Public Employee Fired for Releasing Information to

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On April 2, the Fourth Circuit ruled that a former Baltimore Police Department officer's Section 1983 civil rights claim based on violations of his First Amendment rights may proceed. The Fourth Circuit reversed and remanded the district court's order dismissing the freedom of speech claim. Specifically, the Fourth Circuit held that the plaintiff alleged facts sufficient to pursue his claim that the defendants, including the current and former police commissioners, violated the plaintiff's First Amendment rights by retaliating against him for releasing an internal memorandum to a reporter for the *Baltimore Sun*.

In Andrew v. Clark, No. 07-1184, slip op. (4th Cir. Apr. 2, 2009), the plaintiff (Andrew) was a major in the BPD and was on the scene and on duty during an incident in which a BPD tactical unit shot and killed a suspect who had killed his landlord and barricaded himself in his apartment. Andrew was not the senior officer on the scene, and he questioned whether the incident had been properly handled because the suspect had no hostages and had not threatened additional violence.

In his Complaint, Andrew alleged that after the shooting he repeatedly asked to be included in an internal review and investigation of the incident, but was not. Andrew alleges he then submitted to former BPD police commissioner Clark a memorandum that requested an investigation to determine whether the use of deadly force by the BPD tactical unit against a barricaded suspect was justified and properly conducted. Andrew contends his memorandum was ignored. Out of his "concern for public safety," Andrew says he then released the memorandum to a reporter for the *Sun*, who reported on the memorandum and the incident. Ultimately, the BPD terminated Andrew's employment.

Much of the Fourth Circuit opinion focused on whether Andrew had alleged sufficient facts to assert that he did not write the memorandum as a duty of his employment as a BPD officer. This fact was important because of limitations on public employees' freedom of speech rights. The law related to speech by public employees is set out, in part, in Garcetti v. Ceballos, 547 U.S. 410 (2006), and was discussed by the Fourth Circuit:

In setting forth the basis for its conclusion that Andrew had failed to assert facts that would support a claim for a violation of his First Amendment rights, the district court accurately summarized the rule announced in Garcetti as follows: "[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and therefore are not insulated from 'managerial discipline' based on such statements." The district court failed, however, to recognize that the Supreme Court also stressed in Garcetti that "the parties in this case do not dispute that [the plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework of the scope of an employee's duties in cases where there is room for serious debate." Accordingly, because the parties do not agree that the facts demonstrate that Andrew wrote his memorandum as part of his official duties, contrary to the district court's conclusion, the facts alleged in Andrew's second amended complaint do not "render Garcetti wholly applicable." At this stage of the proceedings in this matter, we must conclude that there is "room for serious debate" regarding whether Andrew had an official responsibility to submit a memorandum regarding the Smith shooting. (citations omitted)

The evidence in the record at this stage of the case—the motion to dismiss stage—asserted that Andrew was under no duty to write the memorandum. (The district court wrote that Andrew conceded that writing the memorandum was part of his job, but at oral argument, defendants' counsel told the Fourth Circuit panel that was not so.) Therefore, according to the Fourth Circuit, Andrew's speech *may* be protected by the First Amendment, subject to the requirements of Pickering v. Board of Education, 391 U.S. 563 (1968). Whether Andrew could show that the speech was "citizen speech" about a matter of public concern or whether the publication of the memorandum "affected the operation of the BPD," as required by Garcetti and Pickering, had not been answered by the district court and could be tested upon summary judgment motions.

It remains to be seen whether Andrew's release of the memorandum to the *Sun* will be considered protected speech—stay tuned.

The concurring opinion authored by Judge Wilkinson does an excellent job of putting the Andrew opinion in context and explains why the outcome at this stage is a win for the media. Here is a excerpt (but we recommend you read the entire concurrence):

To throw out this citizen who took his concerns to the press on a motion to dismiss would have profound adverse effects on accountability in government. And those effects would be felt at a particularly parlous time. It is well known that the advent of the Internet and the economic downturn have caused traditional news organizations throughout the country to lose circulation

and advertising revenue to an unforeseen extent. As a result, the staffs and bureaus of newsgathering organizations—newspapers and television stations alike—have been shuttered or shrunk. Municipal and statehouse coverage in particular has too often been reduced to low-hanging fruit. The in-depth investigative report, so essential to exposure of public malfeasance, may seem a luxury even in the best of economic times, because such reports take time to develop and involve many dry (and commercially unproductive) runs. And in these most difficult of times, not only investigative coverage, but substantive reports on matters of critical public policy are increasingly shortchanged. So, for many reasons and on many fronts, intense scrutiny of the inner workings of massive public bureaucracies charged with major public responsibilities is in deep trouble. . . . [T]he First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine. That scrutiny is impossible without some assistance from inside sources such as Michael Andrew. Indeed, it may be more important than ever that such sources carry the story to the reporter, because there are, sad to say, fewer shoeleather journalists to ferret the story out.