Getting Personal: Public Employees, Workplace Grievances, and Petition Clause Rights

By Sophia M. Stadnyk

If this Court adopts the Third Circuit's view, it will open the door for state and local government employees to make "a federal case" out of every garden variety employment dispute. . . . [1]

On March 22, the U.S. Supreme Court heard arguments in a First Amendment case to determine whether a local government employee is protected from retaliation under the First Amendment's Petition Clause[2] when he complains to the government on matters of purely personal, not public, concern.

The Facts

The case, Borough of Duryea v. Guarnieri,[3] is grounded in an acrimonious working relationship between Charles J. Guarnieri, the chief of police of Duryea, Pennsylvania, and the Duryea Borough Council. A collective bargaining agreement between the municipality and its police officers stipulated that a member of the force could be discharged only for "just cause" and established a binding arbitration process for grievances. After the seven-member Council fired Guarnieri in 2003,[4] he filed a grievance, which led to arbitration and his ultimate reinstatement in 2005. On his first day back at work, the Council presented him with a list of eleven "directives" that began:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.
2. You are not to attend council meetings as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen. . . .[5]

Guarnieri responded by filing another grievance, which resulted in a direction that the Council change or remove some of its directives because, among other things, they were vague or violated the collective bargaining agreement. Guarnieri also filed a 42 U.S.C. § 1983 lawsuit against the Borough and the Council members, claiming that the directives amounted to retaliation against him for having filed (and won) his 2003 grievance. While that federal lawsuit was pending, the Council refused Guarnieri's request for overtime pay.[6] The federal Department of Labor investigated and determined that withholding the overtime compensation violated the Fair Labor Standards Act. Guarnieri amended his suit to add a new claim of retaliation based on his filing a lawsuit. (Incidentally, the Borough allegedly never paid Guarnieri this money, as it conditioned payment of the overtime it owed on Guarnieri signing a waiver that would have compromised his other legal claims.[7])

The Decisions

The jury hearing the federal suit returned a verdict in Guarnieri's favor, finding the defendants had retaliated against him by issuing the directives and withholding overtime pay, and awarded him approximately $45,000 in compensatory damages and $52,000 in punitive damages.[8] The defendants moved for a new trial and for judgment as a matter of law, arguing, among other things, that Guarnieri's filing of his 2003 grievance and lawsuit did not address a matter of public concern and that the Third Circuit's precedent on the issue, San Filippo v. Bongiovanni[9] (that a public employee was protected under the First Amendment's Petition Clause against retaliation for having filed a good faith petition in the nature of a lawsuit or grievance, even if it addressed matters of purely private concern), contravened the law of numerous other circuit courts.

The district court dismissed, finding that Guarnieri's actions were protected without regard to whether or not they addressed a matter of public concern:

> At this time, the Supreme Court has yet to decide the split in authority between the Third Circuit and other Courts of Appeals. Therefore, the law of San Filippo remains good law in this circuit. As a good faith grievance pursuant to a collective bargaining agreement has specifically been protected within the meaning of the Petition Clause by the Third Circuit Court of Appeals in San Filippo, Defendants' motion for judgment as a matter of law will be denied.[10]

That court rejected the defendants' argument that the principle in Garcetti v. Ceballos, 547 U.S. 410, 422 (2006), applied to First Amendment retaliation claims based on a public employee's petitioning activities, as it did to employee speech. In any event, the filing of both Guarnieri's grievance and his lawsuit were not actions taken under his "official duties" as the chief of police.[11] The district court also held that there was sufficient evidence of causation. Although the 2003 grievance occurred approximately two years

before the alleged retaliatory actions, a reasonable jury could still find temporal proximity,[12] and there was a sufficient basis on which a reasonable juror could find that the directives would deter a person of ordinary firmness from exercising his First Amendment rights.[13] Because the law as to the First Amendment was clearly established, the defendants were not entitled to qualified immunity.[14]

On appeal, in a nonprecedential ruling, the U.S. Court of Appeals for the Third Circuit affirmed on the First Amendment issue, finding that, although circuit precedent conflicted with that of other circuits, "we are bound by our prior holding."[15] San Filippo was "clearly established, controlling law," and the defendants were not entitled to qualified immunity.[16] Liability attached to the municipality because of the "ample evidence" that its Council both made Borough policy and was responsible for the retaliatory acts.[17] But, although the issuance of the directives and the withholding of overtime pay were retaliatory, as well as "petty and careless," acts, none of the defendants' actions demonstrated malice or the "reckless or callous indifference to the federally protected rights of others" needed to support the grant of punitive damages.[18]

The decision ran counter to decisions by all 10 other federal circuits and four state supreme courts that had ruled on the issue and set the stage for the Supreme Court's involvement.[19]

The Issue

The backdrop to this case is the Court's earlier First Amendment decisions in Connick v. Myers, 461 U.S. 138, 147 (1983), and McDonald v. Smith, 472 U.S. 479, 485 (1985). In Connick, the Court held that the First Amendment's Free Speech Clause did not protect a public employee from an adverse employment action taken because of her speech, because the speech there was not on a matter of public concern and addressed internal or personal interest issues.[20] A federal court, it noted, was not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. The Court subsequently affirmed this approach in Garcetti v. Ceballos, 547 U.S. 410, 422 (2006), restricting the protection further: when public employees speak in the course of carrying out their routine and required employment obligations, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their speech from employer discipline.

In McDonald, the petitioner, McDonald, wrote letters to President Reagan and others containing "false, slanderous, libelous, inflammatory and derogatory statements" about Smith, a candidate for public office. When sued in a libel action by Smith, McDonald relied on the Petition Clause as a shield, claiming it provided absolute immunity from liability. The Supreme Court disagreed, finding the petitioner's argument sought to "elevate the Petition Clause to special First Amendment status."[21] The Petition Clause, however, was "inspired by the same ideals" as the other "inseparable" First Amendment rights, the freedoms to speak, publish, and assemble, and there was "no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions."[22]

The question for the Supreme Court in Borough of Duryea v. Guarnieri is the extent to which local government employees are protected by the First Amendment's Petition Clause for petitioning the government on purely private concerns. At its most basic, the dispute is one of style versus substance.

The respondent employee argues that the "core purpose of the petition clause is to enable petitioners to seek redress, not to facilitate any expression"[23]—that the clause protects the process. "When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems."[24] Given the facts, neither Connick nor McDonald is the controlling precedent, and the legal issue in this case is "essentially the opposite of the issue in McDonald."[25] There, Smith did not challenge McDonald's Petition Clause right to oppose his appointment to public office; the gravamen of his action was that the statements McDonald made in doing so were false, damaging, and likely cost him the position. In contrast, the municipal defendants here did not take the allegedly retaliatory actions because of Guarnieri's statements, or seek to justify their actions against him because his grievances or the lawsuit were false, defamatory, disruptive, insubordinate, or in any other way objectionable. Rather, "they contend . . . that Guarnieri's very act of petitioning is not protected by the Constitution."[26] The particular retaliatory intent alleged by Guarnieri, and accepted by the lower courts, was limited to the acts of filing the grievance and lawsuit.

For their part, the petitioners, the municipal actors, seek to draw a parallel between the employee free speech rulings and the less common cases relying on the Petition Clause, based on Connick and McDonald. They argue that, by ignoring the "matter of public concern" requirement, the Third Circuit's decision puts employees relying on the Petition Clause in a better position than those raising their free speech rights. This, they say, "violates fundamental principles of parity between speech and petitions," as the right to petition and the right to free speech, while separate guarantees, "are related and generally subject to the same constitutional analysis."[27] Accordingly, if petition claims concerning private matters were actionable but speech claims were not,

> public employees could (and will) easily sidestep Connick by characterizing their claims as arising under the Petition Clause. Such easy evasion of Connick would encourage an onslaught of burdensome litigation and costly settlements and judgments. Government employers would face increased complexity and uncertainty in addressing employee complaints, creating an obvious risk that public employers will retain unproductive or disruptive employees simply to avoid crippling defense costs and judgments.[28]

This, they (and amici in support) argue, would bring government to a standstill, as government offices could not function if every disputed employment decision became a constitutional matter.[29] In addition, one of the potential difficulties would be that an employee could be "petitioning" the same government that was employing him. "By forcing public officials to make employment decisions based on a guess as to whether a disgruntled employee is 'petitioning' or just 'speaking,' the Third Circuit has exposed officials to the very legal uncertainty" that the Supreme Court "consistently has sought to minimize."[30]

Will the Court prioritize petitions, or grant petition parity, or choose a third way that balances the interests at stake? Is there a

distinction between employee petitions and speech in this context, or is any distinction essentially arbitrary and contrary to the best interest of public employers? The answers will surely be of interest.

Endnotes

1. Brief of Amicus Curiae, The State and Local Legal Center, in Support of Petitioner, 2010 WL 5125438, at *2 (U.S. Dec. 13, 2010).
2. U.S. CONST. amend. I, cl. 6. This reads, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
3. 364 Fed. Appx. 749 (3d Cir. 2010), cert. granted, 131 S. Ct. 456 (2010) (No. 09-1476).
4. The reason for the firing is not stated in the decisions. But the Brief for the Petitioners, 2010 WL 5014179, at *6 (U.S. Dec. 6, 2010), states it was for misconduct and disciplinary reasons. The respondents alleged it was prompted, in part, because Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department. Brief for the Respondent, 2011 WL 175871, at *2 (U.S. Jan. 18, 2011).
5. Guarnieri v. Borough, No. 3:05-CV-01422, 2008 WL 4132035, at *13, 14 (M.D. Pa. Sept. 2, 2008). The entire list of directives is included in this decision.
6. 364 Fed. Appx. at 752. In another dispute, Guarnieri was allegedly refused health insurance coverage for his wife because the Borough Secretary did not believe he was married, despite Guarnieri providing a marriage license signed by Duryea's mayor. Id. at 752 n.1. The jury rejected this retaliation claim. Brief for the Petitioners, 2010 WL 5014179, at *10, n.5.
7. Brief for the Respondent, 2011 WL 175871, at *5 (U.S. Jan. 18, 2011).
8. Guarnieri v. Borough, 2008 WL 4132035, at *1. This included $3,000 against each individual defendant respecting the issuance of the directives, and $3,500 against each individual defendant for the denial of overtime pay.
9. 30 F.3d 424, 439 (3d Cir.1994).
10. Guarnieri v. Borough, 2008 WL 4132035, at *5.
11. Id. at *6.
12. Id. at *12. It held, however, that same temporal proximity did not exist between the filing of Guarnieri's lawsuit and the denial of overtime pay.
13. Id. at *14.
14. Id. at *8, *10.
15. 364 Fed. Appx. at 753.
16. Id.
17. Id. at 754.
18. Id.
19. For a list of these other decisions, see Brief for the Petitioners, 2010 WL 5014179, at *4, *5 (U.S. Dec. 06, 2010).
20. 461 U.S. 138, 147 (1983).
21. 472 U.S. at 485.
22. Id.
23. Brief for the Respondent, 2011 WL 175871, at *8.
24. Id. at *7.
25. Id. at *6.
26. Id. at *7.
27. Brief for the Petitioners, 2010 WL 5014179, at *14.
28. Id. at *13.
29. For example, the Amicus Curiae Brief of the Pennsylvania State Association of Boroughs in Support of Petitioners, 2010 WL 2709840 (U.S. July 6, 2010), notes that as

> a result of constitutionalizing public employer-employee disputes, small borough governments, which have limited revenue resources and budgets, will be easily overburdened merely by the threat of employee litigation. . . . The dedication of volunteer public elected service will evaporate as more elected officials are besieged with individual labor issues because of the elevated protection afforded by the Petition Clause.

Id. at * 11.
30. Brief of amicus curiae, The State and Local Legal Center, in Support of Petitioner, 2010 WL 5125438, at *5 (U.S. Dec. 13, 2010).

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