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Digest: Spielbauer v. County of Santa Clara

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Opinion by Baxter, J., expressing the unanimous view of the court.

Issue

Is a public employer required to offer formal immunity from the use of incriminating statements in response to an employee's invocation of his or her Fifth Amendment right against self-incrimination before it can dismiss the employee for refusing to answer questions in connection with its investigation?

Facts

In January 2003, a Santa Clara deputy public defender ("plaintiff") represented Michael Dignan on charges of ammunition possession by a felon.[1] Dignan was arrested with Troy Boyd, his roommate.[2] As part of the defense strategy, plaintiff sought to introduce Boyd's statement to the police that his parents owned the house where the ammunition was located. Boyd also stated that he was renting the home from his parents at the time of the arrest. Plaintiff hoped that this testimony would create reasonable doubt as to whether Dignan had control of the area in which the ammunition was found.[3] However, Boyd testified he had sublet portions of the home to other people in the past, including Dignan.[4] When the prosecutor moved to exclude Boyd's statement as hearsay, plaintiff noted that Boyd was unavailable at the time of trial and the statement would fall within a hearsay exception and thus could be admitted.[5]

At a hearing on the matter, plaintiff stated that a warrant was out for Boyd's arrest and "if the San Jose Police are not going to be able to find Mr. Boyd, I think that my investigator is going to be very hard put to find . . . " him as well.[6] After the hearing, a police sergeant was able to contact Mr. Boyd simply by going to

1 Spielbauer v. County of Santa Clara 199 P.3d 1125, 1141 (Cal. 2009).
2 *Id.* at 1128.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*

the house where the ammunition was found.[7] Boyd told the police officer that he had "recently spoken to 'a public defender investigator.'"[8] Plaintiff was confronted with Mr. Boyd's statement and he confessed to speaking with Boyd.[9] However, plaintiff maintained that any conversation he may have had with Boyd was "attorney work product"[10] and therefore he was under no obligation to disclose the content of the conversation.[11] The prosecutor argued that plaintiff had purposefully misled the court.[12] The court did not rule on potential ethical violations, and instead ruled that Boyd was in fact an available witness and would consider the objection to the admission of Boyd's statement.[13]

Some time later, the Chief Assistant Public Defender, David Mann, learned of plaintiff's potential misconduct and that the prosecutor in the Dignan case intended "to 'go after' [plaintiff] in some manner."[14] This meant one of three possibilities: file misdemeanor charges against plaintiff, report plaintiff to the State Bar, or let the Public Defender's office take care of the plaintiff's discipline.[15] Shortly after learning about the incident, Mann launched an internal investigation. On April 1, 2003 plaintiff and his attorney appeared for an interview on the matter; several department heads were also present, including Mann. During the course of the first interview, plaintiff refused to answer any questions.[16] Each time the following admonition was made to plaintiff: "you have a right to remain silent and not incriminate yourself. Your silence, however, may be deemed insubordination, leading to administrative discipline up to and including termination. *Any statement made during this interview cannot . . . be used against you in any subsequent criminal proceeding*."[17] In response to the admonition, plaintiff's attorney responded that such an admonition did not apply to public defenders and as such any protection from criminal prosecution must be administered via a formal court order.[18] At a subsequent interview on the same matter plaintiff again refused to answer certain questions and on June 9, 2003 plaintiff was discharged

7 *Id.* at 1128–29.
8 *Id.* at 1129.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

for: "(1) insubordination . . . (2) gross misconduct unbecoming a county officer, and (3) seeking, in violation of office rules governing attorney ethics, to mislead a court by artifice or false statement."[19] An administrative hearing upheld the charges and the related discipline.[20]

Plaintiff sought mandamus relief in the Superior Court, arguing that he was improperly dismissed for refusing to answer his employer's questions.[21] In addition, plaintiff argued that his refusal to answer certain questions was based on his right against self-incrimination.[22] Finally, plaintiff argued that his right against self-incrimination was properly invoked as his employer never obtained a formal grant of criminal use immunity.[23] The Superior Court disagreed and upheld the actions of the Public Defender's Office.[24] The court of appeal reversed, finding that "a public employee must receive a formal grant of criminal use immunity before being required, on pain of discipline, to answer potentially incriminating official questions about his or her job performance."[25] The California Supreme Court granted review.

Analysis

Both the Fifth Amendment of the United States Constitution and the California Constitution state that no person shall "'be compelled *in a criminal cause* to be a witness against themselves.'"[26] These provisions not only guarantee protection from self-incrimination from being forced to testify against oneself, but also protects a person from answering questions in any other proceeding "civil or criminal, formal or informal"[27] where the person reasonably believes the answers will be incriminating in a subsequent criminal case. Additionally, one cannot be forced to choose between their job and asserting the privilege.[28] Put another way, one cannot be put in a position where asserting the privilege will subject them to punishment.[29] The only exception is when the refusal to answer would frustrate "legitimate governmental objectives;" in such a situation the use

19 *Id.* at 1130.
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 1131 (citing U.S. CONST. amend. V. § 3; CAL. CONST. art. I, § 15).
27 *Id.* (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).
28 *Id.*
29 *Id.*

of immunity is proper in order to compel the individual to answer the otherwise potentially incriminating questions.[30]

This rule has been extended to a public employer's threat of punishment to an employee who refuses to answer potentially incriminating questions. Thus, it is a well-established rule that "incriminating answers coerced from a public employee under threat of dismissal *cannot be used against the employee in a criminal proceeding*."[31] However, this protection against self-incrimination does not extend to protect an individual from non-penal adverse use of incriminating statements.[32] Therefore, an employee who makes incriminating statements under threat of potential employment discipline may still be punished, and even terminated so long as the employee's right to self-incrimination in criminal proceedings is protected.[33] However, the employee cannot be punished simply for invoking his Constitutional right against self-incrimination, even with assurances that his answers will not be used in criminal proceedings against him.[34]

In this case, the plaintiff and the court of appeal used several California statutes[35] to come to the conclusion that:

> One subjected to coercive official questioning in a noncriminal setting is constitutionally privileged to refuse to answer unless personally immunized, and, if personal immunity is denied, or is unavailable from an authorized source, the person cannot be sanctioned for remaining silent, but if one does speak under official compulsion, without the protection of formal immunity, the Constitution nonetheless prohibits direct or derivative use of the statements in a criminal prosecution against the declarant.[36]

However, both California cases as well as the Supreme Court have held differently.[37] Those cases have held time and time again that a public employee may, under threat of employment sanctions, be compelled to answer potentially incriminating questions so long as they are still afforded the protection of the Fifth Amendment.

The Supreme Court, in *Garrity v. New Jersey*,[38] and its progeny,[39] has stated that a public employee cannot be

30 *Id.*
31 *Id.* (citing Garrity v. New Jersey, 385 U.S. 493, 496–97 (1967)).
32 *Id.* (citing Segretti v. State Bar, 15 Cal.3d 878, 886–87 (1973)).
33 *Id.*
34 *Id.*
35 *Id.* at 1133 (citing various California statutes).
36 *Id.* at 1132.
37 *Id.* at 1133–34.
38 385 U.S. 493, 496–97 (1967).
39 *See* Gardner v. Broderick 392 U.S. 273 (1968) (discussing a New York police officer that was asked to sign a waiver of his Fifth Amendment right and was told that failure to

terminated simply for invoking the protection of the Fifth Amendment. However the Court noted that if an employer coerces an employee to answer questions that are "specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal *without requiring relinquishment of the benefits of the constitutional privilege*"[40] the dismissal would not be the result of invoking the privilege.

The court therefore rejected the court of appeal's reasoning that authorized criminal use immunity was necessary before a public employee could be coerced into answering potentially incriminating statements.[41] Thus, within the instant matter, no state or federal constitutional provision, nor any case law allowed plaintiff to refuse to answer potentially incriminating statements until or unless he received criminal use immunity.[42]

Holding

Neither the California Constitution, nor the Federal Constitution provide that immunity must granted against criminal use before a public employee is forced to answer potentially incriminating questions.[43] Additionally, a public employer may terminate an employee for failure to answer questions if the employee's Fifth Amendment right against self-incrimination in a criminal prosecution is maintained.[44]

Legal Significance

As a result of this decision, the California Supreme Court reaffirmed the notion that public employees may be forced to answer questions so long as the employee is not required on pain of job termination to forfeit his right against self-incrimination in a subsequent criminal proceeding.

do so would lead to his termination); Spevack v. Klein 385 U.S. 511 (1967) (holding that an attorney cannot be disbarred solely for refusing to answer questions at a disciplinary hearing on the basis of his Fifth Amendment right); Sanitation Men v. Sanitation Comm'r. 392 U.S 280 (1968) (discussing employees that were told they would be terminated if they invoked their right against self-incrimination in order to avoid testifying before the commissioner).

40 *Spielbauer*, 199 P.3d at 1134 (citing *Sanitation Men*).

41 *Id.* at 1141.

42 *Id.*

43 *Id.*

44 *Id.*