



# Perceived Political Expression Protected By First Amendment, Supreme Court Says

Insights

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In a 6-2 decision, the Supreme Court today held that the First Amendment of the U.S. Constitution protects both *actual* and *perceived* political speech and expression by public employees. The unsurprising decision squares with decisions from several lower appellate circuit courts, and should serve as a warning sign for public sector employers. *Heffernan v. City of Paterson*.

## What Does The First Amendment Protect?

As a general proposition, the First Amendment – which guarantees freedom of speech and association – prohibits non-political public employees (such as police officers, firefighters, and teachers) from being terminated or demoted for supporting a particular political candidate. Those public employees are free to support the candidate of either political party (or neither) without fear of reprisals.

What happens, though, when a public employer takes disciplinary action against an employee because of perceived but mistaken political affiliation? Would such a situation run afoul of the First Amendment and create an actionable employment claim? That's what the Supreme Court was called to decide in this case.

## Lawn Sign Mistake Leads To Lengthy Litigation

The case began when Jeffrey Heffernan, a police officer for the City of Paterson, New Jersey, was demoted from detective to patrol officer for what he claimed was mistaken political speech.

In 2006, a friend of Heffernan's ran for Mayor against the sitting incumbent. An aide to the incumbent Mayor saw Heffernan carrying a lawn sign for his friend, which led the Mayor to believe that Heffernan was supporting a direct rival. Soon after, Heffernan was demoted. He filed a First Amendment claim alleging that the action was taken in retaliation for perceived political speech.

In reality, Heffernan claimed, he wasn't carrying the lawn sign for himself but for his ailing, bed-ridden mother. While Heffernan wanted his friend to win the election, he did not work on the campaign. In fact, Heffernan could not even vote for his friend because he did not reside in Paterson.

The lawsuit had a lengthy and tortured history before it ended up at the Supreme Court. Heffernan initially won over \$100,000 at a jury trial but that decision was later vacated on appeal. The case was then dismissed and the 3rd Circuit Court of Appeals affirmed the dismissal in early 2015.

The appeals court ruled that because Heffernan was not actually expressing his support for his friend by carrying the lawn sign, he had not engaged in protected activity under the First Amendment. Therefore, the city's action, which was based on a *misperception* of Heffernan's political preference, could not have violated the First Amendment's guarantees of free speech and association. An appeal to the Supreme Court of the United States followed.

### **Supreme Court: Some Mistakes Don't Matter**

Today, the Supreme Court overturned the dismissal of Heffernan's case, and remanded it to the lower court for further proceedings. In so doing, the Court first noted that the statute under which Heffernan sued – 42 U.S.C. §1983 – authorizes a lawsuit brought by anyone who is “depriv[ed]” of a “right . . . secured by the Constitution.”

However, the statute does not specify what precisely is meant by the term “right.” Is it a right primarily focused on the employee's actual activity, or is it primarily focused on the employer's motive? The Court found no guidance in the statute itself nor in the established case law, particularly where, as here, the employer had an apparent misperception of Heffernan's political preference. In coming to a decision without such guidance, the Court found the city's motive in demoting him was of paramount importance.

The decision was in line with rulings from the Courts of Appeal for the 1st, 6th, and 10th Circuits, which had all held that public employees' political speech and association was protected by the First Amendment regardless of whether the employer had correctly or mistakenly judged the employee's activity.

The Court said that, by focusing on the employer's perception, the true purpose of the First Amendment is served: protecting individuals with unpopular views from retaliation. However, because the Court also noted its decision was based on an assumption the city had acted upon an improper motive, the Court remanded the case to the lower court for a determination as to whether that was, in fact, the case.

It was possible, said the Court, the city may have taken its action against Heffernan based upon some “neutral policy prohibiting police officers from overt involvement in any political campaign.” If that could be shown, and if such policy passed Constitutional muster, the city might escape liability.

### **What This Means To You**

This decision does not impact private sector businesses. However, for public sector employers, it should serve as a reminder to use caution before proceeding with employee discipline.

The Court made it clear that public employer's will not be shielded from liability if they take an adverse employment action based upon an improper motive, even if it turns out that motive was based upon a factual error. In this case, perception was as good as reality.

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