

PROTECTED SPEECH CAN FORM BASIS OF RETALIATION CLAIM

Kate Barkman

Campbell, Durrant & Beatty, P.C.

(As prepared for and published in the PELRAS Newsletter
for the Pennsylvania League of Cities and Municipalities)

The Third U.S. Circuit Court of Appeals upheld a jury verdict of nearly \$1 million to an independent contractor whose contract was not renewed after that individual filed written criticisms related to the policies, procedures and administration of the public entity by which he was employed. Springer v. Henry, 435 F.3d 268 (3rd Cir. 2006).

Dr. Springer, a psychiatrist, worked as an independent contractor at a center run by the state of Delaware under a series of one-year contracts until 2000, when his contract was not renewed. Each contract specified that Springer could be discharged without cause upon 15 days notice. Between October 1999 and January 2000, Springer wrote a series of memoranda each of which was critical of the center's policies and procedures. The memos alleged a long list of inadequacies related to patient care, safety, mistreatment and mismanagement of the center's patients. Copies of the memos went to various individuals, including the governor of Delaware, state senators and the director of the center.

In October 2000, Dr. Springer initiated a lawsuit under 42 U.S.C. § 1983 alleging that the non-renewal of his contract constituted retaliation for the memos which he asserted were protected speech under the First Amendment. At trial, the jury returned a verdict in favor of Springer, awarding over \$285,000 in back pay and nearly \$600,000 in future damages. In addition, the jury found the individual director of the state agency overseeing the center who had informed Henry that his contract would not be renewed acted "recklessly, intentionally or maliciously" and awarded \$25,000 in punitive damages. All of these amounts were upheld on appeal.

The 3rd Circuit upheld the lower court's determination that Dr. Springer's speech was protected and that his right to speak on various problems at the center was clearly established. The First Amendment's protection of an employee's right to speak on matters of public concern extends to independent contractors. Bd. of Comm'rs, Wabaunsee v. Umbeher, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). The Court also found sufficient evidence to support Springer's claim that the memos played a substantial part in the non-renewal of his contract. That evidence rested primarily on the fact that Springer's was the only contract not renewed during the nine-year period in which he worked at the center. The Court found no evidence to persuade it that the contract would have been ended absent the protected speech. The jury's award of punitive damages against the individual director was further evidence of the view that she reacted maliciously against Dr. Springer because of the content of the memos.

It should be noted that the factor that formed the basis of the verdict and appellate analysis was inconsistent treatment of employees by a manager. To simply assert that an adverse employment action was taken according to policy or statute overlooks the fact that negative

treatment of an individual after he or she has taken a protected action, when the same treatment was not applied to other employees in similar employment positions is likely to lead to liability. An individual manager can be liable for failing to apply policies in an even-handed manner. In regard to the punitive damages against the individual manager, the Court wrote that based on its observations at trial, the jury could have concluded that the individual manager acted vindictively. The Court found that the evidence supported the jury finding that the individual manager acted at least recklessly or callously, if not intentionally or maliciously, with respect to Dr. Springer's constitutionally protected rights and thus, the lower court did not err in affirming the jury's punitive damage award.