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Constitutional Safeguard on Speech - Dismissal of Public Employee - Balancing Approach

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Constitutional Safeguard on Speech—Dismissal of Public Employee—Balancing Approach—The United States Supreme Court has held that in order for a county constable to terminate an employee for making a political remark on a matter of public concern, it must be shown that the constable's interest in terminating the employee outweighs the employee's first amendment rights.


Ardith McPherson was hired as a deputy in the office of the constable of Harris County, Texas, on January 12, 1981. Her duties were purely clerical in nature, and in the performance of her duties, McPherson never met the public. Her appointment as deputy included a 90-day probationary period, during which time the following incident took place.

On March 30, 1981, McPherson heard of the assassination attempt on President Ronald Reagan on an office radio during the lunch hour. She and a co-worker, her boyfriend, thereafter had a brief, private discussion regarding the President's welfare and unemployment policies, with McPherson ending the conversation with the statement: "I hope if they go for him (President Reagan) again, they get him." This remark was overheard by another deputy in the office, who in turn reported McPherson to Constable Walter Rankin. The constable summoned McPherson and ques-
tioned her regarding her remark; their meeting resulted in her termination.9

On June 5, 1981, Ardith McPherson brought an action in the United States District Court for the Southern District of Texas under 42 U.S.C. § 1983,10 alleging that Rankin's dismissal of her from her position had violated her constitutional rights under the first and fourteenth amendments.11 Pursuant to F.R. Civ. P. 56(a), McPherson moved for a summary judgment12 and Rankin responded by requesting a dismissal.13 The district court held an evidentiary hearing on February 14, 1983, to determine whether McPherson's speech was protected by the first amendment in this instance.14 The district court granted summary judgment in favor of Constable Rankin.15 In its conclusions of law, the district court set forth a three-step analysis which it used to determine whether a public employee's speech is protected.16 The only question in issue was whether her statement was protected, and the court placed

amendment, "it is important to consider the context in which it is made, relevant considerations including the 'manner, time, and place in which it is delivered', and the intention of the speaker." Id. at 178 (emphasis added).

    Every person who, under color of any statute, ordinance, [etc.] . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress. Id.

11. 107 S. Ct. at 2895.
12. 736 F.2d at 177.
13. Id. Rankin claimed that McPherson had failed to state a claim upon which relief could be granted under F.R. Civ. P. 12(b)(6).
14. 736 F.2d at 177. At the evidentiary hearing, McPherson testified regarding her intent in making the statement, claiming that she was only verbally expressing her anger with President Reagan's social and economic policies. Id. at 178. McPherson offered an analogy:
   [It] is just like if I ask my sister to pick me up somewhere and she's late and I say, 'Where is she'. . . 'Wait till she get[s] here, I'm going to kill her.' That don't mean I'm going to kill her with a gun or knife or weapon. It is an expression of conversation. Id.

15. Id. at 177.
16. McPherson v. Rankin, No. H-81-1442 (S.D. Tex. Apr.15, 1983) (order granting summary judgment). This test asks three questions: (1) Is the communication protected?; (2) If so, did it play a substantial part in the decision to fire the plaintiff?; (3) If so, would the employer have fired the employee even if the protected communication had not occurred? See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274,286, (1977). The Court used this test here. 736 F.2d at 179.
the burden of establishing this protection on the plaintiff. Upon balancing the plaintiff's right as a citizen to comment on a matter of public concern against the constable's interest in the execution of his public duties, the court found Rankin's interest to be superior.

McPherson appealed and on July 12, 1984, the Fifth Circuit Court of Appeals, on finding "the existence of substantial issues of material fact," vacated the district court's summary judgment and remanded the case for a full trial on the merits. On remand, the district court entered judgment for Constable Rankin and the county, again holding that McPherson's statement was not protected speech.

Deputy McPherson appealed again to the Fifth Circuit Court of Appeals. This time, the court reversed and remanded "for determination of an appropriate remedy." The attorneys for the county and Constable Rankin petitioned for a writ of certiorari to the United States Supreme Court, which was granted on October 20, 1986.

The United States Supreme Court, in a 5-4 decision, affirmed the circuit court's judgment in favor of Deputy McPherson. In writing for the majority, Justice Marshall held that the deputy's first amendment rights were paramount. In reaching this conclusion, Justice Marshall reasoned that "[g]iven the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment."

Justice Marshall utilized the "balancing of interests" test set

18. Rankin, 107 S. Ct. at 2896.
19. Id.
20. 736 F.2d at 180.
21. Id.
22. McPherson v. Rankin, 786 F.2d 1233, 1235 (5th Cir. 1986).
23. Id.
24. Id. at 1239. The circuit court reasoned that "[h]owever ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office." Id.
27. Id. at 2894. Justice Marshall was joined by Justices Brennan, Blackmun, Powell, and Stevens herein. Id.
28. Id.
29. Id.
forth in *Pickering v. Board of Education* in holding that McPherson's first amendment rights were violated by her discharge. He emphasized that such a balancing is necessary, albeit crucial, to the protection of an employee as a citizen under the first amendment. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."

Justice Marshall also relied on the case of *Connick v. Myers* for its proposition that a statement by a public employee must be considered in its context by the Court to fully protect the employee’s interest. In *Connick*, the Court concluded that there is a constitutional obligation on the Court and its members to examine the statements in question to determine whether they rise to the level of protected speech under the first amendment.

In a concurring opinion, Justice Powell joined the opinion of the Court, but remarked that it was unusual for this case to have reached the Supreme Court of the United States. Justice Powell emphasized that McPherson’s comment was made with no intention that it be heard by anyone but her co-worker, and therefore, he felt that the elaborate *Pickering* and *Connick* analyses were unnecessary.

Justice Scalia, joined by Chief Justice Rehnquist and Justices

30. 391 U.S. 563 (1969). In *Pickering*, the Court addressed the issue of whether a public employer had properly discharged an employee for exercising his freedom of speech. The Court held that such a determination requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*


33. *Id.* at 150. The Court concluded that there is a constitutional obligation on the Court and its members "to examine for [them]selves the statements in issue and the circumstances under which they [were] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Id.*, n.10 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

34. *Id.* at 2900-01. Justice Powell wondered how this case had been considered "five separate times by three different federal courts." *Id.* He acknowledged that although McPherson had made an ill-considered comment during a private conversation, that speech was undoubtedly protected, and that the Constable’s employment decision, on the basis of her comment, was "intemperate." *Id.*

35. *Id.* at 2901. The *Connick* analysis requires that the comment be considered in its context. See infra notes 96-100 and accompanying text. Here, Justice Powell suggests that the strictly private nature of the deputy's remark should have resolved the contextual issue without further balancing analysis. *Id.* at 2897, n.7.
White and O'Connor, filed the dissenting opinion. The dissent shared the reasoning of Constable Rankin’s counsel. They re-stated the district judge’s finding that McPherson’s statement was not “mere political hyperbole . . . [it was] . . . in context . . . vio-

lent words.”

The first amendment to the United States Constitution provides that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace-

ably to assemble, and to petition the Government for a redress of grievances.” Over the course of its history, the first amendment has served as the guardian of the right of the people to speak freely. In New York Times v. Sullivan, the United States Supreme Court stated that:

[Wo]e must interpret the language Congress chose [in wording this amend-

ment] against the background 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.

The outcome of the Rankin case reflects the changes the courts have made in their approach to first amendment issues involving freedom of speech.

In the Rankin case, Deputy McPherson’s statement was alleged to be criminal in itself by a 1917 federal statute that makes it a felony for any person to “knowingly and willfully” make a threat against the life of the President of the United States. In Watts v.

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36. Id. at 2901.
37. Id. at 2901-02. “No law enforcement agency is required by the First Amendment to permit one of its employees to ‘ride with the cops and cheer for the robbers.’ ” Brief for Appellant at 94, Rankin v. McPherson, 786 F.2d 1233 (5th Cir. 1986).
38. 107 S. Ct. at 2903, citing McPherson v. Rankin, 786 F.2d 1233, 1235 (5th Cir. 1986).
41. Id. at
42. Rankin v. McPherson, 107 S. Ct. at 2903. Justice Scalia wrote the dissenting opin-

ion, joined by Chief Justice Rehnquist and Justices White and O’Connor. Id. at 2901.
43. Id. 18 U.S.C. § 871(a)(1917) provides that:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id.
In the *Watts* case, the defendant had been drafted for duty in Vietnam, and while at a public rally at the Washington Monument, he said: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. [President Johnson]." The Court looked closely at this statement to see if there was any apparent determination on defendant's part to carry the threat into execution, reasoning that the government must prove a true threat if any conviction is to stand. In concluding that Watts' speech was mere "political hyperbole," the Court explained that "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise. . . . [The] only offense here was a kind of very crude offensive method of stating a political opposition to the President."

The Court's reading of section 871(a) in *Watts* differs considerably from the rationale applied by the courts in two of the first cases that arose under the statute. In *United States v. Stickrath,* the court upheld an indictment under section 871(a) against a defendant who had stated that "President Wilson ought to be killed. It is a wonder someone has not done it already. If I had an oppor-

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45. Id. at 707.
46. Id. In his concurring opinion, Justice Douglas noted that 18 U.S.C. § 871 "was passed in a 'relatively calm peacetime spring,' but has been construed under circumstances when intolerance for free speech was much greater than it normally might be." Id. at 711. See, Note, Threatening the President: Protected Dissenter or Potential Assassin, 57 Geo. L.J. 553 (1969). The author notes that although Congress has made threats against the President's life a crime, "there is a danger. . .that the urgently felt need to protect the life of the President will obscure the equally urgent need for free public debate in times of crisis." Id. There must be a "clear and present danger." Id. at 562.
47. 394 U.S. at 706.
48. Id. at 708.
49. Id. Counsel for the petitioner, in his motion for an acquittal, offered to explain his client's statement as a "kind of very crude offensive method of stating a political opposition to the President. What he was saying, he says, I don't want to shoot black people because I don't consider them my enemy, and if they put the rifle in my hand, as symbolized by the President, who are my real enemy." Id. at 707.
50. Id. at 708.
tunity, I would do it myself.” Reacting strongly to Stickrath’s remark, the court likened his speech to treason, and denounced his statement “as a crime against the people as the sovereign power.” The *Stickrath* court read section 871(a) in a very objective and broad manner, deciding that the word “ought”, as uttered by the defendant, denoted an “obligation of duty,” and concluded that “[i]t is not the execution of such threat, or a continuing intent to execute it, that constitutes the offense, . . . but the making of it knowingly and willfully.”

The objective standard employed in *Stickrath* was also employed in *Ragansky v. United States* decided one year later. In the *Ragansky* case, the court affirmed the defendant’s section 871(a) conviction on the basis of his statement:

we ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks. . . . I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it.

Ragansky’s defense, that it was merely a joke, was soundly rejected on the grounds that one who “voluntarily uses language known by him to be in form of such a threat, and who thus, to some extent endangers the President’s life,” is guilty of the offense as charged.

52. *Id.* at 152.
53. *Id.* at 153. The court reasoned that the President is the chosen representative of the people and that a threat against his life stimulates opposition to national policies, however wise, even in the most critical times, incites the hostile and evil-minded to take the President’s life, adds to the expense of his safeguarding, is an affront to all loyal and right-thinking persons, inflames their minds, provokes resentment, disorder, and violence, and is akin to treason.

54. *Id.*
55. *Id.* at 154. The court determined that to do something “knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it . . . If it [the threat] be thus made, the subsequent abandonment of the bad intent . . . does not obliterat[e] the crime.” *Id.* The opinion further noted that there is a greater probability that “once set in motion the evil consequences resulting to the public from its [the threatening statement’s] promulgation . . . are vastly greater than the probabilities that the threat will be carried out.” *Id.*

56. *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918).
57. *Id.* at 644.
58. *Id.* at 645. The court reasoned that:
[a] threat is knowingly [and willfully] made, if the maker of it comprehends the meaning of the words uttered by him . . . [and] in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.

*Id.*
The court's use of the objective standard employed in Stickrath and Ragansky was criticized by Justice Marshall in his concurring opinion in Rogers v. United States.\textsuperscript{59} The defendant in Rogers, an unemployed alcoholic, entered a coffee shop at a Holiday Inn and announced that he was going to Washington, D.C. to "whip Nixon's ass" or to "kill him [Nixon] in order to save the United States."\textsuperscript{60} Rogers was arrested by the Secret Service and convicted of violating section 871(a).\textsuperscript{61} Both the district and the circuit courts used an objective construction of the statute, as was done in the Watts case.\textsuperscript{62} In applying this objective analysis, the courts held that no intent to kill was needed for a section 871(a) conviction;\textsuperscript{63} rather, all that is needed is a mere showing that "a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act."\textsuperscript{64}

On certiorari in Rogers, the conviction was dismissed due to a technical flaw in the jury verdict.\textsuperscript{65} In his concurrence, Justice Marshall urged upon the Court a narrower reading of the statute.\textsuperscript{66} Citing the House debates of 1917 regarding the passage of section 871(a), Justice Marshall discussed Congressmen Volstead and Webb and their insistence that the word "willfully" be left in the text of the statute.\textsuperscript{67} Justice Marshall attacked the oft-employed so-called "objective" interpretation of section 871(a) by stating that:

In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements

\textsuperscript{60} Id. at 41-42.
\textsuperscript{61} Id.
\textsuperscript{63} Rogers, 422 U.S. at 43.
\textsuperscript{64} Id. at 43-44.
\textsuperscript{65} Id. at 44. The court's overly broad construction of section 871 was reflected in the district court's jury charge. Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 45-46. The two Congressmen were vehemently opposed to the suggestion that the word "willfully" be stricken from the statute. 53 CONG. REC. 9378 (1916). Mr. Volstead urged that "if this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful." Id. (emphasis added). There is nothing in the language outside of that word to convey the idea that a threat must be an intentional threat against the President. Id. The word "willful" conveys, as ordinarily used, the idea of wrongful as well as intentional. Id. That idea ought to be preserved so as not to make innocent acts punishable." Id. at 9379. Congressman Webb added that, "I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive . . . ." Id. at 9378.
on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes . . . We should be particularly wary of adopting such a standard for a statute that regulates pure speech.68

Justice Marshall concluded that “§ 871 . . . require[s] proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out. The proof of intention would, of course, almost certainly turn on the circumstances under which the statement was made.”69

In light of these cases, and the historic position of the Court, it is evident why the district court in Rankin concluded that Deputy McPherson's statement did not amount to a threat against the life of President Reagan under section 871(a). “A state would . . . face considerable obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot.”70 McPherson made the statement during a private conversation, not intending that anyone but her boyfriend hear it.71 It is important to note here that the private nature of her statement does not strip it of its constitutional protection,72 as it addresses a matter of public concern.73

At this point in the analysis, a brief explanation of Pickering v. Board of Education74 is appropriate. In Pickering, a high school teacher was dismissed by the Board of Education of Will County, Illinois, for the publication of a letter to the editor of a local news-

68. Rogers, 422 U.S. at 47 (emphasis added).
69. Id. at 48 (emphasis added).
70. Rankin v. McPherson, 786 F.2d at 1235.
72. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979). In this case, the Court disregarded any distinction between the public or private nature of an employee's comment for the purposes of applying a Pickering balancing analysis. Id. at 414. The Court stated:

This Court's decisions in Pickering [etc.] . . . do not support the conclusion that a public employee forfeits his protection against government abridgement of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.
Id. (emphasis added).
Considering the statement in context, as Connick requires, discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration . . . on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.

Id.
paper. The teacher's letter criticized the school board's proposed allocation of tax funds, and as such, the board decided that Pickering's letter was "detrimental to the efficient operation and administration of the schools," and that "the interests of the school require[d] [the teacher's dismissal]." Pickering claimed that his first amendment right to freedom of speech had been violated. The Illinois Supreme Court disagreed, but Justice Marshall, writing for the United States Supreme Court, reversed the Illinois decision, thereby upholding the teacher's constitutionally guaranteed freedom of speech. The Court in Pickering was concerned with balancing the rights of a public employee, as a citizen, to speak freely about public issues, against the rights of the state, as an employer, to promote "the efficiency of the public services it performs through its employees." Justice Marshall emphasized that public employment, though it is a benefit which may be altogether denied, may not be subjected to any unreasonable conditions. He noted that by threatening dismissal from public employment, a state wields a powerful means of inhibiting free speech by its employees. Therefore, since the teacher's comment was in

75. Id.
76. Id. at 564-65. The Court soundly rejected the Board's contention regarding the letter:

The statements are in no way directed towards any person with whom appellant would normally contact in the course of his daily work . . . [there is] no question of maintaining either discipline by immediate superiors or harmony among coworkers . . . [therefore] to the extent that the Board's position here [suggests that] comments on matters of public concern . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

Id. at 569-70.
77. Id. at 565.
78. Id.
80. Id. at 575.
81. Id. at 568.
82. Id. See Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also Board of Regents v. Roth, 408 U.S. 564, 582 (1972). In Roth, Justice Douglas dissented as follows: "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." Roth, 408 U.S. at 582. Justices Brennan and Marshall dissented independently. Id.
83. Pickering, 391 U.S. at 574. Justice Marshall stated that:

In a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication . . . we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

Id.
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regard to a matter of public concern, and did not interfere with the state-as-employer's interest in efficiency, the "balance" was tilted in favor of the teacher's fundamental right of free speech. As such, the Supreme Court held that the "exercise of [the] right to speak on issues of public importance may not furnish the basis for . . . dismissal from public employment."

It is clear that the *Pickering* analysis served to uphold Deputy McPherson's right to speak as a public employee. One point touched upon, however, but not fully addressed in *Pickering*, was the lack of interference the public employee's speech caused in the work environment. The fifth circuit explained the factor of job interference in *Smith v. United States*, wherein the court stated that "[i]n order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon [the state] to clearly demonstrate that the employee's conduct *substantially and materially* interferes with the discharge of duties and responsibilities inherent in such employment."

In determining the degree of interference caused by the employee's speech, and thereby adjusting the "interest-balance", the statement made must not be considered in a vacuum; the manner, place, and time of the employee's speech are all relevant factors. Here, then, it is evident that Deputy McPherson's statement was not a substantial and material interference with her duties. Her remark was made in a private conversation in an area of the constable's office to which the public had no access; it was not meant for anyone else to hear. The Court concluded that "[n]ot only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the

84. *Id.*
85. Rankin v. McPherson, 107 S. Ct. at 2896. Justice Marshall cautioned that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Id.*
86. *See* McPherson v. Rankin, 786 F.2d at 1238. The circuit court, on reversing and remanding in McPherson's favor, emphasized that her comment was made to "a coworker who, with the benefit of the remark's full context, was not offended." *Id.* (emphasis added). The court continued by stating that "Constable Rankin specifically denied having fired [McPherson] because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office." *Id.*
88. *Id.* at 517 (emphasis added).
89. Rankin, 107 S. Ct. at 2898.
90. *Id.* at 2899.
remark demonstrated a character trait that made [her] unfit to perform her work."91 In addition, the strictly clerical nature of McPherson's work lessened even further the impact her private speech could have on the functioning of the office.92

It is important to note that the probationary nature of McPherson's job does not shift the balance in favor of the state-employer.93 In Perry v. Sindermann94, a non-tenured college professor's contract was not renewed by the university's Board of Regents because the professor had publicly criticized the college's administrative policies—a criticism deemed an "insubordination" by the Board.95 The Board of Regents successfully argued to the district court that the professor had no first amendment claim because he lacked tenure and/or a contract.96 In reversing this decision, the circuit court of appeals held that the lack of the existence of tenure or an employment contract did not defeat the professor's claim because "[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . [L]ack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim."97

More recent cases have drawn the line of defining when a statement addresses an issue of public concern.98 In Connick v. Myers99, a former assistant district attorney brought suit against her employer, claiming that dismissal from her position violated her right

91. Id.
92. Id. at 2900. Justice Marshall noted:
Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal . . . [at] some point, such concerns are so removed from the effective function of the public employer that they cannot prevail over the free speech rights of the public employee.
Id.
93. Id. at 2896.
94. 408 U.S. 593 (1972).
95. Id. at 595.
96. Id. at 596.
97. Id. at 597-98.
98. Pickering, 391 U.S. at 571-72. A "matter of legitimate public concern" is one upon which "free and open debate is vital to informed decision-making by the electorate." Id. If a statement does not address a matter of public concern, it does not receive the benefit of the balancing test. Id.
99. Connick v. Myers, 461 U.S. 138 (1983). See also Yoggerst v. Stewart, 571 F. Supp. 68 (D.C. Ill. 1983) (state agency employee's statement over the phone to a fellow employee that it was "good news" that their supervisor had been terminated was not protected as it did not involve a matter of public concern).
of free speech.\textsuperscript{100} Upon learning of her impending involuntary transfer to another department in her office, Myers circulated a questionnaire to her fellow employees regarding "office transfer policy, office morale, the need for [an office] grievance committee, the level of confidence in the supervisors, and whether employees felt pressured to work in political campaigns."\textsuperscript{101} Though successful in the trial and appellate courts, on certiorari to the United States Supreme Court her claim was rejected; the Supreme Court found that her questionnaire did not address a matter of public concern, and therefore, her speech was not protected by the first amendment.\textsuperscript{102}

The sentiment held by the Court, reflected in its application of the \textit{Pickering} balancing approach to public employees' first amendment rights, embodies the rationale of the landmark case of \textit{New York Times Co. v. Sullivan}.\textsuperscript{103} A public employee is, first and foremost, a United States citizen, and therefore, has a constitutional right to comment upon matters of public concern.\textsuperscript{104} By accepting government employment, an individual does not accept a corresponding limitation on his inherent right to speak. So long as a public employee's speech does not interfere with the functioning or discipline of his own work or that of his fellow employees, the state has no interest in preventing that speech or dismissing that employee.\textsuperscript{105} As evidenced by the Court's decision in \textit{Rankin v. McPherson}, the first amendment's guarantee of the freedom of

\textsuperscript{100} Connick, 461 U.S. at 140.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 145. The Court reasoned: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id. (emphasis added). Myers' questionnaire herein addressed inner-office politics, and as such, merited no constitutional protection. Id.

\textsuperscript{103} 376 U.S. 254 (1964). Writing for the majority of the Court, Justice Brennan wrote against the background 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 officials.

\textit{Id.} at 270. \textit{See supra} notes 39-40 and accompanying text.

\textsuperscript{104} \textit{See} Connick, 461 U.S. at 144. The Court cited NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), stating: "[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values', and is entitled to special protection." \textit{Id. But see} 107 S. Ct. at 2900, n.18. "This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer." \textit{Id.}

\textsuperscript{105} \textit{Rankin}, 107 S. Ct. at 2900.
speech remains a strong safeguard of the people.

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