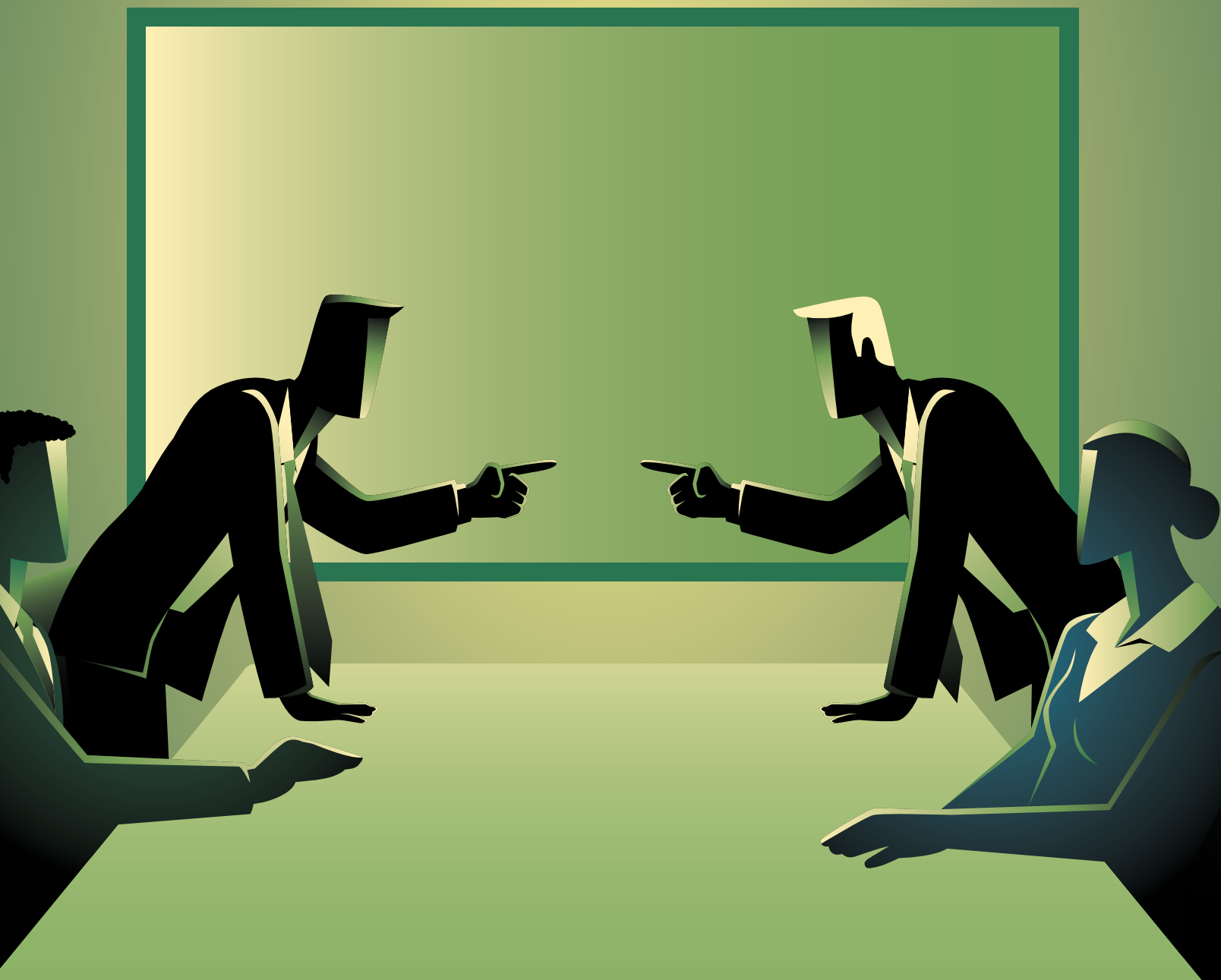
# Demoted for Disloyalty:

## First Amendment Retaliation Against Public Employees

By John B. Spitzer



If an employee of a county coroner's office accidentally dons a mask that bears the logo of a political candidate and is fired for supporting that candidate, can she challenge her termination by filing suit under 42 USC 1983? She may have a viable civil rights claim that she was punished for engaging in protected First Amendment conduct if her employer demotes her based on the mistaken perception that she was engaged in political activity and there is no valid statute or neutral employer policy banning political masks.

## Political horse race

One U.S. Sixth Circuit Court of Appeals case provides an example of an apparent misperception of political loyalty. In *Dye v Office of the Racing Comm'n*,[1] the court reviewed a situation arising out of Michigan horse racing stewards' complaint that they were discriminated against because of their perceived political affiliation. Specifically, the stewards were thought to be Republican because they supported a Republican candidate for governor. This did not sit well with the Democratic contract management consultant appointed by the Democratic Office of Racing Commissioner (ORC) and supported by the Democratic governor. The stewards claimed that the consultant made personnel decisions based on perceived political affiliation and retaliated against those who did not support the consultant's chosen candidate.

Noting that the affidavits and deposition testimony showed that ORC officials perceived that some of the stewards were affiliated with the Republican party because of their support for a GOP challenger to the governor, the court makes an important point: Individuals claiming to have been retaliated against because of their political affiliation need not show that they were actually affiliated with the political party or candidate at issue. In other words, the plaintiffs need not allege an actual affiliation to survive a motion to dismiss; they need only allege they were *perceived* to have been politically affiliated and retaliated against because of their affiliation.[2] In reversing the district court's denial of the stewards' claims, the court held that even though the stewards never affirmatively stated that they were members of the Republican Party, the defendants' alleged perception that they were affiliated with the Republican Party was enough to satisfy their burden of establishing that they engaged in protected activity. The court said that an ORC manager could easily have inferred the stewards were affiliated with the Republican Party based on their support for the GOP candidate.[3]

The court set forth the elements a plaintiff must allege to bring a prima facie case of First Amendment retaliation under 42 USC 1983: (1) she engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between the first two elements—that is, the adverse action was motivated at least in part by her protected conduct.[4] If the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. Once this shift occurs, summary judgment is warranted if, based on the evidence viewed in the light most favorable to the plaintiff, no reasonable juror could fail to return a verdict for the defendant.[5]

## Supreme Court resolves circuit split

In deciding a split between the U.S. Third Circuit and the Sixth Circuit courts, the United States Supreme Court in *Heffernan v City of Paterson, NJ* adopted the Sixth Circuit's position. The Supreme Court held that an employer's mistaken belief that an employee was engaged in political activity when he actually was not did not bar that employee from stating a civil rights claim for First Amendment retaliation.[6]

The Third Circuit reviewed a police officer's complaint that he was demoted because of perceived political affiliation. Heffernan was a police officer in Paterson, N.J. The police chief and Heffernan's supervisor had been appointed by Paterson's mayor, who was running for reelection against Spagnola, a friend of Heffernan. Although Heffernan was not involved in Spagnola's campaign, he agreed to pick up and deliver a Spagnola campaign yard sign to his mother. Other police officers saw Heffernan with the yard sign. The day after other members of the police force heard about the incident, Heffernan's supervisors demoted him from detective to patrol officer. The demotion was described as punishment for involvement in Spagnola's campaign.[7]

Heffernan then filed suit under 42 USC 1983, alleging that he was improperly punished for engaging in protected First Amendment conduct. The district court found that Heffernan had not been deprived of any constitutionally protected right because he had not actually engaged in any protected First Amendment conduct. The Third Circuit affirmed on the basis that Heffernan's §1983 claim was viable only if his employer's adverse action was prompted by Heffernan's actual exercise of his free-speech rights. In contrast to the Sixth Circuit in *Dye*, the Third Circuit held that Heffernan could not maintain a civil rights action because he had not in fact engaged in conduct that constituted protected speech.[8]

## At a Glance

Public officials who take adverse action against non-policymaking subordinates to punish perceived political disloyalty may face viable First Amendment retaliation claims even when their perceptions are mistaken.

Adopting *Dye*'s reasoning and rejecting the Third Circuit's reasoning, the Supreme Court reversed the Third Circuit's decision. Focusing on the employer's motive as the key factor, the Supreme Court held that a First Amendment retaliation claim can be based on a mistaken factual belief that an employee engaged in protected conduct.[9] Remanding for further proceedings, the Court did not address the issue of whether Heffernan violated a neutral policy banning police officers from engaging in political activity. The Court said that whether there was a neutral policy prohibiting police officers from overt involvement in any political campaign, whether Heffernan's supervisors were following it, and whether any such policy complies with constitutional standards are matters for the lower courts to decide.[10] Bottom line: if an employer acting under color of state law demotes a public employee, who is not a policymaker, for engaging in protected First Amendment political activity, the employee is entitled to challenge that action under 42 USC 1983—even if, as in *Heffernan*, the employer's decision is based on a factual misperception.

## Apolitical and unemployed

Just as an employer's mistaken perception of an employee's political loyalties does not bar an employee from bringing a First Amendment retaliation claim, an official's mistaken hunch that an employee will engage in political activity helpful to that official can set the stage for a political retaliation claim.

In a case involving a judge's alleged attempt to recruit an employee to dig up dirt on another judge, the Second Circuit held that even an employee exempt from civil service protection but not a policy maker may bring a claim that certain individuals retaliated against her for refusing to engage in political activity.[11] *Morin* stands for the proposition that, in First Amendment retaliation cases, public employees who are not policymakers can no more be discriminated against for being apolitical than for being a member of the wrong political party.

The court found that Morin expressed no political opinion. According to her complaint, Morin simply refused to be pressed into political service. Rejecting the defendant's interlocutory appeal from the denial of a motion to dismiss, the court held that Morin's alleged status as a policymaker was not established as a matter of law. Applying a multifactor test, the court found that Morin was not a policymaker because, among other things, political activity or ideology was not necessary to effective performance in her position as chief clerk of family court.[12]

The court also rejected the defendant's contention that a qualified immunity defense was established as a matter of law. The court found that the defendants failed to show that Morin's job required that she have a political affiliation. For that reason, the court held that it was not objectively reasonable for the defendants to believe Morin was a policymaker. The court affirmed the district judge's holding that the qualified immunity defense did not apply.[13]

## Conclusion

Perhaps some public officials will permit their personal feelings regarding a subordinate's political loyalties to influence their personnel decisions. But public officials who take adverse action against non-policymaking subordinates to punish perceived political disloyalty may face viable First Amendment retaliation claims even when their perceptions are mistaken.

COVID-19 may cause infected persons to lose their sense of smell. But even uninfected politicians may make mistakes when they sniff the air for political disloyalty. ■

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## ENDNOTES

1. *Dye v Office of the Racing Comm'n*, 702 F3d 286, 292–3 (CA 6, 2012).
2. *Id.* at 300.
3. *Id.* at 302.
4. *Id.* at 294.
5. *Id.* at 294–295.
6. *Heffernan v City of Paterson, NJ*, 136 S Ct 1412, 1419; 194 L Ed 2d 508 (2016).
7. *Id.* at 1412.
8. *Id.* at 1416.
9. *Id.* at 1416.
10. *Id.* at 1419.
11. *Morin v Tormey*, 626 F3d 40, 46 (CA 2, 2010).
12. *Id.* at 44–45.
13. *Id.* at 46.