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Second Circuit Holds Police Officer's Union Speech is Protected Under the First Amendment

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On May 16, 2018, the U.S. Court of Appeals for the Second Circuit reversed the District Court's dismissal in *Montero v. City of Yonkers*, holding that a police officer's union speech was protected under the First Amendment of the U.S. Constitution because his speech was not "part and parcel of his concerns about his ability to properly execute his official job duties," and therefore, he spoke as a private citizen.

Factual Background: Plaintiff, Raymond Montero, was a police officer for the City of Yonkers Police Department, and he also served as the Vice President for the Yonkers Police Benevolent Association (union). He brought his lawsuit against the City, Keith Olson (union President), and two other officers. Plaintiff claimed retaliation based upon several instances of union-related speech. Plaintiff opposed Olson's candidacy for president, he criticized Olson's close relationship with Police Commissioner Hartnett and he criticized police Commissioner's Hartnett's decision to discontinue several police units, including those "dedicated to investigating domestic violence and burglary" and the "community unit dedicated to supporting the Police Athletic League." Plaintiff claimed he opposed Hartnett's decisions because he believed such action would be detrimental to the Police Department, the union and the surrounding community. Finally, Plaintiff called for a vote of no-confidence with respect to Police Commissioner Hartnett. The acting police chief warned Plaintiff that he would be transferred to another division if he did not stop criticizing the Police Department and Commissioner. Plaintiff further alleged that Olson, acting with the other individual defendants, "engaged in a campaign of retaliation against him," including several unauthorized or baseless internal investigations. Plaintiff claims the Police Department took no action after he complained about these allegedly baseless investigations.

Court's Analysis: Under the First Amendment, public employees (and in Connecticut, private employees) are protected from retaliation when (i) they speak as a private citizen on a matter of public concern and (ii) an employer does not have an adequate justification for treating an employee differently based upon his or her speech.

The Second Circuit held that Plaintiff's union remarks did not fall within his responsibilities as a police officer, and therefore, he was speaking as a private citizen. The Second Circuit reversed the District Court's decision that Plaintiff's speech was not protected because "it was tangentially related to his job responsibilities." It relied upon the landmark decision of *Garcetti*, which stated that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech." Instead, the speech at issue must be examined to determine whether the speech is ordinarily within the scope of an employee's duties. It is not sufficient that the speech merely concerns those duties. The Court, however, declined to adopt a categorical rule that union speech is per se speech as a private citizen. But under the facts alleged in this case, Plaintiff's speech made as a union officer "was not composed of statements made as a means to fulfill or undertaken in the course of performing his responsibilities as a police officer."

The Court also found, as a matter of law, Plaintiff's remarks concerning the Police Commissioner and his call for a vote of no-confidence were made on matter of public concern despite the fact that there was no civilian analogue. Indeed, the Court stated that the existence of a civilian analogue is not dispositive of whether a public employee spoke as a private citizen; rather, it is simply a consideration. However, the Second Circuit agreed with the District Court that Plaintiff's speech in opposition to Olson's union leadership "reflected a personal rivalry between two union leaders" and did not implicate a matter of public concern. Indeed, union speech often concerns personal grievances as opposed to matters of public concern.

After concluding its analysis on whether Plaintiff's speech was protected, the Second Circuit remanded the matter to the District Court to address whether Olson, as Union President and a non-supervisory officer, was a "state actor" that can be held liable under Section 1983 for First Amendment retaliation.

The Second Circuit further found that the other individual defendants, who Plaintiff claimed acted with Olson to conduct the baseless investigations, were entitled to qualified immunity, and that the claim against the City had to be dismissed for insufficient allegations.

Conclusion: This case showcases Second Circuit precedent which holds that "a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run;" however, "an individual motived by a personal grievance can simultaneously speak on a matter affecting the public at large." Accordingly, employers should consult with their attorney prior to taking any adverse personnel action against an outspoken employee.

Cindy Cieslak is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including discrimination, harassment, and wage and hour issues. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Carolyn Field, CIRMA Communications Supervisor at cfield@ccm-ct.org.

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