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## JUSTICE WATCH

### Internal comments not protected by 1st Amendment

A federal appellate court has held that a former Miami Dade College vice president's complaints about possible ethical issues concerning president Eduardo Padron were not protected free speech because they were made internally and not publicly.

If Adis M. Vila had made the comments to the news media or the public, they would have been protected under the First Amendment, the court said.

The unanimous April 20 ruling by an 11th U.S. Circuit Court of Appeals panel in *Adis M. Vila v. Eduardo J. Padron* relied heavily on a controversial U.S. Supreme Court ruling. The Supreme Court ruled in a 5-4 decision last June that the First Amendment does not prohibit managers in government agencies from disciplining employees for internal critical comments made pursuant to their official duties.

**Stephen F. Rosenthal**, a partner with Podhurst Orseck in Miami, who represented Padron on appeal, applauded the 11th Circuit and Supreme Court decisions.

"Where an employee just complains about something within the workplace as part of her job, the Supreme Court said that such job-related speech doesn't enjoy constitutional protection," Rosenthal said. "The result is that public-sector CEOs like President Padron are not hamstrung in managing their

personnel effectively for the best interests of the institution."

Rosenthal acknowledged, however, that the rulings "as a practical matter probably did restrict the scope of 'free speech' protections for public employees somewhat."

**Edna Caruso** of Miami, the appellate attorney for Adis M. Vila, the college vice president whose contract was not renewed in 2003, declined comment. It's unclear whether Vila will ask for reconsideration by the full 11th Circuit or appeal to the U.S. Supreme Court.

But **Randall Marshall**, legal director for the American Civil Liberties Union of Florida, said the rulings create "a major loophole for the First Amendment. In our view, the courts have taken away significant protection for governmental employees."

Marshall contended the rulings will force employees with knowledge of wrongdoing in the workplace to take their concerns to the news media or to elected officials, rather than first raising the issue with their bosses. The rulings suggest that public employees engaging in such public speech would be protected from workplace retaliation under the First Amendment.

#### Freedom Tower deal concerns

In 2004, Vila, a lawyer who



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formerly served as the Miami Dade College vice president of external affairs, sued Padron in U.S. District Court in Miami under 42 U.S.C. It was a civil action for deprivation of rights, on 1st and 14th Amendment grounds. She also brought a state whistle-blower claim.

She claimed her employment contract was not renewed in 2003 because she internally raised various ethics questions. The college denied this was the reason she was let go.

Vila was in charge of grants, governmental affairs, legal affairs and cultural affairs. She testified during the 2005 trial before **Judge Cecilia**

**Altonaga** that she had raised concerns internally about several issues.

These issues included a no-bid advertising contract for the college foundation; a request to use college funds to illustrate a book written by the daughter of a college trustee; and several issues concerning the college's purchase of the historic Freedom Tower in downtown Miami.

On the Freedom Tower issue, Vila objected to the college's hiring of Rene V. Murai to help negotiate the deal. Vila claimed Murai had a conflict of interest and the work could have been handled internally. She also

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voiced concerns about the propriety of a proposed payment to the college that was tied to the purchase price, suggesting that it was a kickback.

In addition, she raised questions internally about Padron's plan to transfer \$9.5 million from the Community Endowment Fund to the college's privately funded Foundation Fund to purchase the Freedom Tower. She claimed Padron wanted to do this so he could represent that the funds were "private money" and eligible for matching funds.

The college ultimately acquired the Freedom Tower through a gift by developer Pedro Martin.

Vila voiced her concerns internally and also to **Al Cardenas**, a prominent Miami lobbyist-lawyer and former Miami Dade College trustee.

Of Vila's issues, one of Padron's lawyers, **Paul Hancock** of Miami, said, "These are the kinds of issues public bodies deal with all the time, these are the kinds of debates that occur at high levels of government." He added that none of Vila's allegations involved anything illegal and that none were the reasons her contract was not renewed in 2003. After she left the college, Vila began speaking out to the media.

The issue of whether Murai should be obtained or an in-house lawyer should be used is an issue businesses routinely face, Hancock said. Padron's proposal to transfer funds from the Community Endowment Fund to purchase the Freedom Tower was perfectly legal, he said. And Vila's allegation that a trustee wanted to use college funds to illustrate his daughter's poetry book was not true, he added.

Vila was represented at trial by Fort Lauderdale attorney **Donna Ballman**. Padron was represented by Hancock, then with Hogan & Hartson and now with Kilpatrick & Lockhart Preston Gates Ellis in Miami, and **Robert Josefsberg** with Podhurst Orseck in Miami.

Judge Altonaga granted Padron's motion for summary judgment, ruling that he was entitled to qualified immunity as a government official on her claim for money damages. Then, at the close of Vila's evidence and before Padron could put his case on, Altonaga entered judgment as a matter of law against Vila on a directed verdict. This

was on the issue of whether Vila should be reinstated in her job.

### No protection

Altonaga found that because Vila's speech was made as an employee of the college and not as a citizen addressing matters of public concern, it was not protected by the First Amendment. She also found that even if there was a "cognizable First Amendment interest ... it is outweighed by the interest of Miami Dade College as a governmental entity and employer in the efficiency of public services."

Vila appealed to the 11th Circuit on five issues.

Before oral arguments before the 11th Circuit in Vila's case, the U.S. Supreme Court provided some guidance with its decision in *Garcetti v. Ceballos*.

That case originally was brought by **Richard Ceballos**, a deputy district attorney in Los Angeles, who in 2000 was notified by a defense attorney of inaccuracies in an affidavit used to obtain a search warrant.

Ceballos, thinking he was doing his job by stopping a wrongful prosecution, wrote a memo to his supervisors expressing his concern and recommending dismissal of the case. His recommendation was ignored and the office of District Attorney **Gil Garcetti** proceeded with the case.

Alleging that he was subject to retaliatory employment actions, Ceballos filed a federal suit, claiming violations of his 1st and 14th Amendment rights under 42 U.S.C. 1983.

The trial court ruled that since Ceballos wrote his memo pursuant to his employment duties, the memo was not entitled to First Amendment protection. And even if Ceballos' speech was constitutionally protected, his employer had qualified immunity because the rights Ceballos asserted were not clearly established.

The 9th U.S. Circuit Court of Appeals overturned that decision, holding that because Ceballos' memo had pointed out governmental misconduct — something that is "inherently a matter of public concern" — it enjoyed protection under the First Amendment.

In an opinion written by **Justice Anthony M. Kennedy**, the Supreme Court reversed the 9th Circuit. The majority said public employees making internal statements pursuant to their official duties are not speaking as citizens for First Amendment purposes, even if they are alleging government wrongdoing, and the U.S. Constitution does not insulate their comments from employer discipline.

The high court also said that federal and state whistle-blower protections are a better way to protect employee speech made on the job.

First Amendment lawyers and government watchdog groups decried the Supreme Court ruling.

Rosenthal said that until the *Garcetti* ruling, federal courts "were all over the map" over the question of whether free speech on the job fell under the protection of the First Amendment, Rosenthal said. "There was a lot of disharmony on the issue," he said.

### Parallels with California case

The 11th Circuit's ruling in the Vila case last week mirrored *Garcetti*. Its opinion, written by **Judge Susan H. Black** and joined by **Judges Stanley Marcus** and **Phyllis A. Kravitch**, stated that "the threshold question is whether Vila spoke as a citizen on a matter of public concern."

The panel held that she did not, and therefore "Vila's claim for retaliation fails."

Vila's case was a tough one from the start. Even if the court had ruled that Vila's on-the-job speech was protected by the First Amendment, she then would have had to prove that she was fired in retaliation for that speech. That would have been difficult, Rosenthal said.

**Thomas R. Julin**, a First Amendment attorney and partner at Hunton & Williams in Miami, called the *Garcetti* and *Vila* decisions "bad rulings" that set back First Amendment protections for people trying to hold government officials accountable.

"It's really ironic," he said. "Those things that Adis was talking about were very important matters. She was trying to call attention to serious problems at the college." ■