

Ninth Circuit Restores First Amendment Protections to Officers Reporting Co-worker Misconduct

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California peace officers can now breathe a sigh of relief. The Ninth Circuit Court of Appeals recently restored some First Amendment protections to police officers who report the misconduct of co-workers. In so doing, the court overruled a prior decision (which held that such reports are never protected by the First Amendment) and instead ruled that there are some circumstances in which a police officer can state a claim of retaliation for some of the bad things that can happen in the aftermath of the report.

Factual Background

Angelo Dahlia, a Burbank Police detective, reported that a lieutenant had engaged in excessive force during a robbery investigation. Dahlia claimed that he saw the lieutenant grab a suspect by the throat with his left hand, retrieve his handgun from its holster with his right hand and place the barrel of the gun under the suspect's eye, saying, "How does it feel to have a gun in your face, m---f---er?" (expletive deleted). Dahlia further alleged that later he heard the sound of someone being hit and slapped inside a room where a police sergeant was interviewing another suspect.

Dahlia claimed that he was retaliated against for reporting these allegations through his chain of command to internal affairs, as well as to his union and the Los Angeles County Sheriff's Department. The Ninth Circuit found that some of those reports were protected under the First Amendment while others were not.

The Court's Balancing Test

The court began its analysis by noting that "unless public employees are willing to blow the whistle, government corruption and abuse would persist undetected and undeterred."

The court emphasized, though, that not all reports by whistleblowers are protected. Rather, to be protected, the speech must survive the following five-step balancing test:

1. The speech must have been on a matter of public concern.
2. The individual must have spoken as a private citizen, not as a public employee.
3. The speech must have been a substantial or motivating factor in the adverse action taken against the whistleblower.
4. The employer must not have had an "adequate justification for treating the employee differently from other members of the general public."
5. Consideration must be given to whether the state would have taken the adverse employment action even absent the protected speech.

In this case, the court easily answered the first question, finding that "Dahlia's speech — reporting police abuse and the attempts to suppress its disclosure — is quintessentially a matter of public concern."

The second question — whether Dahlia's reports were made as a private citizen or a public employee — was a fact-intensive determination that depended on the circumstances under which the report was made. The court noted: "In a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties" as a public employee. The court went on to note that "when a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his official duties."

Thus, the court found that Dahlia's initial reports to his supervisors about the misconduct he observed were not protected because they were made pursuant to his job duties and not as a private citizen. However,

Dahlia's report to his union president, who in turn advised the city manager that Dahlia had been threatened as a consequence of reporting the misconduct, was protected speech because Dahlia did not have a duty to report that to his union, which is a separate entity from the police department.

Similarly, the court found that Dahlia's reports to the Los Angeles Sheriff's Department might be protected speech if it was determined that he did so of his own volition and not because he was instructed by his supervisors to meet with the Sheriff's Department investigators.

The Decision's Significance

The Ninth Circuit specifically overruled its prior decision in *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), which had broadly stated that the First Amendment did not protect any reports by a police officer of misconduct by his fellow police employees because a police officer has a legal duty to report misconduct and, therefore, can never be found to make such reports as a private citizen. The *Dahlia* decision took a more practical and fact-specific approach to the question of when speech is protected and when it is not.

Dahlia's case still has a long way to go. All the court ruled was that he had stated a valid claim under the First Amendment for retaliation. That decision was made on the facts Dahlia alleged, which were assumed by the court to be true. Now he will be required to prove those facts. Stay tuned.

About the Author

Alison Berry Wilkinson has been providing effective, quality representation to PORAC members in civil, criminal, disciplinary and collective bargaining matters for over 25 years. Her firm, the Berry Wilkinson Law Group, focuses on all aspects of labor and employment law, with a special emphasis on the representation of peace officers and their labor organizations statewide. ☺