SMU | Dedman School of Law

SMU Law Review

Volume 60 | Issue 1 Article 10

January 2007

First Amendment - Elements of Retaliation: The Fifth Circuit Rules That Independent Contractors Do Not Need a Pre-Existing Commercial Relationship with a Government Entity in Order to Bring a Claim of Retaliation

Vincent P. Circelli

FIRST AMENDMENT—ELEMENTS OF RETALIATION: THE FIFTH CIRCUIT RULES THAT INDEPENDENT CONTRACTORS DO NOT NEED A PRE-EXISTING COMMERCIAL RELATIONSHIP WITH A GOVERNMENT ENTITY IN ORDER TO BRING A CLAIM OF RETALIATION

*Vincent P. Circelli**

IN *Oscar Renda Contracting, Inc. v. City of Lubbock*,[1] a divided panel of the Fifth Circuit ruled that private contractors do not need a "pre-existing commercial relationship" with a government entity in order to state a claim for retaliation under the First Amendment.[2] The Fifth Circuit took an ill-advised step in granting contractors the same rights to bring retaliation claims as individual employees. In *Board of County Commissioners v. Umbehr*, the Supreme Court specifically reserved the question of whether First Amendment retaliation claims by independent contractors require a pre-existing commercial relationship with a government entity.[3] While the *Renda* case may seem to be a harmless extension of *Umbehr*, the decision actually unleashes a host of procedural and constitutional problems. The Fifth Circuit's decision rests on an illogical analogy between contracting corporations and individual employees, imposes federal oversight in an area traditionally and effectively controlled by state law, and creates a needless circuit split by expanding rights outside the text of the First Amendment.[4]

The plaintiff in this case, Oscar Renda Contracting, Inc. ("Renda Contracting"), is a Texas construction company that specializes in public works projects.[5] The defendant is the City of Lubbock, Texas ("the City"). The City sought bids for a construction project on its city-wide storm drainage system.[6] Renda Contracting submitted the lowest bid,

* J.D. Candidate, 2008, SMU Dedman School of Law.

1. 463 F.3d 378 (5th Cir. 2006).
2. *Id.* at 386.
3. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 685 (1996).
4. *Renda*, 463 F.3d at 386-87 (DeMoss, J., dissenting).
5. *Id.* at 380.
6. *Id.* at 380-81.

beating the second lowest bidder, Utility Contractors of America ("UCA"), by $2.2 million.[7] Texas law requires that municipalities award public works contracts to the "lowest responsible bidder."[8] Despite the state law, Lubbock city officials recommended that the construction contract go to UCA.[9]

Upon learning of the City's plans to award the contract to UCA, Oscar Renda ("Mr. Renda"), the company's founder, requested a meeting with City officials to discuss the award.[10] At the meeting, City officials expressed their concern that Renda Contracting was "lawsuit happy" because of a previous suit by Renda Contracting against the El Paso Water District ("the El Paso suit").[11] Mr. Renda explained the nature of the El Paso suit, and left the meeting believing that he had assuaged the concerns of the City officials.[12] The City officials relented and agreed to recommend Renda Contracting for the award, so long as Mr. Renda would execute an affidavit affirming his knowledge of the contract specifications.[13] Mr. Renda signed the affidavit the same day that the Lubbock City Council awarded the contract.[14] The City Council, however, surprised Mr. Renda by awarding the contract to UCA, citing its reservations about Renda Contracting's business practices.[15] Mr. Renda, however, claimed that the City's real motivation for rejecting his bid was the earlier El Paso suit.[16]

Renda Contracting filed suit against the City in federal court, seeking damages for its claim that the City retaliated against it for exercising its First Amendment rights.[17] The City moved to dismiss the case for failure to state essential elements of retaliation, and the district court granted the motion because "(1) Renda did not allege that the speech involved a matter of public concern *to the relevant city* . . . and (2) Renda did not have a pre-existing commercial relationship with the City."[18]

Renda Contracting appealed, and the Fifth Circuit reversed after reviewing the matter *de novo*.[19] Relying on analogies to the Supreme Court's reasoning in *Umbehr*, the Fifth Circuit held that a pre-existing relationship was not an essential element of the retaliation claim, and that Renda Contracting adequately pled that its protected speech was a matter of public concern.[20] The Fifth Circuit also relied on the dissent from

---

7. *Id.* at 381.
8. Tex. Loc. Gov't. Ann. § 252.043(d)(1) (Vernon Supp. 2005).
9. *Renda*, 463 F.3d at 381.
10. *Id.*
11. *See* El Paso County Lower Valley Water Dist. v. Oscar Renda Contracting, Inc., No. 08-01-00473-CV, 2004 WL 1637990 (Tex. App.—El Paso, Jul 22, 2004, no pet.).
12. *Renda*, 463 F.3d at 381.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* (the City's motion to dismiss was made pursuant FED. R. CIV. P. 12(b)(6)).
19. *Id.*
20. *Id.* at 383, 386.

McClintock v. Eichelberger,[21] a Third Circuit case in which the majority refused to apply *Umbehr* to independent contractors with no pre-existing commercial relationships.[22] The *Renda* majority agreed with the *McClintock* dissent that "all independent contractors fall within the standard set forth in *Umbehr*."[23]

The *Renda* court acknowledged that the "principal issue in this case is whether the First Amendment protects a contractor whose bid has been rejected by a city in retaliation for the contractor's exercise of freedom of speech where the contractor had no pre-existing relationship with that city."[24] The court answered this question in the affirmative, reasoning that independent contractors and individual employees should have nearly identical rights in bringing First Amendment retaliation claims.[25] The court stated that refusing to accept the bid of an independent contractor based on its previous exercise of free speech was tantamount to not hiring a government employee for the same reason, which the Supreme Court deemed unconstitutional in *Rutan v. Republican Party of Illinois*.[26]

The holding in *Renda* originates from a string of highly contested Supreme Court decisions that greatly broadened the right to bring claims for retaliation. The first case in the line was *Elrod v. Burns*, which held that the firing of government employees based on their political affiliation violated the employees' First Amendment rights.[27] The next case, *Rutan*, held that a government employer violated the First Amendment when he based "promotion, transfer, recall, and hiring decisions" of potential employees on their political beliefs.[28] The Supreme Court first extended certain First Amendment rights given to employees to independent contractors in *Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*.[29] Both *Umbehr* and *O'Hare* involved independent contractors that had pre-existing business relationships with a government entity. In *Umbehr*, a trash hauler sued Wabaunsee County for terminating his trash removal contract because of the hauler's criticism of the county board of commissioners.[30] The *Umbehr* court found that the termination of the contract violated the First Amendment.[31] In *O'Hare*, a tow-truck company sued the City of Northlake for removing the tow-truck company's name from a rotation list of available towing services in retaliation for the company's support of the mayor's rival.[32] The Court held that this

21. 169 F.3d 812 (3d Cir. 1999).
22. *See id.* at 816-17.
23. *Renda*, 463 F.3d at 385.
24. *Id.* at 380.
25. *See id.* at 385.
26. *Id.* at 383, 385; *see* Rutan v. Republican Party of Ill., 497 U.S. 62, 72, 74, 110 (1990).
27. Elrod v. Burns, 427 U.S. 347, 373 (1976).
28. *Rutan*, 497 U.S. at 65.
29. 518 U.S. 712 (1996).
30. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 670-72 (1996).
31. *Id.* at 686.
32. *See O'Hare*, 518 U.S. at 715-16.

amounted to an unconstitutional denial of a contract.[33] While the Court extended some First Amendment rights enjoyed by individual employees to independent contractors, the Court was careful to limit its decisions strictly to contractors with a "pre-existing commercial relationship with the government."[34]

The crux of the *Renda* majority's argument is that independent contractors should be treated the same as individual government employees in the context of retaliation claims. The *Renda* court claimed to draw this inference from *Umbehr*, *Rutan*, and the dissent in *McClintock*. The court began its analysis by asserting that "in a governmental employment context . . . no prior relationship is required before an employee is permitted to assert a claim for First Amendment retaliation."[35] The court then listed the essential elements for an *employee's* retaliation claim as the following: "(1) the employee must suffer an adverse employment decision; (2) the employee's speech must involve a *matter of public concern*; (3) the employee's interest in commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency; and (4) the employee's speech must have motivated the employer's adverse action."[36] The majority justified using the employee standard by claiming that the *Umbehr* decision was an outright rejection of the notion that independent contractors should be treated any differently than employees.[37] The *Renda* court acknowledged that the Supreme Court carefully limited its holding in *Umbehr* to contractors with pre-existing commercial relationships, but quipped that this issue was merely "reserved for another day."[38] The *Renda* court then discussed the *McClintock* dissent, which argued that there did not seem to be any indication in the *Umbehr* decision that the Court would not some day allow claims by contractors with no pre-existing commercial relationship.[39] Finally, the *Renda* court argued that Justice Scalia's vehement dissent in *Umbehr* demonstrated there was "no hope" that the Supreme Court would bar retaliation suits by independent contractors with no pre-existing commercial relationship "in the next case."[40]

Circuit Judge DeMoss dissented from the *Renda* majority on two grounds: (1) the majority made a needless expansion into an area already too far expanded upon; and (2) the majority's decision would lead to judicial inefficiency.[41] Judge DeMoss sided with Justice Scalia's dissents in *Umbehr* and *Rutan* in questioning the logic of such broad rights to bring

33. *Id.* at 717.
34. *Umbehr*, 518 U.S. at 685.
35. Oscar Renda Contracting, Inc. v. City of Lubbock, 463 F.3d 378, 383 (5th Cir. 2006).
36. *Id.* at 382 (citing Kinney v. Weaver, 367 F.3d 337, 356 (5th Cir. 2004)).
37. *See id.* at 384.
38. *Id.*
39. *Id.* at 385 (relying on McClintock v. Eichelberger, 169 F.3d 812, 820 (3d Cir. 1999) (Roth, J., dissenting)).
40. *Id.*; *see Umbehr*, 518 U.S. 668, 709 (Scalia, J., dissenting).
41. *See Renda*, 463 F.3d at 386 (DeMoss, J., dissenting).

retaliation claims.[42] The *Renda* dissent viewed the majority's interpretation of the First Amendment as an even greater expansion of an already tenuous precedent, and did not want "to expand the free speech right of corporations in this context where even the Supreme Court has yet to do so."[43] The dissent next argued that the panel should have upheld the dismissal because doing so would have allowed the real controversy to be resolved in state court, and thus, "would better serve the interest of federalism in providing the best forum for the resolution of the real controversy."[44]

The *Renda* majority took the final plunge down the slippery slope of overly-broad claiming rights and impinged on federalism in the process. As the *Renda* dissent argued, the majority should have been more reticent to expand constitutional rights given the questionable precedent and the viable state court alternatives to resolve the dispute. The *Renda* court rushed to extend *Umbehr* without first considering the potential negative consequences. The majority's decision creates a circuit split and muddies the already complicated waters of government contracting. The Fifth Circuit should have followed the Third Circuit's lead in *McClintock*, where that circuit dismissed a retaliation claim by a marketing firm without a pre-existing relationship with the defendant.[45] The Third Circuit distinguished the *McClintock* facts from those of *Umbehr* and *O'Hare*, and noted its hesitation to expand constitutional rights into an area that the Supreme Court specifically refused to enter.[46] The *Renda* court took the opposite approach and strangely tried to use *Umbehr*'s limitation to support its own decision. The majority cited the sardonic *Umbehr* dissent to argue that the expansion of retaliation claims to contractors with no pre-existing relationships was a forgone conclusion.[47] In the cited dissent, Justice Scalia predicted that the *Umbehr* majority's attempt to limit its holding would not prevent the creation of a slippery slope, and that some later court would ignore the express limitation and allow claims by contractors with no pre-existing relationship.[48] The *Renda* court indeed embraced this slippery slope and hurled itself down headlong with its decision.

The heart of the *Renda* decision is based on the faulty premise that there is no "legally relevant distinction" between independent contractors and individual employees.[49] This position is simply wrong. Corpora-

42. *See id.* at 386-87.

43. *Id.* at 387.

44. *Id.* Judge DeMoss states the real controversy is based on Tex. Loc. Gov't. Ann. § 252.043(d)(1) (Vernon Supp. 2005), which requires that municipalities award public works contracts to the "lowest responsible bidder." *Id.*

45. McClintock v. Eichelberger, 169 F.3d 812, 817 (3d Cir. 1999).

46. *Id.* at 817.

47. *See Renda*, 463 F.3d at 385-86

48. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 709 (1996) (Scalia, J., dissenting).

49. *See Renda*, 463 F.3d at 384 (quoting Thomas Dagger, *Political Patronage in Public Contracting*, 51 U. CHI. L. REV. 518, 520 (1984)).

tions like Renda Contracting have substantially different rights, interests, and standing than individual employees. For instance,

> Renda (i) is not eligible to vote . . . (ii) is not eligible to . . . hold any public office; (iii) is not eligible to be a member of any political party; (iv) is not eligible in Texas to make any contribution to any political candidate . . . (v) cannot be an employee of any governmental entity; and (vi) is not counted as a "person" in any census.[50]

Additionally, government employees are always individuals, to whom the "termination or denial of a public job is the termination or denial of a livelihood."[51] A public contractor, however, is usually a corporation that is not dependant on any single potential government contract, which it has no guarantee of attaining.[52] As the *Renda* dissent pointed out, the decision transforms the First Amendment's text from the words, "Congress shall make no law . . . abridging the freedom of speech" into the unrecognizable command that "[a] city council . . . shall not deny the award of any contract [to a corporation]. . . on the grounds that such corporation has previously filed suit against another government entity."[53] Because the *Renda* decision relies on an illogical comparison between an individual employee and a corporation, the panel should have decided to "dig in [its] cleats" and stop the descent down the slippery slope rather than read into the text of the First Amendment what it clearly does not say.[54]

The *Renda* decision also impinges on federalism by creating needless federal oversight in an area already effectively controlled by Texas law. The Fifth Circuit should have followed the Third Circuit's reluctance to create new constitutional rights when doing so causes the judiciary to "intrude itself into such traditional practices as contract awards."[55] The Third Circuit also pointed out that if expansion had to be made, it should only be done by the Supreme Court.[56] There is no need to extend such a claiming right, as "all [fifty] states have enacted legislation imposing competitive bidding requirements on . . . contracts with the government."[57] The breadth of state law in the area assures more predictable protection of contractor rights than the "blunt instrument" of constitutional oversight.[58] The situation in *Renda*, in particular, is not one that the Fifth Circuit should have felt compelled to impose federal oversight upon, as Texas has a statute that would have resolved the "real controversy" of the

50. *Id.* at 387.
51. *Umbehr*, 518 U.S. at 696 (Scalia, J., dissenting).
52. *Id.*
53. *Renda*, 463 F.3d at 386.
54. *Umbehr*, 518 U.S. at 696 (Scalia, J., dissenting).
55. McClintock v. Eichelberger, 169 F.3d 812, 817 (3d Cir. 1999) (quoting Horn v. Kean, 796 F.2d 668, 678 (3d Cir. 1986), overruled on other grounds by *Umbehr*, 518 U.S. 668).
56. *Id.*
57. *Umbehr*, 518 U.S. at 692 (Scalia, J., dissenting).
58. *Id.* at 694.

case.[59] By eliminating state sovereignty over this issue, *Renda* has damaged the already weakened bedrock of federalism.[60]

Finally, the Renda majority's holding will unleash a flood of new litigation by disappointed contractors against local government entities, which in turn will lead to economic waste both for governmental entities forced to defend lawsuits, and for federal courts forced to wade through the merits of each well-pled retaliation claim. The *Umbehr* dissent pointed out that the amount of government contracts worth litigating far outnumbers the amount of similar employee cases.[61] That dissent, however, was speaking only of suits initiated by contractors *with* pre-existing business relationships, while the *Renda* court opens the gates to a vastly greater number of potential litigants. Courts will be forced to assume every disgruntled contractor's pleading is true, despite having no pre-existing relationship to a government entity, and grant it a free pass through the dismissal stage. This decision puts an unnecessary encumbrance on the already complicated area of government contracting, not to mention the added caseload it will thrust upon the overburdened federal courts.

In conclusion, the Fifth Circuit erred in its decision not to require a pre-existing commercial relationship as an essential element for retaliation claims by independent contractors. The *Renda* decision relied on an illogical analogy between independent contractors and individual employees. The *Renda* court's reliance on *Umbehr* is also misplaced, as the Supreme Court specifically asserted that its decision did not apply to independent contractors with no pre-existing commercial relationships. Rather than being a simple extension of First Amendment protection, the panel's decision invites judicial uncertainty by creating a federal circuit split. The decision also impinges on federalism, and will lead to a flood of lawsuits. The Fifth Circuit sitting *en banc* should overturn this panel decision in the name of common sense and judicial efficiency. The circuit split created by the case may well lead the Supreme Court to grant certiorari to *Renda* or a like case. If such a case does reach the Court, it should seize the opportunity to halt the excessive expansion of retaliation claims, and perhaps overturn the questionable ruling in *Umbehr*.

59. *Renda*, 463 F.3d at 387 (DeMoss, J., dissenting).
60. *See id.*
61. *Umbehr*, 518 U.S. at 697 (Scalia, J., dissenting).