsburg* on the basis that it is bad law;
2. To find that assignment to home with pay can constitute an adverse employment action

sufficient to establish retaliation; and

3. To find that when a member goes outside his or her chain of command to report corruption to an outside agency (or to the public media) that member acts as a “citizen” and not as an employee; therefore the First Amendment protects the member from retaliation within his employment on account of his “protected speech”.

In a victory for rank and file and file law enforcement, as well as supervisors and managers, the *en banc* 9-2 majority found in Dahlia’s favor on all three points. The opinion cites to the RSA and RSA-LDT *amicus curiae* brief for support of the third proposition. The Court wrote:

**“In its amicus brief, the Riverside Sheriffs’ Association and Riverside Sheriffs’ Association Legal Defense Trust support this chain-of-command distinction. See Amicus Br. at 2 (arguing that “a police officer’s speech on a matter of important public concern[ ] should only fall outside the scope of First Amendment protection if it is made pursuant to his or her routine or core duties, *within his or her chain of command*, and in pursuit of his or her duty to report misconduct *to a superior*.” (emphasis added by Court)). *Slip. Op.* at 29, fn. 14.**

Importantly, the Court agreed with us that when for example, an RSA member reports evidence of corruption within RCSD to his or her supervisor, utilizing the chain of command, or otherwise acts to report misconduct internally, that member is performing a routine or core duty of an RCSD member. Accordingly, because it is *performance of duty*, the member is acting as an employee, and not as a citizen. But if that same member, either together with the internal report or otherwise, goes outside to the Attorney General, DOJ, the U.S. Attorney or the FBI for example, that reporting is done in the role of *citizen*, notwithstanding that the information reported was acquired entirely “on the job,” and the First Amendment protects the member against retaliation from within.

### **What the *Dahlia* Case Means To You**

The *Dahlia* holding is a huge, positive departure from bad law in the Ninth Circuit (*Huppert v. City of Pittsburg, supra*). Whereas under existing law, RSA members had no constitutional protection from official retaliation for reporting internal corruption to, for example, the FBI, now as a result of *Dahlia*, RSA members backed by RSA and RSA-LDT, will benefit from the protections afforded by the Bill of Rights and will engage in “protected speech” if they ever need to report corruption or serious internal misconduct outside RCSD. We also do

not believe *Dahlia* is offensive to good order and discipline within RCSD. Why would our Sheriff favor the law as it existed under *Huppert*, where RCSD members with knowledge of corruption within RCSD, would be better off *avoiding* official reporting where they had no constitutional protection, and instead going to the *Riverside Free Enterprise* where they would have complete First Amendment protection in their roles as “citizens” and not employees? Think about it. *Dahlia* got it right.

Stay legally safe.

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