Exercise of Right Against Self-Incrimination During an Employment Investigation May Constitute Insubordination That Supports Discipline, Including Dismissal

Earlier this month, in Spielbauer v. County of Santa Clara, the California Supreme Court ruled that a public employer acted lawfully when it dismissed an employee for refusing to answer questions with possible criminal implications as part of an internal, noncriminal investigation of misconduct. The employer had told the employee that his refusal to answer questions related to his job performance would be deemed insubordination which could result in dismissal. In addition, the employer had advised the employee that his answers could not be used in a subsequent criminal proceeding. The Court held that the employee’s constitutional right against self-incrimination was not violated when he was dismissed for disobeying the employer’s directive to answer questions related to the investigation.

In Spielbauer, the County of Santa Clara conducted an internal investigation related to allegations that an employee, a deputy public defender, had made deceptive statements to a court. During an interview with a departmental investigator, the employee refused to answer questions by invoking his right against self-incrimination under the Fifth Amendment of the U.S. Constitution. The Fifth Amendment provides that, “[n]o person … shall be compelled in any criminal case to be a witness against himself ….” (Emphasis added.) The Court explained that when an employee answers potentially incriminating questions from his employer under the threat of discipline, the employee is being compelled to answer. This means the employee has an underlying right that his statements will not be used in a criminal prosecution. Thus, where some assurance is made that any statements will not be used in a criminal prosecution, an employee cannot legitimately assert a right against self-incrimination, i.e., a right to remain silent.

The Court noted the significant interest public employers have in investigating workplace misconduct and explained:

[A]bsent a contrary statute, a public employer, acting for noncriminal reasons, may demand answers from its own employee about the employee’s job conduct and may discipline the employee’s refusal to cooperate, without first involving the prosecuting authorities in a decision about granting formal immunity. …[O]n the other hand, the public employer must be able to act promptly and freely, in its administrative capacity, to investigate and remedy misconduct and breaches of trust by those serving on the public payroll. This strong interest outweighs the incidental effect on enforcement of criminal laws that may arise from the rule that statements thus compelled by the employer cannot be used in aid of a later criminal prosecution against the employee.

The employee in Spielbauer was specifically advised that he retained his constitutional right that compelled answers may not be used against him in a criminal prosecution. However, the Court did not
determine whether a public employer is required to provide appropriate advisements. This means that so long as a public employer does not require its employees to waive their constitutional rights, under certain circumstances, a public employer may direct that an employee cooperate in its investigation and discipline the employee for refusing to answer the employer’s job-related questions.

This decision should be of great assistance to public agency employers but involves the consideration of a number of factors. If you should have any questions regarding the impact of this case on your employment practices, including how to advise employees during an investigation of workplace misconduct, please contact any of our four offices.

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This F3 NewsFlash is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this case may apply to your specific facts and circumstances.

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