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Blowing the Whistle on Police Corruption

The Dahlia Decision: Restoring Constitutional Protections for Police Whistleblowers in the Ninth Circuit

Contents

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❖ Introduction

On August 21, 2013 an *en banc* panel of the Ninth Circuit Court of Appeals published its opinion in *Dahlia v. Rodriguez*, #10-55978. The 9-2 majority overruled a previous Ninth Circuit opinion, *Huppert v. City of Pittsburg* (Cal.), #06-17362, 574 F.3d 696 (9th Cir. 2009) which held that Pittsburg Police Officer Huppert had no First Amendment protection from employer retaliation for his report of internal corruption to the FBI.

The *Huppert* court reasoned that the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, #04-473, 547 U.S. 410 (2006) dictated this result, in part because California law had previously determined that the duties of a police officer required reporting internal misconduct to not only superiors utilizing the chain of command, but also to other available law enforcement agencies, including in the *Huppert* case, the FBI.

The *Huppert* court relied for this rather extreme position on *Christal v. Board of Police*

Commissioners of City of San Francisco, #11003, 33 Cal.App.2d 564, 92 P.2d 416 (1939) and a particular passage therein:

> "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 punishments 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 grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community." *Huppert*, 574 F.3d at 707 (quoting *Christal*, 92 P.2d at 419).

Christal was limited to the question of whether a police officer could invoke his right against self-incrimination before a grand jury and remain a police officer. The *Christal* court held that while police officer Christal retained his Fifth Amendment rights against self-incrimination, the exercise of those rights by refusing to answer in a grand jury, violated his duty and he thereby forfeited his job. This is true even though Christal's answers would tend to incriminate him.[1]

The *Huppert* court adopted the cited passages in *Christal* as a controlling statement of the duties of California police officers, and relied upon it to hold that Huppert's "official duty" extended to reporting law violations to the FBI. If Huppert's report was part of his official duty, then he must therefore be acting as a police employee when he made his report to the FBI, and *not "*as a citizen."

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1. Of course, this is no longer the law. The U.S. Supreme Court's decision in *Garrity v. New Jersey*, #13, 385 U.S. 493 (1967) and its progeny have made it clear that a public employee cannot suffer the loss of public employment on account of the valid exercise of constitutional rights.

The finding that Huppert was not acting as a citizen in making his report meant that he had no First Amendment protection from employment retaliation on account of his FBI report. The distinction was important as a result of the Supreme Court's decision in *Garcetti v. Ceballos*, #04-473, 547 U.S. 410 (2006). Richard Ceballos, a Los Angeles County Deputy District Attorney, made an internal report of what he believed were false statements by deputies in a warrant affidavit. He claimed he suffered employment retaliation as a result of pressing the issue with his superiors. The Court determined Ceballos' statements were part of his core duties as a calendar deputy, and therefore were not made in his *citizen* capacity. Therefore, there was no constitutional protection for his statements.

Since *Garcetti,* the Ninth Circuit developed a test for determining when a public employee's speech is entitled to constitutional protection. In *Eng v. Cooley*, #07-56055, 552 F.3d 1062 (9th Cir. 2009), the Court developed a five-part test:

> "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech."

Eng, 552 F.3d at 1070. Dahlia's speech was clearly about a matter of public concern, because it reflected a serious "breach of the public trust." *See: Connick v. Meyers*, #81-1251, 461 U.S. 138, 148.

The district court, in dismissing Dahlia's suit ruled (1) that his federal claim was barred as a matter of law because "Dahlia could not establish that he spoke 'in the capacity of a private citizen and not a public employee'," *Slip Op.* at 15, citing *Eng*, 552 F.3d at 1071; and (2) that "being placed on administrative leave does not constitute an adverse employment action for the purposes of the First Amendment." *Slip Op.* at 15.

Dahlia's 42 U.S. Code §1983 claim was premised on the averment that within days after he reported corruption in the Burbank Police Department (BPD) to the Los Angeles

County Sheriff's Department (LASD), he was placed on administrative leave with pay, in retaliation for his LASD report.

In addressing the second prong of the *Eng* test, "speech as a private citizen," the *Dahlia* Court noted that *Garcetti* turned on the Supreme Court's determination that Ceballos' "speech" was part of his core, official and professional duties and that Ceballos therefore could not have been speaking in his citizen capacity for First Amendment purposes. *Slip Op.* at 16-17.

Of course, whether particular speech falls within a public employee's official duties is a highly fact-oriented question that entails analysis of the *actual* duties of the job the employee is expected to, and paid to perform. The Supreme Court recognized that formal job descriptions may bear little resemblance to the duties an employee is actually expected to perform. Thus, the "listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Slip Op.* at 18, citing *Garcetti*, 547 U.S. at 424-425.

The Supreme Court also rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* The Court concluded that "the proper inquiry is a practical one." *Id.* Courts are to apply a "practical" test to determine whether a particular communication falls within an employee's core or official duties.

The *Dahlia* Court found that the *Huppert* decision was flawed in its reasoning, because it relied on the previously cited passage from the *Christal* case, which the *Dahlia* majority wrote "reads like a civics textbook." *Slip Op.* at 20, fn. 9. This Court found that the *Huppert* court "failed to heed *Garcetti's* mandate that 'the proper inquiry [to determine the scope of an employee's professional duties] is a practical one'." By relying on the sweeping description of the duties of police officers in the *Christal* passage, the *Huppert* majority failed to conduct the "fact-specific inquiry" required by *Garcetti. Id.* at 21.

❖ 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 that 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 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 U.S. Code §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 (9th 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

The authors of this article applied for and were granted leave to file an *amicus curiae* brief on behalf of the Riverside Sheriffs' Association and its Legal Defense Trust, in support of *Dahlia.* The *amicus* brief urged the Court,

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."

The *en banc* 11-2 majority found in Dahlia's favor on all three points. The opinion refers to the *amicus curiae* brief for support of the third proposition:

> "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.

Of course, the *Dahlia* Court had no evidence before it that Dahlia's report to LASD was *directed* by his department. This circumstance could well have altered the opinion. *Slip Op.* at 35-36. However, the Court did find it significant that Dahlia's superiors, in addition to the threats and intimidation, instructed him to not reveal the misconduct to anyone. "Even assuming *arguendo*, that Dahlia might normally be required to disclose misconduct pursuant to his job duties, here he defied, rather than followed his supervisor's orders. As part of a "practical" inquiry, a trier of fact must consider what Dahlia was actually told to do." *Slip Op.* at 31.

In the context of the *Dahlia* facts as pleaded in the complaint, the Court found that involuntary placement on administrative leave could have a "chilling effect" on protected expression, because it reasonably could "deter employees from engaging in protected activity." *Id.* at 37.

❖ Conclusion

The *Dahlia* decision is certain to be reviewed and considered by federal trial and appellate courts throughout the country, as establishing a well-reasoned framework for applying the *Garcetti* holding to law enforcement whistleblowers who bring claims under the First Amendment for retaliation.

- Citation: *Dahlia v. Rodriguez*, #10-55978, 2013 WL 4437594, 2013 U.S. App. Lexis 17489 (*en banc* 9th Cir.).
- Michael P. Stone and Muna Busailah are the founding partners of Stone Busailah, LLP and participated in the *Dahlia v. Rodriguez* decision as *amicus curiae*.

Also see, Officer's Report of the Use of Excessive Force May Be Protected by the First Amendment, by Mayer and Jones.

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