1995

An Independent Contractor Speaks His Mind: Can He Lose His Government Contract? An Analysis of Heiser v. Umbehr

Barbara J. Fick
Notre Dame Law School, barbara.j.fick.1@nd.edu

An Independent Contractor Speaks His Mind: Can He Lose His Government Contract?

by Barbara J. Fick

Barbara J. Fick is associate professor of law at Notre Dame Law School, Notre Dame, IN; (219) 631-5864.

ISSUE

Whether, and to what extent, a governmental unit can take into account an independent contractor's political speech in making decisions regarding the award or termination of government contracts.

FACTS

Keen Umbehr operates a trash hauling service in rural Kansas. Beginning in 1981, Umbehr entered into an agreement with the County Commission of Wabaunsee County (the "Commission"), under which Umbehr provided trash collection services for towns in the County.

The contract remained in force until 1991, when the county commissioners voted to terminate it. For two years prior to the termination vote, Umbehr had been openly critical of the the Commission's policies and the manner in which the Commission performed its duties. Umbehr's criticism was expressed both in published newspaper articles and at Commission meetings.

When his contract was terminated, Umbehr filed suit in federal district court against the county commissioners, alleging that they had terminated the contract in retaliation for the exercise of his First Amendment rights. The district court granted the Commissioners' motion for summary judgment, holding that the First Amendment does not prohibit units of local government from considering an independent contractor's speech in deciding to terminate a contract. 840 F. Supp. 837 (D.Kan. 1993). (Refer to Glossary for the definition of summary judgment.)

On Umbehr's appeal to the Tenth Circuit, the court reversed, holding that an independent contractor is entitled to the same First Amendment protection from retaliatory governmental actions as is enjoyed by a government employee. Thus, when an independent contractor speaks on matters of public concern, he is protected from retaliatory governmental action regarding the award or termination of government contracts, unless the government shows that the speech interferes with the ability to effectively perform its duties. 44 F.3d 876 (10th Cir. 1995).

(Continued on Page 113)

GLEN HEISER AND GEORGE SPENCER V. KEEN A. UMBEHR
DOCKET NO. 94-1654

ARGUMENT DATE:
NOVEMBER 28, 1995
FROM: THE TENTH CIRCUIT

Case at a Glance

Government contracts represent a significant amount of business in today's marketplace. Here, a businessman, operating under a contract with a county commission, claims that the contract was terminated because he criticized the commission. The commissioners argue that government has unfettered discretion in dealing with independent contractors, and courts should not micromanage government operations by reviewing decisions to award or terminate such contracts. Now, the Supreme Court decides if the First Amendment limits governmental discretion in the world of public contracting.

The Supreme Court granted the petition for a writ of certiorari filed by two county commissioners to decide whether independent contractors enjoy First Amendment protection from retaliatory government action, and if so, the nature and extent of that protection. 115 S. Ct. 2639 (1995).

Case Analysis

There are three strands of First Amendment analysis relevant to the resolution of this case. First, there is the basic First Amendment principle that government cannot abridge an individual's freedom of speech in the absence of a compelling governmental interest justifying the restraint. This broad prohibition applies both when government restricts speech directly (such as imposing a penalty on speech), as well as when government restricts speech indirectly (such as conditioning receipt of a government benefit on the recipient's agreement to forgo First Amendment rights). *Perry v. Sinderman,* 408 U.S. 593 (1972).

A second line of cases deals with the practice of political patronage in awarding government benefits. Political patronage implicates the First Amendment because it requires individuals to support a particular political party or candidate. In *Branti v. Finkel,* 445 U.S. 507 (1980), a case dealing with firing of government employees because of their political affiliation, the Supreme Court acknowledged the historical tradition of political patronage and made a distinction between jobs that require party affiliation for effective performance and other types of government jobs that do not. In the former category of jobs, e.g., speechwriters for elected officials, the infringement on an individual employee's First Amendment rights is justified by the government's need to ensure the effective performance of the job in question. As to the latter category of jobs, e.g., clerical workers, there is no relationship between the political affiliation of the employee and his or her ability to effectively perform clerical work; therefore, government may not discharge such workers because of political affiliation.

In *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990), the Court extended the *Branti* principle to include decisions relating to hiring, promotion, transfer, and recall. The Court found that disadvantages suffered by employees who are denied employment, promotion, transfer, or recall opportunities because of their political affiliations may not be as severe as the deprivation caused by the loss of a job, but such disadvantages are injuries suffered because of an employee's First Amendment conduct.

The third line of cases deals with the scope of First Amendment protection for public employees generally. In *Pickering v. Board of Education,* 391 U.S. 563, (1968), the Supreme Court held that public employee speech was protected only to the extent that the employee's speech interest outweighs "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." And, in *Connick v. Myers,* 461 U.S. 138, (1983), the Court held that not all public employee speech is entitled to First Amendment protection, only speech "relating to any matter of political, social or other concern to the community." Thus, a public employee's speech relating to matters of purely private concern is not protected in the public employment arena, even though the government would be prohibited by the First Amendment from restricting such speech outside that arena.

The federal circuit courts of appeals, in applying these First Amendment principles to cases involving independent contractors, have reached conflicting results. The Third, Seventh, and Eighth Circuits have held that independent contractors are not protected by the First Amendment in the award or termination of government contracts. *Horn v. Kean,* 796 F.2d 668 (3d Cir. 1986); *Downtown Auto Parks v. City of Milwaukee,* 938 F.2d 705 (7th Cir. 1991); *Sweeney v. Bond,* 669 F.2d 542 (8th Cir. 1982).

To those courts, the award of government contracts falls within the definition of political patronage and the Supreme Court has restricted the use of patronage only in the employment arena and has never condemned its propriety in other traditionally accepted areas such as granting political supporters lucrative government contracts or providing better services to supporters. Moreover, the practical and economic differences between independent contractors and government employees justify a difference in First Amendment protection. A contractor generally has other, nongovernment customers from which it can derive income; the public employee's sole source of income is generally his or her job. Lastly, recognition of a First Amendment right in these circumstances would lead to excessive interference by the judiciary in government operations.

The Fifth Circuit, on the other hand, has held in certain cases that independent contractors enjoy the full range of First Amendment rights. *Blackburn v. City of Marshall,* 42 F.3d 925 (5th Cir. 1995). The Fifth Circuit's analysis started from the Supreme Court's *Perry* principle that every individual enjoys First Amendment protection while noting the *Pickering* principle that, in public employment, First Amendment rights can be restricted because of the nature of the relationship. In cases in which the relationship between an independent contractor

and government is sufficiently analogous to the employer-employee relationship or in which the contractor's speech deals solely with the contractual relationship unrelated to any matter of public concern, the *Pickering-Connick* balancing test applies to governmental retaliatory action. Under this test, the Fifth Circuit has held that government can take adverse action if a contractor's speech is unrelated to issues of public concern or if the government's ability to effectively and efficiently provide government services is impeded by the contractor's speech. In those cases in which the relationship between government and the independent contractor is not analogous to the employer-employee relationship and the contractor's speech relates to matters of public concern, the *Perry* test applies, and government is prohibited by the First Amendment from withholding a benefit (such as continuing the contract) in retaliation for the contractor's speech. Like the Fifth Circuit, the Second and Ninth Circuits have extended First Amendment protection to independent contractors in certain situations. *White Plains Towing Corp. v. Patterson,* 991 F.2d 1049 (2d Cir. 1993); *Havekost v. United States Department of Navy,* 925 F.2d 316 (9th Cir. 1991).

The Tenth Circuit, in its decision in the present case, applied the *Pickering-Connick* test and held that an independent contractor is protected under the First Amendment to the same extent as a public employee would be protected. The court saw little justification for treating the two categories differently on the basis of their economic interests. In *Rutan,* the Supreme Court clearly stated that the degree of economic harm suffered is irrelevant to whether or not individuals have suffered a loss in retaliation for their First Amendment speech.

Thus, the Supreme Court has available several different theories with which to resolve the question presented. The Court could decide that, like anyone else, an independent contractor enjoys the full panoply of First Amendment rights, and the government cannot award or terminate contracts because of the contents of a contractor's speech, applying the *Perry* test. The Court could decide that an independent contractor's relationship to the government is sufficiently analogous to that of a public employee, that the *Pickering-Connick* balancing test applies. It could decide that when the independent contractor's speech relates to matters of public concern the *Perry* test applies, but if the contractor's speech is of a purely private nature unrelated to community concerns, the contractor enjoys no First Amendment protection under the rationale of *Connick*. Finally, the Court could decide that the awarding of government contracts is historically accepted political patronage that is not subject to the restrictions of the First Amendment.

Significance

This case has drawn surprisingly little attention given its wide-ranging ramifications. Should the Court impose First Amendment restrictions on government dealings with independent contractors, state and local governments will face the specter of increased litigation challenging their decisions relating to awarding and terminating contracts. Such a decision certainly would cause governments to be more cautious in their decisionmaking, thus imposing restraints on their ability to effectively control contracted-out government services. Given the increasing trend toward privatizing public-sector operations, such restrictions pose a major concern for government units as they spend time, money, and energy justifying their decisions.

On the other hand, should the Court decide that independent contractors are not entitled to protection from loss of government contracts because of their political speech, the chilling effect on the free speech of a whole category of individuals would be enormous. Given the sheer number and dollar value of government contracts, many businesspeople would be extremely circumspect in voicing their political views for fear of losing out on the economic benefits associated with these contracts. The prudent businessperson would be faced with weighing the benefits of expressing his or her views against the cost of losing government contracts.

Whatever the Court's decision, this case likely will have far-reaching consequences.

Attorneys of the Parties

For Glen Heiser and George Spenser (Donald Patterson; Fisher, Patterson, Sayler & Smith; (913) 232-7761).

For Keen A. Umbehr (Robert A. Van Kirk; (703) 313-9740).

Amicus Briefs

In support of Keen A. Umbehr

Joint brief of The American Civil Liberties Union, The ACLU of Kansas, and The Thomas Jefferson Center for the Protection of Free Expression (Counsel of Record: Robin L. Dahlberg; American Civil Liberties Union Foundation; (212) 944-9800);

Planned Parenthood Federation of America, Inc. (Counsel of Record: Bruce J. Ennis, Jr.; Jenner & Block; (202) 639-6000);

The United States (Counsel of Record: Drew S. Days, III, Solicitor General; Department of Justice; (202) 514-2217).