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Coszalter v. City of Salem: Just Whistle While You Work - Expanding First Amendment Protection for the Whistleblowing Employee

David Uchida

COSZALTER V. CITY OF SALEM:[1] JUST WHISTLE WHILE YOU WORK—EXPANDING FIRST AMENDMENT PROTECTION FOR THE WHISTLEBLOWING EMPLOYEE

I. INTRODUCTION

On February 18, 2003, in *Coszalter v. City of Salem*,[2] the Court of Appeals for the Ninth Circuit held that "[i]n a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech."[3] The court also held that "when adverse employment actions are taken between three and eight months after the plaintiffs' protected speech, a reasonable jury could infer that retaliation is a substantial or motivating factor."[4] In so holding, the court expanded the First Amendment protections afforded to the whistleblowing employee through a relaxation of previous case standards in First Amendment retaliation claims.

This Comment first provides a factual background of *Coszalter* and the holding of the district court. Second, it summarizes the Ninth Circuit's decision. Third, this Comment analyzes the Ninth Circuit's decision and acknowledges that the standard the Ninth Circuit applied in evaluating a plaintiff's First Amendment retaliation claim, though less stringent than previous standards, is the proper standard. Finally, this Comment concludes that the Ninth Circuit's decision helps to promote the current trend of growing acceptance for the whistleblower cause.

1. 320 F.3d 968 (9th Cir. 2003).
2. *Id.*
3. *Id.* at 970.
4. *Id.*

II. FACTS AND HISTORY OF *COSZALTER V. CITY OF SALEM*

A. Plaintiffs' Claim

Plaintiff Guido Coszalter is a current employee of the City of Salem Public Works Department.[5] Plaintiffs Steve Johnson and Gary Jones are former employees of the same employer.[6] The City of Salem Public Works Department employed all three as members of the "main line crew."[7] Around July 8, 1996, Coszalter called the news media and reported to them a residential neighborhood's sewage discharge problem on the surface of a city street.[8] After completing the necessary repairs on the street, defendants[9] "punitively reassigned Jones and Coszalter to new duties . . . ."[10] After these reassignments, Johnson further complained to the State of Oregon Occupational Safety and Health Administration (OR-OSHA) about unsafe working conditions and violations of safety codes.[11] Coszalter also made complaints to the Risk Manager of the City of Salem.[12] Defendants then initiated a disciplinary investigation of Coszalter, alleging that he was responsible for the safety violations.[13]

After the disciplinary investigation, plaintiffs reported other safety violations. From August 1996 until around December 1997, plaintiffs and defendants continued this cycle of reporting and reprimanding.[14] As a result, on December 10, 1997 defendants subjected plaintiffs Coszalter and Jones to a criminal investigation.[15] Subsequently, in March 1998, defendants reduced Coszalter's pay by two steps after alleging he disrupted a safety training class.[16] On May 5, 1998, the City of Salem terminated Coszalter's employment,

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5. *Id.*
6. *Id.* The facts in this case are disputed, and the following summary of facts are according to plaintiffs' evidence. *See id.*
7. *Id.*
8. *Id.*
9. Plaintiffs sued the City of Salem as a municipality as well as various supervisors in their individual capacities who worked for the City of Salem at the Public Works Department. *Id.*
10. *Id.* at 971.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 972.

alleging that he had misused a cellular phone.[17] On that same day, Johnson suffered a physical injury that prevented him from working.[18] On May 11, 1998, Jones resigned from his employment.[19]

Although Coszalter was reinstated in June 1999—less than a year later—the City of Salem commenced another disciplinary action against him regarding an incident in which he was not involved.[20] Plaintiffs thereafter sued defendants, alleging that defendants violated their First Amendment rights by retaliating against them for publicly disclosing the health and safety hazards.[21]

B. Defendants' Motion for Summary Judgment

Plaintiffs filed suit in the United States District Court for the District of Oregon. Defendants filed a motion for summary judgment. The magistrate judge, relying on *Nunez v. City of Los Angeles*,[22] granted summary judgment in favor of defendants. The magistrate judge held that as to most of defendants' acts, "plaintiffs had not shown the loss of a valuable benefit or privilege and therefore had not shown an adverse employment action."[23] In addition, the magistrate judge held that defendants' actions that were "adverse" were not taken in retaliation to plaintiffs' protected speech.[24]

1. The district court found that plaintiffs' speech regarded matters of public concern

Initially the district court analyzed plaintiffs' claim against defendants using the Supreme Court's test set forth in *Board of*

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 970.
22. 147 F.3d 867 (9th Cir. 1998).
23. *Coszalter*, 320 F.3d at 972.
24. *Id.* at 973. The magistrate judge held that the reprimand against Jones, the reduction of Coszalter's pay, and the termination of Coszalter's employment were adverse employment actions. However, because eight months time elapsed between plaintiffs' speech and these adverse actions, the magistrate judge found that no direct evidence existed which showed that the actions were taken in response to plaintiffs' protected speech. *Id.*

County Commissioners v. Umbehr.[25] In that case the Supreme Court held:

> [I]n order to state a claim against a government employer for a [First Amendment violation] . . . an employee must show (1) that he or she engaged in protected speech; (2) that the employer took "adverse employment action"; and (3) that his or her speech was a "substantial or motivating factor" for the adverse employment action.[26]

As a threshold matter, the district court determined that plaintiffs' speech was protected under the First Amendment. In *Pickering v. Board of Education*,[27] the Supreme Court held that an employee's speech is protected under the First Amendment if it addresses "a matter of legitimate public concern."[28] In *Allen v. Scribner*,[29] the Ninth Circuit held that "the determination of whether an employee's speech deals with such an issue of public concern is to be made with reference to 'the content, form, and context' of the speech."[30] Thus, "[s]peech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'"[31]

Based on the *Allen* standard, the magistrate judge concluded that all but one of plaintiffs' assertions of protected speech regarded matters of public concern.[32] Thus, the magistrate judge found plaintiffs' protected speech included Coszalter's contacting the news media to disclose the existence of an ongoing sewage discharge and Johnson's complaints of unsafe working conditions to the OR-OSHA.[33] The magistrate judge did not find Jones's reporting to management that his backhoe had been vandalized to be a matter of

25. 518 U.S. 668 (1996).

26. *Coszalter*, 320 F.3d at 973 (quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996)).

27. 391 U.S. 563 (1968).

28. *Id.* at 571.

29. 812 F.2d 426 (9th Cir. 1987).

30. *Id.* at 430 (quoting Connick v. Meyers, 461 U.S. 138, 147–48 (1983)).

31. *Coszalter*, 320 F.3d at 973 (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)).

32. *Id.* at 974.

33. For a complete list of plaintiffs' protected speech, see *id.*

public concern, "reasoning that this disclosure was of no relevance to the public's evaluation of the performance of the government."[34]

2. The district court concluded that most of defendants' actions were not adverse employment actions

Analyzing the second element of plaintiffs' First Amendment retaliation claim, the magistrate judge concluded that most of defendants' actions did not constitute adverse employment actions.[35] The magistrate judge based this decision on the court's previous opinion in *Nunez v. City of Los Angeles*.[36] In *Nunez*, the court stated, "Although 'the type of sanction . . . need not be particularly great in order to find that rights have been violated,' the plaintiff must nonetheless demonstrate the loss of 'a valuable governmental benefit or privilege.'"[37] Consequently, the magistrate judge concluded that "if an alleged retaliatory act [could] not be characterized as the loss of a valuable governmental benefit or privilege, it [could] never constitute an adverse employment action in a First Amendment retaliation case."[38]

In the instant case, the district court concluded that most of defendants' acts, including threats of disciplinary action, unwarranted disciplinary investigations, and unpleasant work assignments did not constitute adverse employment actions because plaintiffs did not demonstrate any loss of a valuable governmental benefit or privilege.[39]

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34. *Id.*

35. *Id.*

36. 147 F.3d 867 (9th Cir. 1998).

37. *Id.* at 875 (quoting Hyland v. Wonder, 972 F.2d 1129, 1135–36 (9th Cir. 1992)).

38. *Coszalter*, 320 F.3d at 974.

39. *Id.* at 972–73. For a complete list of all the incidents that the district court concluded were not adverse employment actions, see *id.* The magistrate judge concluded that three of defendants' acts were adverse employment actions, but nevertheless granted summary judgment because plaintiffs failed to satisfy the third element in their First Amendment retaliation claim. *See infra* Part II.B.3.

3. The district court concluded that plaintiffs' protected speech did not substantially motivate defendants' adverse employment actions

To successfully plead a First Amendment retaliation claim, the final element that a plaintiff must show is that the plaintiff's protected speech was a "substantial or motivating factor" for the adverse employment actions.[40] In *Coszalter*, the magistrate judge found that three of defendants' employment acts were adverse: the reprimand of Jones, the reduction of Coszalter's pay, and the termination of Coszalter's employment.[41] However, the judge granted summary judgment on the ground that plaintiffs' speech was not a "substantial or motivating factor for these acts."[42] Because the magistrate judge granted summary judgment based on these three adverse employment actions, the judge did not consider whether the other alleged retaliatory acts were a result of plaintiffs' protected speech.[43]

In addition to holding that plaintiffs' protected speech was not a substantial or motivating factor for defendants' adverse employment acts, the magistrate judge considered the elapsed time between plaintiffs' speech and defendants' actions.[44] In this case, "[t]he elapsed times between the protected speech and the adverse actions were eight months, three months, and five months, respectively."[45] The magistrate judge concluded that no relation existed between defendants' actions and plaintiffs' protected speech because these elapsed time periods "were too long, without regard to other circumstances, to support an inference of retaliation."[46]

III. NINTH CIRCUIT ANALYSIS AND DECISION

The district court granted defendants' motion for summary judgment and plaintiffs subsequently appealed to the Ninth Circuit.[47] While agreeing with the district court's analysis of the first element

40. *Coszalter*, 320 F.3d at 973.
41. *Id.*
42. *Id.* at 977.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 973.

in the three-part test for a First Amendment retaliation claim, the court disagreed with the district court's analysis of the final two elements.[48] Thus, as to the first element, which considers whether plaintiffs engaged in protected speech, the court agreed with all of the district court's findings with respect to the classification of plaintiffs' speech as indeed protected.[49]

Next, the court analyzed whether defendants took adverse employment actions against plaintiffs. Whereas the district court analyzed this element based on whether plaintiffs suffered the "loss of a valuable governmental benefit or privilege,"[50] the court used the standard set forth in *Ray v. Henderson*.[51] The court first explained the government employer's nature and noted that a government employer "'cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'"[52] Moreover, "[w]hen a government employee exercises his protected right of free expression, the government cannot use the employment relationship as a means to retaliate for that expression."[53] Finally, the court emphasized the irrelevancy of the district court's requirement of a "loss of a valuable governmental benefit or privilege" in determining whether an employment action was adverse.[54]

In analyzing this second element, the court also clarified the district court's usage of the "loss of valuable benefit or privilege" test set forth in *Nunez*.[55] Acknowledging that *Nunez* suggested that a plaintiff "must . . . demonstrate the loss 'of a valuable governmental

48. *See id.* at 974.
49. *Id.*
50. *Id.* at 972.
51. 217 F.3d 1234 (9th Cir. 2000).
52. *Coszalter*, 320 F.3d at 974 (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)).
53. *Id.*
54. *See id.* at 975. The court cited Allen v. Scribner, 812 F.2d 426, 428 (9th Cir. 1987); Thomas v. Carpenter, 881 F.2d 828, 829 (9th Cir. 1989); Ulrich v. City and County of San Francisco, 308 F.3d 968, 977 (9th Cir. 2002); and Anderson v. Cent. Point Sch. Dist., 746 F.2d 505, 506 (9th Cir. 1984) as examples of where the court found the question of whether an act of retaliation was in the form of the removal of a benefit or the imposition of a burden to be irrelevant. *Id.*
55. *See id.*

benefit or privilege,'"[56] the court explained that in light of its other cases, it could not "read this language as establishing an exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment."[57] Thus, the court concluded that the "essential holding of *Nunez* is simply that when an employer's response includes only minor acts, such as 'bad-mouthing,' that cannot reasonably be expected to deter protected speech, such acts do not violate an employee's First Amendment rights."[58]

Based on its reading of *Nunez*, the court concluded that the proper standard for this second element was the "reasonably likely to deter" standard. The court cited two recent cases as instructive on the matter: *Ray v. Henderson*[59] and *Moore v. California Institute of Technology Jet Propulsion Laboratory*.[60] In those cases, Title VII and the False Claims and Major Fraud Acts protected each employee's speech, respectively.[61] Although *Coszalter* encompassed protected speech under the First Amendment, the court stated that the "reasonably likely to deter" standard as set forth in *Ray* and *Moore* was indeed applicable to this case.[62] Clarifying that it was not adopting a new standard, the court specified that its "reasonably likely to deter" standard was "a more specific articulation of the standard set forth in previous First Amendment retaliation cases."[63]

Therefore, the court held that the magistrate judge erred when he found that defendants' acts, including transferring plaintiffs to new job duties, performing unwarranted disciplinary investigations, and

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56. *Id.* (quoting Hyland v. Wonder, 972 F.2d 1129, 1136 (9th Cir. 1992)).

57. *Id.* The court further explained that if this were not the case, the government would be allowed to take severe retaliatory action, such as instigating unwarranted criminal investigations or disciplinary actions, as long as those actions did not result in the loss of a valuable governmental benefit or privilege. *See id.* at 975–76.

58. *Id.* at 976.

59. 217 F.3d 1234 (9th Cir. 2000).

60. 275 F.3d 838 (9th Cir. 2002).

61. *See Ray*, 217 F.3d at 1244–46; *Moore*, 275 F.3d at 848.

62. *See Coszalter*, 320 F.3d at 976.

63. *Id.* In other words, the "reasonably likely to deter" test is comparable to the standard from previous First Amendment cases where the Court's goal was to prevent, or redress, actions by the government employer that chilled the exercise of protected First Amendment rights. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 73 (1990).

reprimanding based on false accusations, were not adverse employment actions.[64] The court held that defendants' actions were adverse employment actions because all of defendants' acts, when taken together, "amounted to a severe and sustained campaign of employer retaliation that was 'reasonably likely to deter' plaintiffs from engaging in speech protected under the First Amendment."[65]

Finally, the court analyzed the last element in plaintiffs' First Amendment retaliation claim, specifically addressing whether plaintiffs' speech was a "substantial or motivating factor" for defendants' adverse employment actions.[66] The district court found, and the Ninth Circuit agreed, that three of defendants' acts—including the reprimand against Jones, the reduction of Coszalter's pay, and the termination of Coszalter's employment were adverse employment actions.[67] However, unlike the district court's conclusion that the elapsed time between the protected speech and the adverse employment actions was too long to support an inference of retaliation, the court concluded that enough evidence existed to support an inference of retaliation.[68]

In *Keyser v. Sacramento City Unified School District*,[69] the court listed three ways in which a plaintiff could show that retaliation was a substantial or motivating factor behind a defendant's adverse employment action:

> First, a plaintiff can introduce evidence regarding the "proximity in time between the protected action and the allegedly retaliatory employment decision," from which a "jury logically could infer [that the plaintiff] was terminated in retaliation for his speech." Second, a plaintiff can introduce evidence that "his employer expressed opposition to his speech, either to him or to others." Third, the plaintiff can introduce evidence that "his employer's

64. *Coszalter*, 320 F.3d at 976 (listing all the employment actions the court believed could have been adverse under the "reasonably likely to deter" test).
65. *Id.* at 977.
66. *Id.*
67. *Id.* at 973.
68. *Id.*
69. 265 F.3d 741 (9th Cir. 2001).

proffered explanations for the adverse employment action were false and pretextual."[70]

In this case, the elapsed time periods between the protected speech and the three adverse employment actions were eight months, three months, and five months, respectively.[71] Although in *Allen v. Iranon*[72] the court held that "an eleven-month gap in time is within the range that has been found to support an inference that an employment decision was retaliatory,"[73] here the court cautioned that such "a specified time period cannot be a mechanically applied criterion."[74] Moreover, the court noted that a "rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic."[75]

The district court stopped short of completely addressing this third element because it determined that the elapsed time period was too long to raise an inference of retaliation.[76] However, because the Ninth Circuit did not limit itself to a rigid time period as the district court did, it held that the issue of whether plaintiffs' protected speech was a "substantial or motivating factor" behind defendants' adverse actions would have to be remanded back to the lower courts.[77]

IV. ANALYSIS OF THE COURT'S DECISION

The Ninth Circuit's decision was a major victory for employees who were unable to report their employer's improper activities for fear of retaliation.[78] Because society values the whistleblowers' role

70. *Id.* at 751–52 (quoting Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988) (alteration in original)).

71. *Coszalter*, 320 F.3d at 977.

72. 283 F.3d 1070 (9th Cir. 2002).

73. *Id.* at 1078.

74. *Coszalter*, 320 F.3d at 977.

75. *Id.* at 977–78.

76. *Id.* at 978.

77. *See id.* at 978–79. The court also discussed how plaintiffs provided additional evidence to show that defendants' employment actions were pretextual, and that retaliation was indeed a motivation behind defendants' actions. *See id.* at 978. Finally, the court rejected defendants' qualified immunity claim, pending the outcome of the issues remanded to the lower court. *See id.* at 979.

78. The remainder of the article will refer to those employees who do speak out against their employer as "whistleblowers."

in revealing their employer's improper activities, the court correctly held that in a First Amendment retaliation case, an "adverse employment action" is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech.[79]

The concept of a whistleblowing employee is neither a new idea nor an anomaly of the courts and society. For example, Time magazine recently named as "Persons of the Year for 2002" three whistleblowers: Cynthia Cooper of Worldcom, Coleen Rowley of the FBI, and Sherron Watkins of Enron.[80] Moreover, courts have noted that "[d]issenters and whistleblowers rarely win popularity contests or Dale Carnegie awards. They are frequently irritating and unsettling. These qualities, however, do not necessarily make their views wrong or unhelpful . . . ."[81]

Society has grown increasingly more receptive to the whistleblower's cause not only because of the whistleblower's connection to society's values but also because of the important issues whistleblowers address. For example, although agencies both stress that "[l]oyalty to team and group has always been valued in the American culture,"[82] and claim that whistleblowers are disloyal to the agency, media coverage and congressional attention more often "present the same whistleblowers as heroes."[83] Furthermore, whistleblowers typically reveal health and safety issues that are important to people. Whistleblowing is "'more likely to occur when there is increasing public concern for environmental, health, and safety problems' and when there is concern for the government's effectiveness in monitoring hazards and maintaining safety hazards."[84] Thus, because society values whistleblowers' roles in keeping their respective employers in check, whistleblowers should have their speech protected to the fullest extent under the First Amendment's wings.

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79. *See Coszalter*, 320 F.3d at 970.

80. Monique C. Lillard, *Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(C) of the OSHAct and the Public Policy Tort*, 6 EMPLOYEE RTS. & EMP. POL'Y J. 329, 333 n.14 (2002).

81. *Id.* at 330 (quoting Greenberg v. Kmetko, 840 F.2d 467, 477 (7th Cir. 1988) (Cudahy, J., dissenting)).

82. ROBERTA ANN JOHNSON, WHISTLEBLOWING: WHEN IT WORKS—AND WHY 14 (2003).

83. *Id.* at 16.

84. *Id.* at 16–17 (citations omitted).

A. The Court Correctly Held Plaintiffs' Speech was a Matter of Public Concern

In recognizing the plaintiffs' speech as a matter of public concern, and thus as protected speech, the court correctly interpreted what speech should be protected under the First Amendment. It is important to note that the Supreme Court has already recognized the value of speech that criticizes officials' wrongdoings. Thus, in *New York Times v. Sullivan*,[85] the Court's decision focused on the premise of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[86] Moreover, the Ninth Circuit has held that speech should only be "characterized as *not* [a matter] of 'public concern' when it is clear . . . that the information would be of no relevance to the public's evaluation of the performance of governmental agencies."[87]

Here, even if plaintiffs' reports to the news media about OSHA safety violations or sewage discharges near schoolyards appeared unpleasant, the Ninth Circuit, in agreeing with the district court, properly reasoned that these disclosures were indeed relevant to the public's evaluation of the government's performance and actions.[88]

B. The Court Correctly Held Defendants' Actions were Adverse Employment Actions

The court correctly held that defendants' actions were adverse employment actions. In making its determination, the court correctly emphasized the fact that a government employer cannot abuse its position and interfere with the constitutional right to exercise freedom of expression guaranteed to employees under the First Amendment.[89] Moreover, without rejecting the holding in *Nunez*, the court properly limited *Nunez's* holding by requiring an employee

85. 376 U.S. 254 (1964).

86. *Id.* at 270; *see also* Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency"*, 23 OHIO N.U. L. REV. 17, 63 (1996) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

87. Voigt v. Savell, 70 F.3d 1552, 1560 (9th Cir. 1995) (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)).

88. *See* Coszalter, 320 F.3d at 974.

89. *See id.*

to show the "loss of a valuable governmental benefit or privilege" in order to show an adverse employment action.[90] Rather, the court held that it would not interpret *Nunez* as "establishing an exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment."[91] To expand its protection of employees, the court chose to adopt a more relaxed standard favoring employees' attempts to show adverse employment actions. Specifically, in adopting the "reasonably likely to deter" standard set forth in two recent cases, the court allowed employees greater ease and flexibility in proving their cases.[92]

The court correctly determined that its holdings in *Ray v. Henderson*[93] and *Moore v. California Institute of Technology Jet Propulsion Laboratory*[94] controlled. In *Ray*, the main issue was whether plaintiff's employer's actions constituted an adverse employment action against plaintiff's complaints of perceived unfairness towards women employees at the United States Postal Service.[95] The *Ray* court adopted the language of the Equal Employment Opportunity Commission guidelines and held that the "reasonably likely to deter" standard was the applicable standard to determine whether an adverse employment action existed.[96] Similarly, the *Moore* court adopted that same standard in a case involving retaliation claims against an employee who spoke out about fraud at the California Institute of Technology Jet Propulsion Lab.[97] Although *Moore* involved retaliation claims brought under the federal False Claims Act and the Major Fraud Act, the court adopted the standard set forth in *Ray*, a Title VII retaliation claim.[98]

In the instant case, the court consistently adopted the standard applied in *Ray* and *Moore*. Just as those two decisions involved speech deserving of heightened protection, the speech here—categorically protected under the First Amendment—rightfully deserves as much protection as possible.

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90. *See id.* at 975–76.
91. *Id.* at 975.
92. *See id.* at 976.
93. 217 F.3d 1234 (9th Cir. 2000).
94. 275 F.3d 838 (9th Cir. 2002).
95. *See Coszalter*, 320 F.3d at 976.
96. *See Ray*, 217 F.3d at 1242–43.
97. *See Moore*, 275 F.3d at 841, 847–48.
98. *See id.*

The "reasonably likely to deter" standard achieves this goal and gives employees needed protection when speaking out against their employers. Without such leeway or increased protection of their speech, whistleblowers will once again crawl back into hiding, deterred from speaking out against their employers. By allowing courts to determine that an employer's action is adverse simply if that action is "reasonably likely to deter" an employee from engaging in protected activity, the court demonstrated its commitment to ensuring protection for employee whistleblowers.

C. The Court Correctly Held that Plaintiffs' Protected Speech was a Substantial or Motivating Factor for Defendants' Adverse Employment Actions

The court correctly determined that it could infer retaliation despite the elapsed time periods between plaintiffs' speech and defendants' adverse employment actions. This was unlike the district court's determination that retaliation played no factor in defendants' actions. The court properly rejected any per se rule that a certain period of elapsed time between a plaintiff's protected speech and the adverse employment action would automatically invalidate a plaintiff's First Amendment retaliation claim.[99]

Specifically, the court's proffered reason for rejecting any per se rule articulated precisely the rationale of its decision. The court stated that "[r]etaliation often follows quickly upon the act that offended the retaliator, but this is not always so."[100] Because whistleblowers are indeed placed in a precarious position with their decision to speak out against their employer, an employer may "wait until the victim is especially vulnerable or until an especially hurtful action becomes possible."[101] Most importantly, the court stressed that, a per se rule specifying a time period as too long to support an inference of retaliation would enable the employer to "wait until they [thought] the lapse of time [would disguise] their true motivation."[102] For example, an employer could simply not reveal his intentions and

99. *See supra* notes 60–75 and accompanying text.
100. *Coszalter*, 320 F.3d at 978.
101. *Id.*
102. *Id.*

also not provide demonstrably false or pretextual reasons for his acts, and thus escape freely from any allegations of retaliation.[103]

The court solidified its protections afforded to whistleblowers in rejecting any per se rule. This rejection enables a court to consider an act as retaliatory in light of the *totality* of the circumstances, even in a case such as *Coszalter*, where the alleged retaliatory act took place eight months after a plaintiff's protected speech occurred.[104] Providing no set time period beyond which employer's acts cannot support an inference of retaliation and forcing future courts to consider the factual setting and totality of the circumstances means that employers can no longer hide their adverse acts behind any protective time wall. Following the tone set throughout the rest of its decision, the court gives the employee the benefit of the doubt and warns the employer to watch out and understand that its actions will not be tolerated, especially if found retaliatory.[105]

V. IMPACT OF THE NINTH CIRCUIT DECISION

The Ninth Circuit's decision in *Coszalter* properly solidified the court's commitment to protecting First Amendment expression. In his concurrence to the decision, Judge Ferguson aptly described the main outcome of *Coszalter*—that of protecting the state employee from acts of retaliation.[106] Specifically, Judge Ferguson quoted *Rutan v. Republican Party of Illinois*[107] where the U.S. Supreme Court stated, "[T]he First Amendment . . . protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'"[108] *Coszalter* provides reassurances to whistleblowers that their speech is not trivial and is strongly protected under the First Amendment from retaliation.

Whistleblowers will always face two differing motivations in deciding whether or not to report their employer's violation. On the

103. *See id.*
104. *Id.* at 978.
105. *See id.* at 978–79.
106. *Id.* at 979.
107. 497 U.S. 62 (1990).
108. *Id.* at 76–77 n.8 (1990) (quoting the lower court opinion at 868 F.2d 943, 954 n.4 (7th Cir. 1989)).

one hand, "[p]opular culture often adulates the whistleblower."[109] On the other hand, "[m]any employees are afraid of reprisal for whistleblowing, and their fears lead to silence."[110] Nevertheless, the public appears to be forming a more positive view towards whistleblowers because of the increase in and positive spin of media coverage; newspapers and magazines often feature whistleblowers as public interest heroes.[111] Such media coverage, combined with the court's holding providing for greater protection for the whistleblower's First Amendment speech, may make even the most wary of whistleblowers feel more inclined to report their employer's improper activities.

The Ninth Circuit's decision will surely face its critics. Even before *Coszalter*, critics voiced their opinions against laws that expanded the support of whistleblowers. For example, some critics suggested that whistleblowers' "motives range from putrid to pure. While some are impelled by an acute sense of justice or public concern, others are like ants longing to be grasshoppers."[112] Despite these critics who are against the trend towards greater whistleblower protection, the Ninth Circuit nonetheless provides the necessary balance between what is and is not to be considered an employer's First Amendment violation. Though not attempting to scare employers from denying allegations of workplace violations, the Ninth Circuit does provide gentle guidance and warning that it will not tolerate employers who improperly prevent their employees from rightfully speaking out.

VI. CONCLUSION

"Often the very act of whistleblowing indicates that governmental regulation has been inadequate to protect the public; it represents a breakdown of systems whose very goal is to make sure that misconduct does not occur in the first place."[113]

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109. Lillard, *supra* note 80, at 333.

110. *Id.* at 331–32.

111. *See* JOHNSON, *supra* note 82, at 21.

112. *Id.* at 94 (quoting DAVID W. EWING, FREEDOM INSIDE THE ORGANIZATION 88 (1977)).

113. Lillard, *supra* note 80, at 333 (quoting Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 729 (Tex. 1990)).

In a dynamic society where breakdowns of systems are inevitable, the whistleblowing employee provides the public some assurance that the government is functioning properly, especially in the areas of safety and health. In this case, plaintiffs Coszalter, Jones, and Johnson were punished for speaking out against their employers regarding safety and health violations. However, the Ninth Circuit protected these plaintiffs from their employer's adverse employment actions. In so doing, the Ninth Circuit has provided the necessary protections to future employees who are faced with similar circumstances as the plaintiffs faced in this case.

This decision solidifies the concept that when an employer attempts to retaliate against a whistleblowing employee for speaking up about workplace violations, the First Amendment will rightfully protect the outspoken employee. By adopting a set of standards that allow whistleblowers more leeway in proving their First Amendment cases against their employers, the court provides needed protection to employees who fear retaliation from employers who decide to violate workplace rules.

David Uchida[*]

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