

Employee's Speech Undermining Public Employer in the Course of Duties Is Not Protected

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ATTORNEYS

Rebecca Green

A public employee's speech that undermines their employer's policies is not protected by the First Amendment when that speech is made in the course of the employee's job. In *Ohlson v. Brady*, the Ninth Circuit also affirmed that when the law of a case is not clearly established, public officials are entitled to qualified immunity from liability.

Plaintiff Ohlson was a forensic scientist employed by the Arizona Department of Public Safety. Ohlson's job was to analyze criminal defendants' blood samples for alcohol content and testify about his findings in court. The Department's policy, which was in line with national standards, provided criminal defendants only with their own test results. Plaintiff believed that defense attorneys could better evaluate the accuracy of the results if the samples of the individual in question were reported along with the results for the entire batch of samples. Against Department policy, Ohlson instructed multiple defense attorneys to request the batch of samples and testified in at least two court proceedings that disclosure of the entire batch was necessary to ensure accuracy of the result. He was disciplined for undermining the Department and public confidence in its operations, and eventually retired. He sued three Department officials, claiming retaliation for exercising his right to free speech.

Ohlson argued he should be treated as a private citizen exercising his First Amendment right to criticize the government, and not as a government employee speaking on behalf of his employer. The trial court concluded Ohlson was speaking in contravention of his supervisors' orders, and therefore speaking as a citizen rather than employee. The Ninth Circuit disagreed, finding that he was speaking in the course of his job, and that a blanket rule allowing public employees to couch acts of insubordination in First Amendment rights would hinder government administration and the deterrence of employee misconduct.

The Court held that the government's interest in administering a policy backed by national standards outweighed Ohlson's interest in publicly expressing his views on better laboratory procedures. The Court further held that because the law differentiating private speech versus employee speech is not clearly

established, the public official Defendants were entitled to qualified immunity.

For more information regarding public employment issues, please contact **Rebecca Green** or **Cassandra Lo**.