

CLIENT NEWS BRIEF

Employer's Mistaken Belief Is No Defense to an Employee's First Amendment Challenge to Discipline for His Off-Duty Political Activity

Last month, the U.S. Supreme Court held in *Heffernan v. City of Paterson* (April 26, 2016, No. 14-1280) 578 U.S. __ [2016 U.S. LEXIS 2924] that an employee may challenge an employer's adverse action under the First Amendment even if the employer's action was based on a mistaken perception that an employee engaged in political activity. The decision impacts government employers, including school districts, county offices of education, and local governments by giving greater protection to all government employees.

Heffernan establishes that actual engagement in a protected activity is not an element that must be proven to prevail in First Amendment retaliation claims. Instead, retaliation claims must be evaluated based on the employer's motive and whether that motive was constitutional, regardless of whether the motive was based on actual facts or mistaken perception.

During the 2006 mayoral election in Paterson, New Jersey, Jeffery Heffernan worked in the office of Police Chief James Wittig. The candidates included the incumbent mayor who appointed Wittig and former Chief Lawrence Spagnola, Heffernan's good friend. Before the election, Heffernan's bedridden mother asked him for a "Spagnola" yard sign. Heffernan visited a Spagnola distribution spot where city police officers saw Heffernan talking to campaign workers and holding a Spagnola yard sign, and word of this sighting quickly spread throughout the department. The next day, Heffernan's supervisors demoted him from detective to patrol officer as punishment for his "overt involvement" in a political campaign. Wittig later claimed this was against office policy even though Heffernan did not work on Spagnola's campaign or otherwise show support for the candidate.

In August 2006, Heffernan sued the city for retaliating against him for exercising his First Amendment rights. Heffernan claimed he was demoted because, in his supervisor's mistaken view, he engaged in conduct that constituted protected speech under the First Amendment.

The city claimed that the First Amendment protects an employee from retaliation for exercising a "right," and that the First Amendment was not implicated here because – by his own admission – Heffernan was not involved in the Spagnola campaign and only picked up a lawn sign for his mother. Heffernan asserted he was still protected by the First Amendment, which required only that the city believed he was exercising his First Amendment right, not that he actually did so.

The District Court and Court of Appeals both held that, for a retaliation claim, Heffernan needed to show that he actually exercised his free speech and association rights prior to the city's adverse action. According to these courts, Heffernan was not deprived of any First Amendment right because he never engaged in a constitutionally protected political act.

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The Supreme Court heard Heffernan's appeal and rejected the lower courts' rationale, reasoning that "[w]hen 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 . . . even if, as here, the employer makes a factual mistake about the employee's behavior." Simply put by the Supreme Court, "the government's reason for demoting Heffernan is what counts."

Public employers are reminded by this case to be wary when considering discipline against an employee for conduct that is related to involvement in political activities, and to consult with legal counsel to ensure that any adverse action taken does not violate a public employee's First Amendment rights.

For more information on the impact of this decision or employee retaliation claims in general, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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