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PUBLIC EMPLOYEE PROTECTED SPEECH IN THE WAKE OF *WATERS v. CHURCHILL*

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ABSTRACT

The Supreme Court's recent decision in *Waters v. Churchill* will have a significant impact on protected speech in public employment. It will also have a significant effect on the procedures public employers use to investigate instances of employee expression leading to termination. In the final analysis, however, this plurality decision appears to pose more questions than answers and could give rise to a new kind of public sector employment litigation.

In 1994, the U.S. Supreme Court's plurality decision in *Waters v. Churchill* [1], changed the protected speech rights of public employees and the management prerogatives of public employers. This troubling decision, which eluded majority support, creates new rights and standards for both employees and employers in the public sector as it wrestles with defining the factual basis for speech-related discipline. At the same time, this decision has the potential to create a new basis for speech-related litigation in the public sector.

Historically, speech rights of government employees have always been limited. The government as employer has far broader powers than does the government as sovereign [2]. The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer [1]. Thus, while the government cannot restrict the speech of the public at large in the name of sovereign efficiency, when the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate [1]. The government's interest in efficient employment decision making may sometimes, but not always, overshadow an employee's right to free speech.

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To be protected, an employee's speech must be on a matter of public concern, and the employee's interest in expression on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" [3]. There have been a number of public sector employment cases illustrating the conditions under which speech is protected and those under which it is not.

WHEN SPEECH IS PROTECTED

Cases protecting public employee speech include *Pickering v. Board of Education of Township High School District 205*, in which a teacher, fired for writing a letter to a newspaper criticizing how the board and superintendent handled proposals for raising school revenues and favored athletics over academics, was reinstated [3]. The board had dismissed Pickering because they considered the letter to be "detrimental to the efficient operation and administration of the schools of the district" [3]. The U.S. Supreme Court, however, disagreed, concluding that "absent proof of false statements knowingly or recklessly made, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment" [3].

Likewise, in *Roberts v. Lake Central School Corporation et al.* [4], statements made by a nontenured teacher while he served on the teachers' negotiating team could not be the sole basis for refusing to renew his contract. He had said that the administration was trying to buy teachers off with little items at the expense of big items. The court found Roberts' statements a matter of negotiation and therefore public concern, a statement to be expected in the negotiating role. In this decision the court noted that "if a school board were permitted to refuse to renew a teacher's contract on the sole basis that the teacher had made statements critical of the school administration, there would be a serious impairment in the freedom of teachers to speak out on items concerning them" [4].

Public employee speech has also been protected where discipline short of dismissal is at issue. The courts have been sensitive to the chilling impact lesser penalties might have on the free expression of public employees on matters of public concern. Lesser penalties (transfer, reprimand, and suspension) also effectively silence public employees and compel them to forego exercise of rights guaranteed by our Constitution [5]. One such case is *Bernasconi v. Temple Elementary School District No. 3*, in which a teacher was involuntarily transferred when she advised parents of bilingual students to seek legal aid because their children were being incorrectly placed in classes for the mentally retarded [6]. Here the court found the transfer from a position uniquely suited to the teacher's talents and desires represented the loss of a valuable government benefit [6]. This case reaffirmed an earlier decision that even though a person has no right to a valuable government benefit, and even though the government may deny the benefit for any number of reasons, it may not deny a benefit on a basis

that infringes on constitutionally protected interests—especially freedom of speech [7].

WHEN SPEECH IS NOT PROTECTED

In contrast to these cases protecting public employee speech on matters of public concern, there have also been a number of cases in which speech by public employees was not protected. *Connick v. Myers* is a pivotal case illustrating the circumstances in which the courts are likely to find employee speech unprotected [8]. Myers, an assistant district attorney unhappy with the prospect of being transferred to another section, distributed a survey to her fellow staff members concerning office transfer policy, office morale, level of confidence in supervisors, pressure to work in political campaigns, and the need for a grievance committee. This led to her dismissal for insubordination, which she challenged on the basis of her right to speak out on matters of public concern. The Supreme Court, however, found that Myers' questionnaire did not seek to inform the public. It had no bearing on the district attorney's discharge of responsibility to investigate and prosecute criminal cases, a genuine matter of public concern. Her questionnaire was not an effort to bring wrongdoing or breach of public trust to light. Rather, her questions pertaining to confidence and trust in supervisors were mere extensions of her personal dispute over her transfer. The Court viewed Myers' questions as a reflection of one employee's dissatisfaction with a transfer, an attempt to rally others to her cause, and concluded that the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs [8].

In *Duke v. North Texas State University*, a state university teacher's dismissal was also upheld in spite of her claim of constitutional protection [9]. Here Duke was dismissed for using profane language and criticizing the university in a speech before an unauthorized and unsponsored group. A student in the group testified that Duke used words commonly thought of as profane, and a faculty member said he considered her statements to cast an adverse reflection on him as a faculty member. He described her behavior as irresponsible, unwise, and unreasonable, reflecting poorly on all teachers at North Texas. In upholding Duke's dismissal, the court cited the university's interests in maintaining a competent faculty and perpetuating a public confidence in the educational institution. Duke's comments, while they may have been on a matter of public concern, were delivered in a manner that undermined the efficient delivery of university services. Thus her comments were not constitutionally protected.

Use of profanity was also not protected speech in *Martin v. Parrish*, a case testing the limits of academic freedom [10]. Martin, an economics professor, was fired because students complained about his use of profane language in the classroom. Since there is no obvious academic reason to condone profanity in an economics classroom, the court found Martin's use of profanity in the classroom an expression of personal frustration, not public concern. His language was "a

deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification" [10].

The U.S. Supreme Court, the final arbiter of these disputes, has maintained that many of the most fundamental maxims of First Amendment jurisprudence cannot reasonably be applied to speech by government employees [1]. The First Amendment demands a tolerance for "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate" [11]. Nevertheless, the U.S. Supreme Court has never expressed doubt that a government employer may bar its employees from using offensive utterances to members of the public, or to people with whom they work [1]. "Under the First Amendment there is no such thing as a false idea" [12]; the "fitting remedy for evil counsels is good ones" [13]. But when an employee counsels her coworkers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech [1]. The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" [14]. But though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, the Court has never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing [15]. These citations, taken from *Waters v. Churchill* [1], further define the limits public sector employment places on constitutionally protected speech. They represent judicial concern for balancing individual right against the need for agency efficiency.

WATERS v. CHURCHILL

The *Waters v. Churchill* decision, however, is not simply another application of this balancing test. Rather, it addresses the question of who will determine the facts on which the decision to protect or not will be made. That is, should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask a jury to determine the facts for itself? [1]. The Court in *Waters* concluded that the *Connick* test should be applied to what the government employer reasonably thought was said, not to what the trier of fact ultimately determines to have been said [1]. In doing so, the Court freed the employer from the chilling effect of conforming employment practices to the evidentiary rules of a courtroom. The standard of care prescribed is that which a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case [1].

The case itself illustrates the importance of this issue. Churchill, a nurse in the obstetrics department of a public hospital, was fired because of statements she allegedly made to Perkins-Graham, a coworker, during a work break. Perkins-Graham was considering transferring to the obstetrics department as part of the hospital's cross-training policy. Cross-training gave nurses in one department an opportunity to work in another when their department was overstaffed. Churchill

believed this policy threatened patient care because it covered staff shortages, but was not designed to actually train nurses for service in the new department. She had complained about this policy to her supervisor, Waters, and to Davis, the hospital's vice president of nursing, and now shared this and other concerns she had with Perkins-Graham, a prospective cross-trainee. According to Ballew, a nurse who overheard the conversation and later told Waters about it, Churchill took "the cross trainee into the kitchen for . . . at least 20 minutes to talk about [Waters] and how bad things are in [obstetrics] in general" [1]. Ballew said this conversation led the cross-trainee to withdraw interest in the cross-training program.

When Waters met with Ballew a second time to confirm her initial report, Ballew said Churchill "was knocking the department" and "in general [Churchill] was saying what a bad place [obstetrics] was to work" [1]. Ballew's report was also confirmed by Perkins-Graham, who told both Waters and Davis that Churchill "had indeed said unkind and inappropriate negative things about [Waters, the program supervisor]" [1].

Waters was aware of Churchill's negative attitude well before the incident that led to her dismissal. In an earlier evaluation of Churchill, Waters had stated that Churchill "promotes an unpleasant atmosphere and hinders constructive communication and cooperation," and that she "exhibits negative behavior towards [Waters] and [Waters'] leadership through her actions and body language"; the evaluation said Churchill's work was otherwise satisfactory [1]. Perkins-Graham said that Churchill had told her about the evaluation, noting Waters "wanted to wipe the slate clean . . . but [Churchill thought] this wasn't possible" [1]. Churchill is alleged to have told Perkins-Graham "that just in general things were not good in OB and hospital administration was responsible," and that specifically Davis "was ruining McDonough District Hospital" [1].

According to Churchill, the conversation with Perkins-Graham primarily concerned the cross-training policy. While she admits she criticized Davis, saying her staffing policies threatened to "ruin" the hospital because they "seemed to be impeding nursing care," she claims she actually defended Waters and encouraged Perkins-Graham to transfer to obstetrics [1].

Waters did investigate, though she did not directly interview Churchill until the meeting at which she was fired. Waters met with Ballew twice to confirm her initial report. In addition, Waters and Davis met with Perkins-Graham concerning the incident. As a result of this investigation, Churchill was fired. She then filed an internal grievance, and Stephen Hopper, the hospital's president, met with Churchill to hear her side of the story. He also reviewed the reports made by Waters and Davis of their interviews with Ballew and Perkins-Graham, and, as a final precaution, he had the hospital's vice-president of human resources interview Ballew one more time. After considering all this information, Hopper denied Churchill's grievance, and she sued, claiming the firing violated her First Amendment rights because her speech was protected under *Connick v. Myers*.

The district court held that neither version of the conversation was protected under *Connick* since the speech was not on a matter of public concern, and even if it was on a matter of public concern, its potential for disruption nonetheless stripped it of First Amendment protection [16]. However, on appeal, this decision was reversed with the Seventh Circuit finding that Churchill's speech, viewed in the light most favorable to her, was protected speech under the *Connick* test: It was on a matter of public concern—"the hospital's [alleged] violation of state nursing regulations as well as the quality and level of nursing care it provides its patients"—and it was not disruptive [17]. The court said that the inquiry must turn on what the speech actually was, not on what the employer thought was said, and "if the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental" [17].

The U.S. Supreme Court, in granting certiorari, noted that the dispute between the district and appellate courts actually centered on how the factual basis for applying the test was to be determined, i.e., "what the speech was, in what tone it was delivered, and what the listener's reactions were" [1]. Should the court apply the Connick test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself? [1]. Justice O'Connor, writing for the plurality, found that the court of appeals' decision had given insufficient weight to the government's interest in efficient employment decision making. The court of appeals' approach would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court [1]. Government employers would be forced to ignore hearsay, personal knowledge, and any other factor that a court would find unacceptable under the rules of evidence and procedure. But as the Court points out, "what works best in a judicial proceeding may not be appropriate in the employment context" [1]. For example, a manager may legitimately want to discipline an employee based on patron complaints of rudeness, even when the complaints would be viewed as hearsay in a court of law. The Court concluded that "government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability" [1].

The Court conceded that a trier of fact should be able to consider the *reasonableness* of the employer's conclusions. Specifically, ". . . the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision" [1]. The Court went on to conclude that in this case the public employer did conduct an adequate investigation, and, based on its findings, *reasonably* fired Churchill. The employer's investigation revealed that

the potential disruptiveness of Churchill's speech outweighed its importance as a matter of public concern. "Discouraging people from coming to work for a department certainly qualifies as disruption . . . if not dealt with, [Churchill's complaining] threatened to undermine management's authority in Perkins-Graham's eyes" [1]. O'Connor, speaking for the plurality, concluded that "if [the employer] did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, the employer must win. Their belief, based on the investigation they conducted, would have been entirely reasonable" [1].

SUMMARY DISCUSSION

This plurality decision promises to be a judicial bone of contention for some time to come. Even in its concurrence there was dissension. Justice Souter raised the specter of the employer who acts without *real* belief in the facts uncovered, and the problems encountered in substantiating such real belief. Scalia, Kennedy, and Thomas joined in a concurrence tempered with concern that the decision has actually expanded the rights of public employees. They worry that the Court's previous parsimony is abandoned, in favor of a general principle that "it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures, . . . the proposed right to an investigation before dismissal for speech not only expands the concept of First Amendment procedure into brand new areas, but brings it into disharmony with cases involving government employment decided under the Due Process Clause" [1]. The justices are concerned that the new right to *investigation* before dismissal introduces negligence liability if an employer's investigation is found inadequate. They found no historical grounds for the right to investigation in these matters, and fear that this new right could become a new challenge to public employer dismissals.

Justice Stevens, in his dissent, feared that the investigations prescribed by this decision, might become mere pretexts for firing employees who dare to voice valid opinions and criticism. He believes the "pretext" review supported by this decision is inadequate, since it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights [1]; and ordinarily when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion [18]. He maintained "the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives, but whether the employee's freedom of speech has been "abridged" [1]. Justice Stevens believes the factual basis on which dismissal is based should indeed be determined by a jury or the trier of fact. "The risk that a jury may ultimately view the facts differently from even a conscientious employer, is not, as the plurality would have it, a needless fetter on public employers' ability to discharge their

duties. It is a normal means by which our legal system protects legal rights and encourages those in authority to act with care" [1]. Stevens took issue with the plurality argument that managers "can spend only so much of their time on any one employment decision" [1]. He believes that First Amendment rights are a fragile commodity that merit the close and careful scrutiny of the courts. "Deliberation within the government, like deliberation about it, is an essential part of our 'profound national commitment' to the freedom of speech" [1].

Essentially, *Waters v. Churchill* is a case hamstrung between a concern for giving too little protection to the speech of public employees and a concern for giving too much protection to free expression in public employment. In many ways this case poses more questions than answers in its effort to guide public employment practices. What is a reasonably conducted investigation? How can pretext be distinguished from true investigative effort? Under what circumstances may a disciplined employee challenge the quality of investigation? Does the investigative standard set in this case ignore the employee's right to confront and question those making accusations and statements to investigating employers? *Waters v. Churchill* is a plurality decision, not a majority decision; a beginning, not an end, to judicial analysis of protected employee speech in the public sector.

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ENDNOTES

1. *Waters v. Churchill*, 114 S.Ct. 1878; 1994 U.S. Lexis 4104; 128 L.Ed. 2d 686.
2. *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 564 (1973).
3. *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 564, 568, 574 (1968).
4. *Roberts v. Lake Central School Corporation et al.*, 317 F. Supp. 63, 65 (N.D. Ind. 1970).
5. *Adcock v. Board of Education*, 513 P.2d 900 (Cal. 1973).
6. *Bernasconi v. Temple Elementary School District No. 3*, 548 F.2d 857, 860 (9th Cir. 1977).
7. *Perry v. Sindermann*, 408 U.S. 593, 597 (1971).
8. *Connick v. Myers*, 461 U.S. 138 (1983).
9. *Duke v. North Texas State University*, 529 F.2d 829 (5th Cir. 1973).
10. *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986).
11. *Cohen v. California*, 403 U.S. 15, 24-25 (1971).
12. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).
13. *Whitney v. California*, 274 U.S. 357, 375 (1927).
14. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
15. Cf. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

16. App. to Pet. for Cert. 45-49.
17. 977 F.2d 1114, 1122, 1124, 1127 (1992).
18. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1965).

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