COMMENTARY

Preparing and Arguing in the US Supreme Court

BY MARK FROST AND RYAN LOCKMAN
Special to the Legal

In 2006, Jeffrey Heffernan—a detective in the Paterson, New Jersey, police department—was seen holding a mayoral campaign lawn sign while off duty and was immediately demoted on the government's mistaken belief that Heffernan was supporting the challenger against the incumbent mayor. Heffernan filed suit against the city of Paterson for violating his First Amendment rights. Ten years, one trial, three district judges, three summary judgment motions, two dismissals, and two appeals later, Heffernan and his lawyers found themselves in the U.S. Supreme Court, in *Heffernan v. City of Paterson*, No. 14-1280. On April 26, we won.

The issue before the court was unique: It is well-established that nonpolitical public employees cannot be retaliated against for supporting a political candidate. But what if a public employee is demoted because his supervisor mistakenly believes he supports a candidate? A circuit split emerged, with three circuits finding that the employee's claim was actionable, while the U.S. Court of Appeals for the Third Circuit did not. After the Third Circuit rejected our claims, we were joined by Stuart Banner, who ran the UCLA Law School Supreme Court Clinic. We then filed a petition for certiorari to the U.S. Supreme Court.

FROST

LOCKMAN

MARK FROST, *the founder and principal of Mark B. Frost & Associates, primarily concentrates his practice on First Amendment retaliation cases, where he represents police officers and other public employees. He has argued numerous cases in the Third Circuit, as well as* Heffernan v. City of Paterson, *which he argued before the U.S. Supreme Court and won in April.*

RYAN LOCKMAN *has served as an associate at the firm for the past five years. Lockman recently served as co-counsel for petitioner in* Heffernan *before the U.S. Supreme Court, where he contributed to the briefs and assisted in oral argument preparation, among other responsibilities.*

Roughly 2,000 cert petitions were considered in the 2015 "long conference," nicknamed for the fact that the court considers in one conference all of the petitions filed during its three-month summer break. Thus, roughly a quarter of the year's petitions are decided in one day. While the odds of having cert granted once the term starts are extremely low, the odds of being successful in the long conference are almost Powerball worthy: one former solicitor general once called it "where petitions go to die." Of the 2,000 cases considered, the court granted cert on only 13 of them. That is roughly a 0.6 percent chance of being accepted by the high court. But on Oct. 1, 2015, our cert petition was granted. We were going to the Supreme Court.

> *The tried-and-true way of preparing for Supreme Court oral argument is through moot courts.*

After a few days of celebrating, it hit us—we have work to do. The clock starts immediately upon having cert granted. Within 10 days, the petitioner must forward to respondent a draft joint appendix. Within two weeks, we were also having a conference call with the U.S. Solicitor General's Office. The solicitor general—on behalf of the United States—can choose to join a side in cases in which it is not a party. The office brings immense clout to the side it joins, and it also submits a brief and is provided time at oral argument. Having the solicitor general—who is unofficially considered to be "the 10th justice"—also does wonders for one's odds at the court; in the last term, the solicitor general participated in 41 cases as amicus curiae and won 71 percent of those cases. We ended up conferencing with members of the SG's office, including current acting solicitor general Ian Gershengorn. This call was our first real sense of the questions the justices might ask at oral argument. Ominously, we did not hear back from the SG's office after our call.

In October and November, organizations and law schools—including Georgetown University and the University of Virginia—reached out to us regarding potential amicus briefs, and we met with them about potential issues and arguments

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for them to explore. In mid-November, we submitted our opening brief. A week later, we received four amicus briefs in our favor, including—to our surprise—from the solicitor general.

In December, the city of Paterson responded. By early January, we filed our reply. We then prepared for oral argument. The tried-and-true way of preparing for Supreme Court oral argument is through moot courts, where a panel of experienced lawyers and professors—many of whom have themselves argued before the court—pepper you with questions for roughly an hour and thereafter critique your answers. The goal is to get beat up enough over multiple moots until you begin to anticipate the questions. Mark Frost, who would be the attorney arguing the case, argued at the moots. Ryan Lockman prepared potential questions and ideal answers from the moots for approximately 150 different questions that might be asked at oral argument. By the time all of the moots were completed, there were not many surprise questions. The trick—which proved to be easier said than done—is to state the answers immediately and succinctly. During this time, we also learned many of the unwritten rules of Supreme Court oral argument, like how to address each justice, how to respond if you are asked multiple questions at once, and when to ask for rebuttal time.

We also attended the moot court for Ginger Anders, assistant to the solicitor general, who would be arguing on behalf of the United States. Set in the bowels of the Justice Department, with intense levels of security (we needed an escort to go anywhere, including the restroom) this moot was one of the major highlights of our Supreme Court experience. We then discussed the case with panel members from the moot, who were attorneys in the SG's office and elsewhere in the Justice Department.

Finally, oral argument day came, Jan. 19. All of the justices (with the exception of typically silent Justice Clarence Thomas) were active in oral argument. Within seconds, questions were flying. We had anticipated that the "conservative" justices would be critical of our case based on their votes in prior cases involving political patronage, and their questions confirmed our suspicions. Justice Antonin Scalia—in what would end up being his penultimate oral argument day—was his typical self, asking pointed questions and joking simultaneously. Then, it was time for Ginger Anders to argue. She faced similar questioning. When the city's counsel argued, Justices Elena Kagan and Stephen G. Breyer grilled him with hypotheticals, and soon all four "liberal" justices joined. Justice Anthony M. Kennedy, like usual, seemed to be the swing vote. After argument, we were reasonably confident that we had four in our favor, three against us, and two—Chief Justice John G. Roberts and Kennedy—on the fence.

The justices informally vote on each case in highly secretive conferences that not even the justices' clerks attend. However, the results are not divulged until the opinion is formally released. The way the Supreme Court releases its opinions is unlike other federal courts. The Supreme Court does not have PACER. It also does not announce which cases are going to be decided ahead of time. Rather, certain days are designated as opinion announcement days, opinions are posted online as they are announced, and you'd better be on the Supreme Court website at 10 a.m. on those days, lest you miss it.

On April 26, at around 10:10, our case popped up on the site. The site did not say who won; you had to actually read the opinion to find that out, which is announced in real time once the justice reads a summary of his/her opinion live at the Supreme Court. But judging by the breakdown in justices, we knew immediately that we won, 6-2, with only Justices Thomas and Samuel Alito dissenting.

Breyer's opinion was succinct and persuasive. As stated in the opinion, First Amendment retaliation claims are predicated on the supervisor's motive, not the employee's intent. Thus, when an employer demotes an employee out of a desire to prevent the employee from engaging in protected activity, the First Amendment has been violated, even if the supervisor's assumptions were incorrect.

This ruling affects free speech and association claims and can be applied in a litany of different scenarios. There are 21 million public employees, and the vast majority of them occupy nonpolitical positions—they are teachers and firefighters, nurses and letter carriers, bus drivers and police officers. The court's decision profoundly shaped the environment in which they work. Employees can be free from worry that their conduct will be misinterpreted by their employers and result in political retaliation. Further, an adverse decision would have clearly discouraged other public employees from engaging in protected activity. As Justice Breyer stated, "The discharge of one tells the others that they engage in protected activity at their peril."

The decision also affects Third Circuit precedent. In *Ambrose v. Township of Robinson Pennsylvania*, 303 F.3d 488 (3d Cir. 2002), and *Fogarty v. Boles*, 121 F.3d 886 (3d Cir. 1997), the Third Circuit had ruled that First Amendment retaliation claims required actual protected activity, as intended by the employee. That is no longer good law. Now, the employee's conduct as perceived by the government determines whether a First Amendment retaliation claim is actionable.

Heffernan has now been remanded to the Third Circuit for a determination as to what occurs next. Our case has changed the law for millions of public employees and has helped define the meaning of the First Amendment. This case will have an impact on First Amendment jurisprudence, as well as potentially other areas like perceived race or religion discrimination claims. What more could any attorney ask for in his career? •

Intellectual Property

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then be validated in any country (such as the U.K.) that is a signatory to the EPC for the patent to be enforceable in that country. Applicants seeking this option need to make one additional choice: (a) taking the direct European route or (b) proceeding through the Euro-PCT route. In the direct European route, the patent application is filed with the EPO and the European Patent Convention governs the entire procedure—through the granting of the European patent. In the Euro-PCT route, two treaties are invoked—the European Patent Convention and the Patent Cooperation Treaty (PCT). The PCT allows a single international application (a PCT application) to be filed, and a search regarding the patentability of the claimed invention to be conducted by any "competent" patent office (that is a PCT signatory) throughout the world (a patent office may or may not be "competent"—depending upon the language of the patent application and its technology). After the search is conducted, the PCT application enters individual countries in order to decide whether to grant a patent. Thus, for example, a company that files a PCT application can request a patentability search through the U.S. Patent and Trademark Office (or any other competent patent office), continue the patent procurement process in the EPO, obtain a European patent, and validate the European patent in the U.K. The system is indeed complicated, but it has been honed by many years of experience, and in actuality it runs quite smoothly.

There is also an option to file a PCT application and then have the U.K. IPO decide whether to grant the patent without going through the EPO.

Brexit has no effect on European patents with U.K. validations (regardless of whether the direct European route or the Euro-PCT route is chosen) or U.K. patents obtained from a PCT application.

Moving on to trademarks, the effect of Brexit again varies depending upon the specific type of intellectual property involved. The biggest concern here is with regard to European Union trademark registrations. The European Union Intellectual Property Office (EUIPO) registers almost 120,000 trademarks every year, and a European Union trademark is valid in all 28 countries of the European Union (including the U.K.). Of concern is what will happen to the enforceability of a EU trademark in the U.K. once the U.K. leaves the EU. Most European IP attorneys believe that before this happens, some mechanism will be put into place to ensure that existing EU registrations still provide trademark protection in the U.K.

In the meantime, trademark protection in the U.K. can also be sought by filing a trademark registration application directly with the U.K.'s Intellectual Property Office (IPO). This is a good option for a trademark owner that desires registration in a limited number of countries. The direct filing of trademark registration

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