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TRAINING BULLETIN

DOES THE FIRST AMENDMENT BAR A DEPARTMENT FROM DEMOTING A POLICE OFFICER BASED ON THE PERCEPTION THAT OFFICER SUPPORTS A POLITICAL CANDIDATE

Heffernan v. City of Paterson, argued January 19, 2016
United States Supreme Court, Docket No. 14-1280

By: Michael P. Stone, Esq. and Muna Busailah, Esq.

The United States Supreme Court will soon decide if a public employee can be disciplined for a perceived exercise of first amendment rights, as opposed to an actual exercise of such rights. In 2006, a former City of Paterson police chief was running for mayor against the incumbent. Jeffery Heffernan, a police officer in Patterson, was observed obtaining a campaign sign for the former police chief. Despite his protests that he was not politically involved and was actually getting the sign for his mother, Heffernan was demoted for being involved in political activities.

Heffernan sued the City for unconstitutional retaliation for exercising his First Amendment rights. The District Court granted summary judgment against

Heffernan, which he appealed. The Third Circuit Court of Appeal affirmed the District Court's dismissal of the case. As that Court explained, Heffernan did not produce evidence that he was actually exercising his First Amendment rights, and a claim of retaliation based only on the perceived exercise of those rights was not allowed. A free speech retaliation claim is allowed only where the adverse action, in this case Heffernan's demotion, was prompted by an employee's actual, rather than perceived, exercise of constitutional rights.

Heffernan's petition for writ of certiorari filed in the Supreme Court was granted. The issue before the Court is whether the First Amendment bars the government from

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demoting a police officer based on a supervisor's perception that the officer supports a political candidate.

During argument, all sides agreed that if Officer Heffernan had been demoted for **actually** supporting the candidate, the First Amendment would protect him. Two Justices did not seem to care. "He was not expressing any First Amendment view whatever," said Justice Antonin Scalia. "I mean, he was fired for the wrong reason, but there's no constitutional right not to be fired for the wrong reason." "The First Amendment guarantees the right to freedom of speech and freedom of association." Scalia added. "[Heffernan was neither speaking nor associating. So how could he possibly have a cause of action under the First Amendment?" Chief Justice John Roberts said the fact the officer was punished for his mother's, rather than his own, politics was "simply a mistake of fact," and suggested there wasn't much the court could do under the First Amendment if there were other avenues of relief to Heffernan -- like civil service protections. Other Justices were more sympathetic. Justice Stephen G. Breyer said he was concerned that the demotion would chill the speech of others who might want to take a position. Justice Ruth Bader Ginsburg said it defied common sense that a person who spoke out would be protected from demotion and one who did not would have no case. As Justice Elena Kagan put it, under the city's logic, a newly elected Democratic official could "identify every person without a well-known political view, every couch potato out there," fire them all, and replace them with Democrats. Tom Goldstein, the lawyer representing Paterson, told Justice Kagan she was right.

"The Constitution doesn't fix everything," he said. Goldstein encouraged the justices to focus on the case in front of them: "He may have a state law right; he does have a collective-bargaining-agreement right, but he doesn't have a First Amendment right because he's not engaging in First Amendment-protected activity."

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court held the practice of patronage dismissals violates the First Amendment because such dismissals severely restrict political belief and association, which constitute the core of those activities protected by the First Amendment, and government may not, without seriously inhibiting First Amendment rights, force a public employee to relinquish his right to political association as the price of holding a public job. In *Elrod*, Republican non-civil-service employees of the Cook County Sheriff's Office were discharged for the sole reason that they were not affiliated with or sponsored by the Democratic Party. In light of *Elrod*, the Supreme Court should rule that a public employer violates the First Amendment when, absent justification, it acts against an employee with the purpose of suppressing disfavored political beliefs, even if the employer's perception of those beliefs is mistaken.

While it is apparent Paterson police officer Jeffrey Heffernan would have had a better case if he had endorsed the former police chief who was running for mayor, rather than maintain his neutrality, the First Amendment should not only grant individuals the right to speak freely, but should also prevent the government from trying to control a person's beliefs. To that

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end, the First Amendment should prevent the government from punishing a person because that person doesn't share the government's views.