

# Balancing Act: Public Employees and Free Speech

BY DAVID L. HUDSON JR.

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# Balancing Act: Public Employees and Free Speech

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*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 Thurgood Marshall in *Rankin v. McPherson*<sup>1</sup>

## *I. Introduction*

More than 20 million Americans work for federal, state or local governments.<sup>2</sup> Police officers, public school teachers and city clerical employees represent only some of this country's many public employees.

Sometimes these employees are disciplined for speaking out against government corruption, belonging to a particular political party, criticizing agency policy or engaging in private conduct of which the employer disapproves. For example, recent appellate court decisions reveal that public employees have been disciplined for:

- Criticizing a police policy that placed primarily African-American officers on the front lines of a community-policing project in certain neighborhoods.<sup>3</sup>
- Uttering a racial slur at a dinner party.<sup>4</sup>
- Complaining that a police helicopter unit was not operating safely.<sup>5</sup>
- Refusing to change a college student's grade from an F to an "incomplete" when the student had attended only three of 15 classes.<sup>6</sup>
- Failing to remove a religious pin from a uniform.<sup>7</sup>

- Being married to a man who had opposed the employee's boss — the sheriff — in a recent election.<sup>8</sup>

Granted, government employers need some leeway when dealing with their employees. After all, the primary function of a government agency is to provide efficient services to the public, and if a government employer were second-guessed every time it disciplined a public employee, services could grind to a halt. On the other hand, such employers do not have unfettered discretion to discipline employees whose speech content they dislike. Like any other public entity, a government employer must conform to principles set forth in the First Amendment.

The First Amendment provides free-speech protection to public, not private, employees because the Bill of Rights applies only to governmental actions. This means that a private employer generally can discipline an employee as he sees fit (unless the employer is found to be engaging in a discriminatory practice). While the private employer probably can fire an employee whose speech he dislikes, the First Amendment governs the circumstances under which public employers may discipline employees for their speech.

On the other hand, government has more authority to regulate the speech of its employees than it does to regulate the speech of the general citizenry. While the First Amendment prevents police from arresting a person for publicly criticizing the chief of police, the mayor, the governor or even the president of the United States, the job of a public employee who speaks critically of his or her employer may or may not be protected by the First Amendment. If a reviewing court determines that the employee's speech was disruptive or subversive to the employer's interest in maintaining an efficient workplace, the employee may lose the case.

#### **CONTENT, VIEWPOINT AND THE SPECIAL CASE OF PUBLIC EMPLOYEES**

In essence, the U.S. Supreme Court has carved out an exception to its First Amendment jurisprudence for public employees. Basic free-speech rules that apply outside the workplace sometimes have little relevance for public employees.<sup>9</sup>

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Consider, for instance, that as a general matter the First Amendment prohibits governmental discrimination based on the content or viewpoint of an individual's speech. For example, a law prohibiting citizens from criticizing elected officials would be impermissible because it would discriminate on the basis of content, allowing praise of government officials but not allowing criticism.

Nor could the government enforce a law prohibiting criticism of the Republican Party but allowing criticism of other parties, because this would be an even more egregious constitutional violation known as "viewpoint discrimination." In other words, the First Amendment, above all else, rejects laws that favor some ideas or viewpoints while excluding others. Such laws limit the scope of the "marketplace of ideas," the metaphorical public forum whose protection has been the focus of First Amendment jurisprudence for the past 80 years.

Yet such fundamental First Amendment principles do not always apply to public employees in the workplace. For instance, a public employee could be fired for saying, "My superior or co-worker is unqualified and corrupt." Even though that employee would clearly be expressing a particular viewpoint, the Supreme Court has recognized that "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."

Why? Because public employers must maintain efficient operation of the people's business. For that reason, it is acceptable for government employers to discipline employees for speech that undermines the integrity of the office or disrupts morale. This discipline can take many different forms, including transfer, demotion or even discharge. Unfortunately, government employers sometimes retaliate against employees for speech that concerns an important public issue — a matter of "public concern," as the Supreme Court has termed it.

Because public employers and employees both have important interests at stake in these cases, the courts often are faced with the difficult task of balancing these competing interests. The Supreme Court recognizes that government employers must protect business efficiency. But the Court also has said that "the threat of dismissal of public employment is ... a potent means of inhibiting speech."<sup>10</sup>

In the past, courts usually deferred to employers in such cases, reasoning that employees were free to leave their jobs if they didn't like the conditions. In the public sector, employers could discipline an employee for any type of speech. Courts followed the reasoning of Justice Oliver Wendell Holmes, who as a member of Massachusetts' highest state court famously wrote: "The petitioner (a police officer) may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>11</sup>

In the latter part of the 20th century the law changed dramatically, however, and public employees are now understood to possess a greater degree of First Amendment rights. State and federal laws now also protect so-called "whistleblowers" — employees who call attention to workplace waste or corruption. Yet, many courts are hesitant to turn day-to-day employment decisions into matters of constitutional law, saying the courts should not act as "super" personnel departments.

Government employers have a dual role: (1) to effectively operate institutions providing public services and (2) to operate as entities governed by the First Amendment. Thus, as law professor Kevin O'Neill has written, "When an employee criticizes a government employer, the difficulty is to determine whether the employee's words are protected political speech or an unprotected act of insubordination."<sup>12</sup>

The First Amendment thus comes into play when a public employee faces retaliation or job loss because of his or her speech or political associations. The Supreme Court has developed a complex body of law to address such issues. While there are an infinite number of factual scenarios in which a public employee could raise a First Amendment claim, the cases tend to fall into one of several general categories:

- (1) A public employee is fired because of speech or expressive conduct that the employer claims is disruptive to the efficient operation of the workplace.

- (2) A public employee contends that he or she has suffered an adverse employment action (dismissal, demotion, etc.) in retaliation for First Amendment-protected conduct.
- (3) A public employee is fired because of political patronage — that is, for not belonging to his or her boss’s political party.

## II. *History of Public-employee Speech Rights*

Courts in the 19th and early 20th centuries simply rejected public employees’ claims of freedom of speech. They reasoned that workers waived their constitutional rights once they accepted public employment.

A classic example of this view is the Supreme Judicial Court of Massachusetts’ 1892 decision in *McAuliffe v. New Bedford*.<sup>13</sup> John J. McAuliffe was dismissed from his job as a policeman for “talking politics.” Town officials alleged that McAuliffe had engaged in political canvassing and had solicited votes.

The mayor fired McAuliffe for violating a police regulation that provided in part:

No member of the department will be permitted to be a delegate to or member of any political or partisan club. ... No member of the department shall be allowed to solicit money or any aid, on any pretence [sic], for any political purpose whatsoever.

McAuliffe alleged that the mayor’s action infringed on his right to express his personal political opinions, but Massachusetts’ highest state court — in an opinion written by Justice Oliver Wendell Holmes (who would later become a U.S. Supreme Court justice) — sided with the mayor.<sup>14</sup>

As noted earlier, Holmes, writing for the majority, said that holding a government job was a privilege, not a right. For many years, courts invoked Holmes’ language like a mantra when deciding cases brought by public employees. For example, in

upholding a city's right to discharge a firefighter who was arrested for fighting with two police officers, the Nebraska Supreme Court ruled: "The holding of a position of fireman is not a matter of right. It is merely a privilege."<sup>15</sup>

A California appeals court employed the same reasoning in upholding the dismissal of a public school teacher who refused to answer questions about her alleged membership in the Communist Party. "A teacher's employment in the public schools is a privilege, not a right," the court wrote in the 1954 decision *Board of Education of Los Angeles v. Wilkinson*.<sup>16</sup> "The power of a teacher to mold the thoughts and conduct of children is so great that surely the State must have power to inquire into the beliefs of the teacher in whose care the youth of the country is placed for instruction."<sup>17</sup>

Another California appeals court had reached a similar conclusion in 1948 when it required police officers to swear a loyalty oath and aver that they were not members of a group advocating the overthrow of the government. Several police officers challenged this requirement, but the appeals court was unsympathetic in *Steiner v. Darby*.<sup>18</sup> "By accepting public employment (the officers) forego any privilege they may have had as private citizens to advocate the overthrow of the government by force and violence," the court held.<sup>19</sup>

During the "Red Scare," when paranoia over communist infiltration peaked in the United States, the Supreme Court also adopted Holmes' view of public employment as a privilege. In its 1952 decision *Adler v. Board of Education*,<sup>20</sup> the Court upheld a New York law empowering the Board of Regents to dismiss teachers who were members of the Communist Party and other organizations that advocated the overthrow of the U.S. government.

The Court recognized that individuals have a right to join the Communist Party. However, the high court said the state also has a right to dismiss such people from government jobs:

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system



on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.<sup>21</sup>

### **SUPREME COURT GRANTS MORE PROTECTION TO EMPLOYEES**

In the 1960s, the Supreme Court granted public employees greater First Amendment protection. In *Keyishian v. Board of Regents*,<sup>22</sup> the Court disavowed its earlier reasoning in the *Adler* case, writing that “pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested.”<sup>23</sup>

*Keyishian* involved a 1953 New York law that had extended the state’s loyalty-oath requirement to state colleges and universities. A provision of the law allowed the dismissal of state public school employees who spoke “treasonable” or “seditious” words. Another section barred the employment of those who advocated or taught the overthrow of the government.

The Court, in the 1967 opinion by Justice William Brennan, warned that the language in the New York law was overly broad. “Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?” he asked.<sup>24</sup> Brennan quoted with approval a lower court decision in the case that held “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”<sup>25</sup>

### *III. Modern Public-employee Speech Case Law*

Just a few years later, the Supreme Court decided another case that arose out of the school setting, this one becoming the foundation of today’s public-employee speech jurisprudence. In *Pickering v. Board of Education*,<sup>26</sup> the Court for the first time examined a First Amendment case in which a public employee had publicly criticized his employer.

### **Marvin Pickering: 'It was an important battle'**

Retired high school science teacher Marvin Pickering had no idea that his battle with Illinois school board officials more than three decades ago would lead to the seminal Supreme Court decision on public-employee First Amendment rights. But that's what eventually happened when the then-youthful teacher wrote a letter to the editor of the local newspaper complaining about the school board's funding of athletics.

The letter got him fired.

"It was an important battle that gave public employees some rights," Pickering says modestly. Free-speech experts say the case stands as the foundation of public-employee First Amendment case law.

"To this day the Pickering case stands as *the* public-employee First Amendment case," says Robert M. O'Neil, founder of the Virginia-based Thomas Jefferson Center for the Protection of Free Expression and author of a book on public-employee speech rights. "Though the Court has modified the test for public employee rights somewhat, it still all begins with a Pickering analysis."

### **The controversy**

The controversy began in 1961 when the Board of Education of Township High School District in Will County, Ill., asked the district's voters to approve a bond issue to raise more than \$5 million to build two new high schools, one of which was Lockport East.

After the bond issue was approved, the board submitted another proposal to raise taxes to obtain more money for the two schools. Two proposals to raise the tax rate were defeated. In the midst of this controversy, Marvin Pickering, a teacher at Lockport East, decided to speak out.

"Members of the board were not being straight about how they were spending some of this money for these new schools," he said. "They were spending too much money on athletics. Instead of spending \$3.2 million at one school and \$2.3 million at the other school, they spent more than \$4 million on one of the schools. As a result the classrooms at Lockport East were constructed with three walls. This was a nightmare for teachers as the rooms opened into each other."

Pickering wrote a letter to the editor of *The Lockport Herald* in which he criticized the school board's handling of the bond and tax issues with regard to building the two new schools. The Sept. 24, 1964, letter stated in part: "Perhaps others would enjoy reading

[back issues of the newspaper] in order to see just how far the two new high schools have deviated from the original promises by the Board of Education.”

Other statements in the letter included:

- “That’s the kind of totalitarianism teachers live in at the high school, and your children go to school in.”
- “But \$20,000 in receipts doesn’t pay for the \$200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.”
- “To sod football fields on borrowed money and then not be able to pay teachers’ salaries is getting the cart before the horse.”
- “As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don’t know whom to trust with any more tax money.”

The letter concluded: “I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken away from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?”

After he drafted his letter, he showed it to his wife. “She read it and then told me: ‘You’re probably going to get fired.’ But I went ahead and sent the letter anyway,” he says.

Pickering says he did so because “I thought that if they did fire me, it would only prove my case. Why else would they get so upset and fire me? To me, I loaded the gun and handed it to them, and they were stupid enough to pull the trigger.”

Pickering was fired from his teaching job, his letter having been found “detrimental to the efficient operation and administration of the schools of the district.” The board concluded at a hearing that several statements in the letter were false.

Though many people in the community supported him, most of Pickering’s fellow teachers did not publicly side with him. “Most of them were scared to support me,” he recalls. “When we were out of sight of the principal and other teachers, they would say, ‘We’re with you.’ But only when no one else was in sight.”

### **Fighting back**

Pickering appealed the board's decision in state court. He argued that the board's actions violated his constitutional right to freedom of speech. A state Circuit Court affirmed the school board decision.

In the meantime, Pickering had to find other employment to support his wife and two children. He ended up taking a job in Chicago with Campbell Soup Co., where he worked for more than two years as a production manager.

"Sure, I missed teaching," he says. "But I had to support my family, and I had always been independent."

When asked why he put himself on the line, Pickering responds: "I grew up on a farm in Liberty Township, Missouri, where people were free and independent. There in Missouri, the people told the politicians what they wanted them to get done. In Illinois, I found it to be different. There, the politicians were telling the people what they were going to do. I thought the government officials in Illinois were being dictators."

Pickering appealed the Circuit Court's decision to the Illinois Supreme Court. In January 1967, that court voted 3-2 against him.

The majority rejected Pickering's free-speech claim, writing: "By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in." The majority continued: "A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him."

In dissent, two justices pointed out that the Board of Education was disciplining a teacher who had just subjected it to public criticism. The dissent questioned the impartiality of the action, writing that it was unseemly if not unconstitutional.

"The letter is substantially accurate, and more important it has not been shown to be knowingly false," the dissenting justices wrote. They concluded that the board had violated Pickering's First Amendment rights.

Pickering was not too surprised at the outcome, though he was disappointed. "The board's lawyers had wined and dined with the chief justice of the Illinois Supreme Court," he says.

### Appeal to U.S. Supreme Court

Pickering did not lose faith. Instead, he appealed to the U.S. Supreme Court. "I believed in my heart that the Supreme Court would rule in my favor," he says.

On the day before the Court was to hear oral arguments, Pickering's optimism suffered a blow as he was walking with his attorney inside the Supreme Court building.

"I heard a court clerk tell someone who was asking about tomorrow's docket: 'There is nothing much on tomorrow's docket, just a little case involving a public high school teacher. I don't even know why it is on the docket.'"

"I got a little concerned after that statement," he says.

But Pickering's worries were allayed on June 3, 1968, when the high court issued its decision in *Pickering v. Board of Education*. The Court voted 8-1 in his favor. Only Justice Byron White dissented, and then only in part. He would have remanded the case to the trial court for further fact-finding.

However, the eight-member majority determined that the Board of Education had violated Pickering's First Amendment rights. They noted that oftentimes employee-employer disputes present a conflict between the employee's free-speech interests and the employer's efficiency interests.

Wrote Justice Thurgood Marshall: "The problem in any case is to arrive at a balance between the interests of the teacher, 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."

The Court first noted that Pickering's letter referred to important matters of public concern in the community and then pointed out that Pickering should not lose the rights he possessed as a citizen simply because he worked as a public school teacher. The Court also minimized the board's argument that the letter disrupted the efficient operation of the schools.

The Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Pickering was pleased with the Court's opinion, which ordered his reinstatement.

"The only regret I have is that the Court never cleared up the truth of several points in my letter," Pickering says. "I had hoped the Supreme Court decision would have substantiated the truth of each and every statement."

### **Aftermath**

Pickering returned to the classroom in September 1969 and worked as a teacher at Lockport East until his retirement in 1997. "It took a while for the local judge to reinstate me," he says. "I guess that was part of politics then. You have to remember that the good ol' boys were running the show back then."

"You cannot improve any public body if you don't have freedom of information about what that public body is doing," he says. "The First Amendment is a very important amendment because it is fundamental for the dissemination of information."

Pickering says that periodically other public employees and whistleblowers with lawsuits will call him to tell him the outcome of their cases. "On occasion, some law professors will call me and want me to address their class," he says. "I don't mind. I think whistleblowers should have a right to speak out."

Looking back on the case, Pickering acknowledges that it "took a lot of time and strained my finances. But I survived."

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In 1964, Marvin L. Pickering, a high school teacher in Will County, Ill., wrote a letter to the editor of a local newspaper criticizing the board of education and the superintendent of schools. The letter criticized administrators' proportional allocation of funds to the schools' educational and athletic programs.

The letter contained such comments as: "That's the kind of totalitarianism teachers live in at the high school, and your children go to school in," and "I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?"

Saying his letter was "detrimental to the efficient operation and administration of the schools of the district," the board of education fired Pickering. The teacher sued on First Amendment grounds, and his case eventually reached the U.S. Supreme Court, which ruled 8-1 in his favor. The Court said the difficulty in deciding the case lay in balancing the employee's right of free speech with the employer's interests in efficiency:

The problem in any case is to arrive at a balance between the interests of the teacher, 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.<sup>27</sup>

The Court declined to set a "general standard" as to what comments by a public employee would be allowed, but it did offer "general lines along which an analysis of the controlling interests should run."<sup>28</sup>

The Court also noted that Pickering's critical comments were not directed against anyone with whom he worked on a daily basis. The Court found Pickering's letter did not interfere with his teaching and did not interfere with the daily operation of the school. Finally, the Court emphasized that the subject of the letter was a matter of public importance.

Even though some of the statements in *Pickering*'s letter were shown to be false, the high court determined that they were protected by the First Amendment unless the teacher had made them recklessly knowing of their falsity — in other words, unless his expression met the standard for defamation. The Court concluded that “in these circumstances” the school board had no greater interest in limiting a teacher’s comments on a matter of public interest than in limiting the comments of “any member of the general public.” More importantly, perhaps, the Court recognized that “the threat of dismissal from public employment is ... a potent means of inhibiting speech.”<sup>29</sup>

Because the teacher’s speech was in the form of a letter to the editor and did not involve any personal attacks on immediate superiors or fellow workers, legal experts considered *Pickering* an “easy case.”<sup>30</sup> However, as First Amendment expert Robert O’Neil writes, the decision left “many issues that were to be the focus of hundreds of later cases.”<sup>31</sup> One of the many questions raised was, would the result have been different if the employer had alleged the speech did disrupt the day-to-day operations of the workplace?

#### **POST-PICKERING DECISIONS**

In cases decided after *Pickering* — *Perry v. Sindermann* (1972)<sup>32</sup> and *Givhan v. Western Line Consolidated School District* (1979)<sup>33</sup> — the Supreme Court extended the free-speech protections afforded public employees.

In *Perry*, the Court ruled that junior college officials could not terminate a professor for publicly criticizing the university system during his testimony before a legislative body.

Robert Sindermann, an instructor at Odessa Junior College in Texas, disagreed with the college’s governing Board of Regents on a number of matters. After he had publicly criticized the university and disagreed with the regents about keeping the college program at two years rather than extending it to four, he was not rehired. Sindermann sued, claiming school officials had violated his First Amendment rights by refusing to rehire him. The court ruled that 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.”<sup>34</sup>

“What I established was that teachers have the same constitutional rights as ordinary Americans,” Sindermann said. “The school officials denied me my fundamental constitutional rights. If the average American citizen testified before the Texas Legislature it would be no big deal, but when I as a teacher criticized the university I was punished.”<sup>35</sup>

In *Givhan*, the Court ruled that a high school teacher could not be fired for criticizing the school district’s policies as racially discriminatory, even though the teacher’s comments were made during a private meeting with her principal. “Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public,” the Court wrote.<sup>36</sup>

### ***Connick v. Myers***

In 1983, the pro-employee trend ended abruptly with the Supreme Court’s clarification of its *Pickering* precedent in *Connick v. Myers*.<sup>37</sup>

In 1980, Sheila Myers, an assistant district attorney in Orleans Parish, became upset when one of her supervisors proposed transferring her to a different section of the criminal court. Myers eventually circulated a questionnaire to her fellow attorneys in the D.A.’s office. Among the 14 questions she posed were:

- “From your experience, do you feel office procedure regarding transfers has been fair?”
- “Do you believe there is a rumor mill active in the office?”
- “Do you ever feel pressured to work in political campaigns on behalf of office-supported candidates?”
- “Do you feel a grievance committee would be a worthwhile addition to the office structure?”

### **Sheila Myers: 'I hope I live to see it overturned'**

New Orleans attorney and former U.S. Supreme Court litigant Sheila Myers says she wishes the landmark public-employee speech case that bears her name was not a “negative one for public employees.”

In 1983, the Supreme Court ruled in *Connick v. Myers* that Harry Connick, the district attorney in Orleans Parish, did not violate Myers’ First Amendment rights when he discharged her for distributing a questionnaire to her fellow assistant district attorneys in the office.

Nearly 20 years later, the major players in the case are still heavily involved in the legal community in New Orleans. Connick, the father of famous jazz musician Harry Connick Jr., is still the district attorney.

Myers practices criminal defense law in New Orleans. Both attorneys who argued the case before the Supreme Court continue to reside in New Orleans.

Their lives will be forever linked by the landmark case. “When a federal court has a public-employee speech case, the first precedent it looks to is *Connick v. Myers*,” says Supreme Court attorney Tom Goldstein.

Neither Myers nor Connick ever perceived the case as a major First Amendment contest. Myers said she thought her act of distributing the questionnaire was fully authorized. Connick saw the issue as one of employee disobedience to an order.

However, “the case established a doctrine that has shaped the analysis of countless public employee free-speech cases,” says Robert O’Neil, author of *The Rights of Public Employees*.

### **The controversy**

The controversy began in 1980 after then-first assistant district attorney Dennis Waldron informed Myers that she was being transferred to a different section of the criminal court. At that time, Myers had been employed at the district attorney’s office for more than five years.

Believing the transfer to be unjust, Myers told Waldron that she objected. During their discussion, Myers complained about several office procedures. Waldron informed her that others did not share her concerns. According to Myers, she told Waldron she would obtain information on these matters.

"He said 'fine,' and I regarded what I did as fully authorized," she says. Myers distributed a 14-point questionnaire soliciting the views of fellow staff members. Some of the questions were:

- "From your experience, do you feel office procedure regarding transfers has been fair?"
- "Do you believe there is a rumor mill active in the office?"
- "Do you ever feel pressured to work in political campaigns on behalf of office-supported candidates?"
- "Do you feel a grievance committee would be a worthwhile addition to the office structure?"

After Myers distributed the questionnaire to 15 assistant district attorneys, Waldron phoned Connick and told him that Myers was creating a "mini-insurrection."

When Connick returned to the office, he informed Myers that she was being terminated for her refusal to accept the transfer. He also told her that her distribution of the questionnaire was an act of insubordination.

Myers sued in federal court, contending that she had been fired in violation of her First Amendment free-speech rights. A U.S. District Court sided with Myers, finding that the real reason for her termination was her constitutionally protected act of distributing the questionnaire concerning important public issues. The court determined that the questionnaire had not "substantially interfered" with the workings of the D.A.'s office.

After the 5th U.S. Circuit Court of Appeals affirmed the lower court, Connick appealed to the U.S. Supreme Court, which agreed to review the case.

When the Court agreed to hear the case, "I had this sinking feeling," said Tulane law professor George Strickler Jr., who argued the case on behalf of Myers. "Plainly, we figured there were at least four justices who disagreed with the lower courts." (For the Supreme Court to grant review of a decision, four justices must vote to hear the case.)

Conversely, New Orleans attorney William F. Wessel, who argued the case for Connick, said that "once the Supreme Court granted certiorari, we felt we would win."

### **Supreme Court's decision**

Strickler and Wessel proved accurate in forecasting the outcome. On April 20, 1983, the Court ruled 5-4 in favor of Connick.

Writing for the majority, Justice Byron White noted that the issue was “whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.”

The majority’s phrasing of the issue foreshadowed its result, because a key inquiry in public-employee free-speech cases is whether the speech in question touches on matters of public concern. In its 1968 decision in *Pickering*, the Court had determined that school board officials in Will County, Ill., violated the First Amendment rights of high school teacher Marvin Pickering when they fired him for writing a letter to the editor of the local newspaper. (See other sidebar, p. 8.)

Citing the *Pickering* decision, White determined that the threshold question in a public-employee speech case was whether the speech touched on matters of public concern or public importance.

The majority ruled that nearly all of Myers’ questions dealt with private internal matters, rather than issues of public concern. “Indeed, the questionnaire, if released to the public, would convey no information at all, other than the fact that a single employee is upset with the status quo,” White wrote.

However, he also said that the question of whether assistant district attorneys “feel pressured” to work in political campaigns did “touch upon a matter of public concern.”

“We believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal,” White wrote.

The majority then said that the next question was whether Myers’ interest in free speech on a matter of public concern outweighed Connick’s interest in creating a disruption-free work environment.

The majority sided with the employer’s efficiency interests. “When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate,” White wrote.

The tone of the majority’s opinion was pro-employer. For example, White wrote that

“government offices could not function if every employment decision became a constitutional matter.”

Four justices dissented in an opinion written by Justice William Brennan. He wrote that most of the points in Myers’ questionnaire “addressed matters of public concern that could reasonably be expected to be of interest to persons seeking to develop informed opinions about” the district attorney’s office.

Brennan argued that the majority “artificially” restricted “the concept of public concern.” He believed that the proper standard should be similar to that articulated by the high court in a student-speech case, *Tinker v. Des Moines Independent Community School District* (1969). In *Tinker*, the Court ruled that student expression could not be punished unless school officials could reasonably forecast that the expression would cause a substantial disruption in the school.

Brennan concluded that the majority’s decision would “deter public employees from making critical statements” about the way in which government agencies operate.

### **Reflections by attorneys**

Tulane’s Strickler says Brennan was correct when he predicted that the decision would chill employee criticism. “The standard from the case on what is a matter of public interest has proved not to be very workable in the sense that we see very different opinions by the lower courts,” he says.

He adds that in the trial court, his side “showed ample evidence that the questionnaire did not cause any inflammatory uprising or ‘mini-insurrection.’ ”

“This was the purest kind of speech by an employee,” Strickler says. “This had been an easy case for the lower courts and, I think, rightfully so.”

However, Strickler says that “plainly, the Supreme Court’s decision establishes that public employees are more at risk for expressing dissent.”

Wessel disagrees with such assessments. He says he never viewed the case as involving a major First Amendment issue. “I always characterized the speech at issue in this case as petty bickering,” he says.

“I think the Supreme Court majority took a common-sense approach to this type of situation,” Wessel says. “If you look at the tone of the questionnaire, it was nearly 100 percent internal.”

“The primary precedent from the case is that not everything said in the public arena by public employees gets the protection of the First Amendment,” he says.

Wessel, who practices employment law and usually represents employees, says “the First Amendment is not imperiled in the area of public employment.”

### **Reflections by litigants**

Connick, who has been district attorney in Orleans Parish since 1973, remains puzzled over how the facts of the case gave rise to a First Amendment Supreme Court decision.

“We should have won in the district court,” he says. “We never should have gone to the U.S. Supreme Court.

“If that case got to the Supreme Court, then any case involving a public employee could get to the Supreme Court. At oral arguments, I was thinking, ‘What in the hell are we doing in the Supreme Court?’ This case had to do with an assistant D.A. refusing to be transferred for the good of the office. All of this free-speech foolishness was nonsense.”

Connick insists that Myers was fired for refusing the transfer. “We got into this First Amendment issue, but that was totally unrelated,” he says. “An employer should be able to fire an employee who fails to follow orders, plain and simple.”

Myers, however, sees the outcome as a free-speech loss for public employees. She also disagrees with Wessel’s assessment of her speech. “The speech goes from creating a ‘mini-insurrection’ to ‘petty bickering,’ ” she says. “Who knows what label will be placed on it next.

“I think public employees were disserved by this decision,” she says. “I didn’t draft the questionnaire with the thought that it would be risky to my employment. I thought it was at least implicitly authorized by Judge Waldron.” (Dennis Waldron is now a criminal court judge.)

Both Connick and Myers agree with the Supreme Court majority that speech about employees being pressured to work in political campaigns addresses a matter of public concern. They just disagree on whether such pressure was ever exerted in Connick’s office.

“That is an issue of grave public concern and is absolutely improper,” Connick says. “I can tell you that that has never happened in my office.”

Myers says she was disappointed by her firing and by the Supreme Court's decision. "I was probably more upset at being fired, particularly because I was the first person from my family to become an attorney," she says.

However, Myers holds no bitterness over the actions of Connick and Waldron.

"It is kind of ironic that we are all still around," Myers says. "When I see them, I speak and they speak. I think there is a level of mutual respect. I did what I thought was right, and I think they did what they thought was right at the time.

"I do believe that a positive outcome for me from the case is that people believe me when I say that I'm going to do something," says Myers, who works on death-penalty litigation these days. "I think people believe that I will stand up for what I believe in."

Myers' chief regret is that the case bearing her name is cited as the one that went against public employees.

### **Future of public-employee free speech**

The Supreme Court's decision in *Connick v. Myers* has been applied in different ways by lower courts. For example, many courts are divided on what constitutes a matter of public concern.

"This area of the law is very confused in the lower courts right now," attorney Goldstein says. "It is confused in no small part because of the very different factual situations that can arise and because of the very flexible standard from *Connick v. Myers*."

O'Neil, founder of the Thomas Jefferson Center for the Protection of Free Expression, agrees that "clarity is lacking in the Court's opinion. Since the decision we have had continuous confusion about what speech is a matter of public concern."

"This is a messy area of First Amendment jurisprudence," Goldstein says. "I expect that the conflicts in the lower courts will give rise to another Supreme Court case."

Connick agrees with First Amendment experts that the Supreme Court opinion is confusing. "The decision is confusing," he says. "I don't know how this case became a big First Amendment case. The main reason this employee was fired was for failing to follow an order."

Myers wants the high court to review this area of First Amendment law. "I hope to live to see it overturned," she says.

Harry Connick, the district attorney, fired Myers and said he did so because of her refusal to accept the transfer. Alleging that Connick had told her that distributing the questionnaire was an act of insubordination, Myers contended that she had been fired in violation of her First Amendment free-speech rights.

A federal district court sided with Myers, finding that the real reason for her termination was her constitutionally protected act of distributing a questionnaire about important public issues. The court determined that the questionnaire had not substantially interfered with the workings of the district attorney's office. However, the Supreme Court reversed by a 5-4 vote. Writing for the majority, Justice Byron White noted that the balancing test in the *Pickering* case controlled the analysis for public-employee speech cases.

The threshold inquiry, the Court said, was whether the employee's speech touched on matters of public concern. The majority determined that the bulk of Myers' questionnaire dealt with personal grievances rather than matters of public concern. "Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo," White wrote.<sup>38</sup>

The majority did find that the question about being pressured to work in campaigns touched on a matter of public concern because such a practice would constitute "coercion of belief in violation of fundamental constitutional rights."<sup>39</sup> Because one question related to a matter of public concern, the Court then had to balance Myers' free-speech interests against Connick's interest in maintaining an efficient workplace. "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," White wrote.<sup>40</sup>

The Court determined that Myers' questionnaire could have interfered with "close working relationships" and therefore deferred to Connick's judgment as an employer. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate," the Court held.<sup>41</sup>



In drawing a further distinction between Myers' case and earlier Court decisions, the majority noted that Myers had distributed her questionnaire at work, while Pickering's letter to the editor had been sent from home.

#### IV. *Examining the Pickering-Connick Test*

In the aftermath of *Connick*, public employees must clear two hurdles in order to state a cognizable First Amendment claim alleging they have been discharged for the content of their speech:

- They must show their speech addresses a matter of public concern.
- They must show their free-speech interests outweigh their employer's efficiency interests.

The threshold prong of this two-part test — the “public-concern” requirement — has proven to be a difficult issue for the federal courts, which have reached widely divergent conclusions. How can a court determine whether speech addresses a matter of public concern? In *Connick*, the Supreme Court wrote that a matter of public concern is speech “relating to any matter of political, social, or other concern to the community.”<sup>42</sup>

The Court explained that “whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>43</sup>

The second prong of the *Pickering-Connick* test requires courts to balance the employee's and employer's interests. The Court must weigh whether the speech in question:

- Impairs discipline or harmony among co-workers.
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary.

- Interferes with the normal operation of the employer’s business.

“Needless to say, this daunting list of factors would challenge even the most fearless judge obliged to balance the competing interests in a public-employee free speech case,” writes law professor Rodric Schoen.<sup>44</sup>

The lower courts thus differ in their application of the *Pickering-Connick* test. Schoen writes that the test “leaves lower courts to struggle, case-by-case, with the enormous variety of fact situations presented when public employees are terminated because of their speech.”<sup>45</sup>

#### **AREAS OF “PUBLIC CONCERN”**

Often the determinative legal issue in public-employee speech cases is the “public-concern” requirement. Employers frequently argue that the employee is speaking as an employee rather than as a citizen. They contend that the employee’s speech is better characterized as an expression of personal grievance than as a matter of public importance.

Indeed, some courts take a narrow view of the type of employee speech that can be said to touch on matters of public concern. As one federal appeals court explained in a recent decision:

When a public employee’s speech is purely job-related, that speech will not be deemed a matter of public concern. Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment.<sup>46</sup>

Other kinds of speech — such as those touching on corruption in the workplace or racial discrimination — do tend to be viewed by the courts as matters of public concern. For example, in *Givhan*, the Supreme Court ruled that speech about racial discrimination is inherently a matter of public concern.<sup>47</sup>

Some lower courts have cited this language to hold that speech about discrimination is always a matter of public concern. The 6th U.S. Circuit Court of Appeals wrote: “Thus, whether ... [the] racial discrimination complaint was borne of civic-minded motives or of an individual employment concern is irrelevant. What is relevant is that the subject of ... [the] ... complaint was racial discrimination — a matter inherently of public concern.”<sup>48</sup>

Just because an employee complains about discrimination, however, does not mean all courts will automatically find the speech touches on a matter of public concern. One federal appeals court characterized an employee’s complaint about sexual harassment as a private dispute rather than a matter of public concern. The appeals court came to this conclusion because the employee in question had never communicated her concerns to the public.<sup>49</sup>

Legal commentators have criticized the public-concern requirement because of its “inherent elasticity.”<sup>50</sup> One has suggested that employees can manipulate the requirement by stating “virtually any criticism of a public employer in terms that will satisfy the public concern test.”<sup>51</sup> Another summed it up this way: “The most fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what ‘public concern’ is.”<sup>52</sup>

One recent appellate court decision bluntly stated: “Analysis of public concern is not an exact science.”<sup>53</sup> Some commentators have even advocated dispensing with the public-concern requirement altogether and applying a general balancing test instead.<sup>54</sup> One proposal would redefine public concern as “speech spoken outside the scope of the speaker’s employment.”<sup>55</sup>

The public-concern requirement also requires courts to evaluate the content of speech, something the First Amendment generally forbids. Attorney Lawrence Rosenthal writes, “One other aspect of the public concern test merits concern: it does not require an employer to have any policy or standards for the types of comments for which it disciplines employees.”<sup>56</sup>

**EMPLOYER'S PREROGATIVE: CONTROL DISRUPTION, PROMOTE EFFICIENCY**

The second prong of the *Pickering-Connick* test requires the courts to balance the employee's right to free speech with the employer's interest in an efficient, disruption-free workplace.

Sometimes courts will defer to employers' judgments about the potential disruptiveness of employee speech. For example, one federal appeals court ruled in 1998 that Illinois prison officials could terminate a corrections officer for his membership in the Ku Klux Klan and his expression of a white-supremacist viewpoint in the prison.<sup>57</sup> The parties agreed that the officer's association with the Klan and advocacy of white supremacy touched on matters of public concern and thereby implicated the First Amendment. But while the officer argued that the prison could not discipline him for off-duty activities, the prison countered that his conduct was undermining discipline and creating danger in the workplace.

The federal appeals court wrote that the balance "weighs heavily" in favor of the prison, which has important interests in maintaining safety and avoiding racial violence. The appeals court also noted that the officer would himself be a "target for racially motivated violence" in a setting where the inmate population was 60% African-American or Hispanic.<sup>58</sup> The appeals court reasoned that the plaintiff's position as a sergeant weighed against him as well, because supervisory and managerial employees set examples for subordinate employees and their views are more likely to be considered reflective of the employer's views.

Similarly, the Supreme Judicial Court of Massachusetts ruled in 2000 that the state's Department of Social Services could fire an investigator for telling a racist joke at a dinner honoring retiring members of a city council.<sup>59</sup> The court noted that "a public employee has a strong interest in speaking her mind free from government sanction." However, the court reasoned that in this instance the employee's racist speech had the "clear potential" to undermine the DSS's relations with its clients and the community.<sup>60</sup>

## V. Post-Connick Decisions by the U.S. Supreme Court

### ***Rankin v. McPherson***

In 1987, the Supreme Court took on another major public-employee speech case, *Rankin v. McPherson*.<sup>61</sup> It ruled in favor of a clerical employee who had been discharged from a Texas constable's office for making a disparaging remark about then-President Reagan.

Ardith McPherson, a data-entry employee in the Harris County constable's office allegedly told a co-worker after John Hinckley Jr. shot Reagan: "If they go for him (Reagan), I hope they get him." Someone overheard the remark and told Constable Walter H. Rankin, who subsequently terminated McPherson.

The case eventually reached the Supreme Court, which sided with McPherson in a 5-4 vote.

The Court first determined that McPherson's comment "plainly dealt with a matter of public concern."<sup>62</sup> Then it proceeded to the balancing part of the *Pickering-Connick* test. The Court noted that the comment was not heard by any member of the public and was "unrelated to the functioning of the office."<sup>63</sup> The majority also focused on the fact that McPherson did not have a high-ranking job. "Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal," the Court held.<sup>64</sup>

Justice Antonin Scalia dissented. He wrote that McPherson's private statement was not simply a matter of public concern, but was "only one step removed" from an unprotected threat. Scalia also argued that a law-enforcement official should be allowed to fire an employee who advocates the killing of the president. In colorful language, he wrote:

I, for one, do not look forward to the new First Amendment world the Court creates, in which nonpolicymaking employees at the

Equal Employment Opportunity Commission must be permitted to make remarks on the job approving of racial discrimination ... and ... nonpolicymaking constable's deputies to express approval for the assassination of the President.<sup>65</sup>

***Waters v. Churchill***

While the *Pickering* and *Connick* cases established the fundamental test for public-employee speech cases, the Supreme Court still had to determine how to handle cases in which an employer and employee disagreed on what the employee had actually said. The Court addressed this question in *Waters v. Churchill* (1994).<sup>66</sup>

The case involved obstetrics nurse Cheryl R. Churchill, who was discharged from her job in a public hospital for critical comments she allegedly made in January 1987 about her supervisor to another nurse during a dinner break. Three other employees overheard the conversation.

The hospital officials who fired Churchill claimed her speech was disruptive to working relationships with her supervisor and detrimental to the interests of the obstetrics department. Churchill contended that she had never made the alleged comments. She asserted that she had merely expressed her concern about the hospital's cross-training policy in which nurses would work in different departments when their own departments were overstaffed.

After her discharge, Churchill filed an internal grievance, which was denied. The hospital interviewed some of the involved parties but did not interview two employees who confirmed Churchill's story concerning the substance of her remarks.

Churchill then sued in U.S. District Court, which also rejected her claim. The court reasoned that neither version of the conversation constituted speech on a matter of public concern. It also ruled that the speech's potential for disruption was very high.

A federal appellate court reversed, finding that Churchill's version of the conversation had indeed involved matters of public concern, such as violation of nursing regulations and compromise of patient care. The appeals court reasoned that a public employer who fails to ascertain the true nature of such disputed speech runs the risk of an improper discharge.

The Supreme Court, however, ruled 7-2 that a public employer may fire an employee for speech the employer reasonably believed was unprotected: "We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be."<sup>67</sup>

"We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information," Justice Sandra Day O'Connor wrote in her plurality opinion in 1994.<sup>68</sup>

The Supreme Court nevertheless sent the case back to the District Court because Churchill had produced enough evidence "to create a material issue of disputed fact about petitioners' actual motivation."<sup>69</sup>

Justice Scalia, in his concurring opinion, questioned the plurality opinion's potential for creating new procedural wrinkles in public-employment speech case law. "We will spend decades trying to improvise the limits of this new First Amendment procedure that is unmentioned in text and unformed by tradition," he wrote.<sup>70</sup>

Justice John Paul Stevens began his dissent by saying: "This is a free country. Every American has a right to express an opinion on issues of public concern."<sup>71</sup> Stevens warned that the Court's decision would diminish public-employees' speech rights: "Our legal system generally delegates the determination of facts upon which important rights depend to neutral factfinders."<sup>72</sup> To Stevens, a jury should determine the content of Churchill's speech. "Today's ruling will surely deter speech that would be fully protected under Pickering and Connick," he wrote.

The *Waters* case thus added an important procedural requirement to public-employee speech cases. Justice O'Connor attempted to develop a plan for

determining the true content of the speech and concluded that a court should presume that an employer’s “reasonable investigation” had correctly ascertained the true content of an employee’s speech.

While this duty of reasonable care appears to provide a certain level of protection for public employees, some believe otherwise. Professor Schoen writes:

It in fact provides less protection because the plurality has endorsed termination for employee speech that is fully protected by the First Amendment. All that an employer needs to do to justify termination for speech protected by the First Amendment is argue that it made a reasonable, good-faith mistake about what the employee said.<sup>73</sup>

In the end, says Schoen, *Waters v. Churchill* enables employers to claim that they acted in good faith in discharging an employee for speech the employee may not even have uttered.

#### **EXTENDING PROTECTIONS TO INDEPENDENT CONTRACTORS**

*Waters v. Churchill* was the last pure public-employee speech case to be decided by the Supreme Court. However, two years after that 1994 decision, the Court extended the protective umbrella of the First Amendment to independent contractors whose government contracts are terminated in retaliation for protected speech.

In *Board of County Commissioners, Wabaunsee County v. Umbehr* (1996),<sup>74</sup> a Kansas county terminated the contract of garbage hauler Keen Umbehr for criticizing the county board at public meetings and in the newspaper. The board argued that because Umbehr was not a public employee, he had no First Amendment right to protest the termination of his contract.

O’Connor and six other justices disagreed, finding that such a rule would give government free rein to fire independent contractors for speech with which the



public officials disagreed. O'Connor wrote: "The bright-line rule proposed by the Board and the dissent [no protection for independent contractors] would give the government carte blanche to terminate independent contractors for exercising First Amendment rights."<sup>75</sup>

## VI. Retaliation Cases

In many public-employee First Amendment cases, the reason for the employer's disciplinary action against the employee is in dispute. While the employee alleges that the action was taken in direct response to speech critical of the employer, the employer counters that the action was taken for an entirely different reason, one not infringing on the employee's constitutional rights.

In *Mt. Healthy City Board of Ed. v. Doyle*,<sup>76</sup> discharged teacher Fred Doyle alleged that he had been fired from his teaching position in retaliation for having called a radio station about the adoption of a new dress code for teachers. The school board admitted that it had fired Doyle in part for contacting the station. However, the board also cited other instances that it said contributed to the decision, including Doyle's making an obscene gesture at two female students who would not obey his orders, calling some students who didn't listen to him "sons of bitches" and arguing with another teacher in a dispute that turned physical.

A U.S. District Court determined that Doyle had proven his constitutionally protected conduct in contacting the radio station on a matter of public concern was a "substantial" or "motivating" factor in the decision to discharge him. An appellate court affirmed this finding.

On appeal, the Supreme Court in 1977 accepted the District Court's finding that Doyle's speech was protected by the First Amendment. However, it also determined that the lower court "should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."<sup>77</sup>

Thus an employer may raise a “*Mt. Healthy* defense” — contending that it would have taken the same action against the employee even if the employee had not engaged in any constitutionally protected speech.

In summary, a public employee currently must make four showings in order to pursue a successful First Amendment retaliation suit. The plaintiff must show:

- (1) That he or she has suffered an adverse employment action. Of course, firings or demotions would qualify. But a transfer without a drop in benefits and salary or significant diminishment of responsibility might not.
- (2) That the speech in question touched on a matter of public concern.
- (3) That his or her free-speech interest trumps the employer’s interest in maintaining an efficient workplace.
- (4) That the First Amendment-protected speech was a substantial or motivating factor in the employer’s decision to take the adverse action. The employer could then make the so-called *Mt. Healthy* defense by arguing that the same adverse employment action would have been taken even if the employee had not spoken on a matter of public concern.

Lower courts are divided as to what constitutes “retaliation.” Some have determined that employers may take action against a public employee for his or her speech so long as the action does not rise to the level of a dismissal, demotion or transfer.<sup>78</sup>

The *Mt. Healthy* decision has provided public employers with more leeway in regulating public-employee speech. As law professor Michael Wells has pointed out, “Employers in retaliation cases often find some evidence of insubordinate behavior or can point to some other grounds for the action taken, and they have had a fair amount of success in showing that a permissible motive, and not the protected speech, was the cause in fact of the dismissal.”<sup>79</sup>

Partly for this reason, Wells argues that the Court should reexamine *Mt. Healthy* to provide greater protection for public employees' free-speech interests in retaliation cases.<sup>80</sup>

## VII. Political Patronage Cases

Generally, government employees may not be discharged or punished as a result of their affiliation with a political party. In patronage cases, however, employers assert that rewarding politically loyal employees with jobs ensures an efficient, effective government. Others counter that to deny someone a government job because of his or her political associations violates the First Amendment and the doctrine of unconstitutional conditions.

The Supreme Court established the conditions under which a public employee may be fired because of political affiliation in a trilogy of cases: *Elrod v. Burns* (1976),<sup>81</sup> *Branti v. Finkel* (1980)<sup>82</sup> and *Rutan v. Republican Party* (1990).<sup>83</sup> As determined in these cases, public employees may not be fired because of their political affiliation unless “party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>84</sup>

### ***Elrod v. Burns***

In *Elrod*, the newly elected Cook County, Ill., sheriff, Richard Burns — a Democrat — in December 1970 fired or threatened to fire several non-civil-service employees (employees not protected by statute or regulation from arbitrary discharge) because they were Republicans. The employees included a chief deputy, a bailiff and a process server.

Political patronage in the United States has a history that dates at least to the days of Thomas Jefferson, although as the Supreme Court has recognized, the practice achieved prominence during the presidency of Andrew Jackson, who adhered to the principle of “to the victor belong the spoils.”

In its 1976 decision in *Elrod*, the Court majority reasoned that the practice of political patronage infringes on public employees’ political beliefs and associations — core values protected by the First Amendment. Because of this, the Court determined that in order to pass constitutional muster, the patronage “must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.”<sup>85</sup>

However, the high court also created a “policymaking employee” exception, saying that employees in policymaking positions could be dismissed for political reasons due to strong governmental interest in the political loyalty of such employees. But how does one determine whether an employee is a policymaking employee? The Court in *Elrod* recognized this difficulty, writing that “no clear line can be drawn” but that “the nature of the responsibilities is crucial.”<sup>86</sup>

“In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals,” the Court decided.<sup>87</sup>

***Branti v. Finkel***

In *Branti*, the Supreme Court ruled 5-4 in 1980 that two assistant public defenders in a New York county could not be discharged solely because they lacked the proper political affiliation. (They were Republicans, and the newly elected public defender was a Democrat).

Lower courts had asked whether the assistant public defenders were the type of policymaking, confidential employees who can be discharged because of their political affiliation. The Supreme Court broadened the inquiry beyond the *Elrod* test, writing: “In sum, the ultimate inquiry is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>88</sup>

The Court did not offer much by way of explaining how to resolve such a formulation. Perhaps that is why Justice Lewis F. Powell Jr. in his dissent referred to the decision as “vague” and “certain to create vast uncertainty.”<sup>89</sup>

In 1996, however, the 6th Circuit in *McCloud v. Testa*<sup>90</sup> offered four categories of positions that would fall under the *Elrod-Branti* exception:

- Category One: Positions specifically named in relevant federal, state, county or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted.
- Category Two: Positions to which a significant portion of the total discretionary authority available to Category One position holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction’s pattern or practice the same quantum or type of discretionary authority commonly held by Category One positions in other jurisdictions.
- Category Three: Confidential advisers who spend a significant portion of their time on the job advising Category One or Category Two position holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to Category One positions, Category Two positions or confidential advisers.
- Category Four: Positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different government agencies or bodies.<sup>91</sup>

***Rutan v. Republican Party of Illinois***

In 1980, then-Gov. James Thompson of Illinois instituted a hiring freeze and subjected state-employment decisions to agency review. Several state employees,

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including a rehabilitation counselor, a road-equipment operator and a prison guard, sued, claiming that the governor's decree amounted to a political patronage system in violation of *Elrod* and *Branti*.

The case eventually reached the U.S. Supreme Court, which issued a sharply divided opinion in *Rutan* in 1990. In a 5-4 decision, the Court extended the *Elrod-Branti* precedent to promotions, transfers, recalls or hiring decisions. Writing for the majority, Justice Brennan began with the phrase: "To the victor belong only those spoils that may be constitutionally obtained."<sup>92</sup>

The Court rejected the argument that only employment decisions that were "the substantial equivalent of a dismissal" were subject to the *Elrod-Branti* test. "Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected," the Court said. "They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder."<sup>93</sup>

In dissent, Justice Scalia wrote that the majority opinion "may well have disastrous consequences for our political system."<sup>94</sup> He noted that patronage has a long history in this country, adding: "The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives."<sup>95</sup>

Whether the contemporary Supreme Court would overrule the *Rutan* decision remains an intriguing question. The four dissenters in *Rutan* — Scalia, Rehnquist, Kennedy and O'Connor — remain on the Court, while Stevens is the only member left from the majority. However, First Amendment expert O'Neil believes the current Court would be reluctant to undo the decision because of a desire to adhere to precedent.<sup>96</sup>

As further evidence that *Rutan* likely will stand, O'Neil cites *O'Hare Truck Service, Inc. v. City of Northlake*.<sup>97</sup> In that 1996 decision, the high court ruled that Northlake, Ill., city officials could not remove a tow-truck independent contractor from their rotation list just because the company's owner refused to politically support the new mayor. "Independent contractors, as well as public employees, are

entitled to protest wrongful government interference with their rights of speech and association,” Justice Kennedy wrote for a seven-member majority.<sup>98</sup>

Lower courts have varied in their application of this patronage line of cases. Writes law professor Cynthia Grant Bowman, “Many plaintiffs lose patronage cases when the courts find their positions to be policymaking.”<sup>99</sup> Furthermore, lower courts remain divided on what constitutes a “policymaking employee.” Nor do they agree on how to apply the patronage line of cases in concert with the normal *Pickering-Connick* line of cases.

Take the example of a nonpolicymaking employee who is discharged for what the employer deems to be disruptive speech. While the employee could not be discharged under the *Elrod* line of cases (because the employee is a nonpolicymaking employee), the employee could still be fired under the *Connick* balancing test. “At the very least, it vastly complicates litigation concerning policymakers if that categorical determination does not end the case,” Bowman writes.<sup>100</sup>

“In sum, two competing standards may apply to the same case, presenting obvious problems for the courts and requiring Supreme Court direction,” she writes.<sup>101</sup>

## VIII. Conclusion

The sheer number of public employees shows the importance of ensuring that First Amendment rights are a living reality rather than abstract theory for government workers. The Supreme Court long ago dismissed the notion that employees forfeit their constitutional protections when they enter the public workplace.

All employers, including public ones, wield great power over their employees. If an employee fears being disciplined for speaking out on matters of public concern, he or she may well keep quiet. Yet the fundamental purpose of the First Amendment is to ensure that “debate on public issues ... be uninhibited, robust and wide-open.”<sup>102</sup>

As Justice Brennan once stated: “The constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements expressing criticism of governmental officials.”<sup>103</sup>

Public employees can contribute greatly to that civic debate. They are uniquely situated to speak out on important issues of which the average citizen is unaware. When public employees speak as citizens rather than as disgruntled workers, courts must respect their free-speech interests.

Justice O’Connor recognized this point when she wrote that “government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”<sup>104</sup>

This same principle applies in retaliation and patronage cases. When a public employer retaliates against an employee simply because it dislikes the content of his or her speech, other employees are discouraged from making comments that could be interpreted as critical. When a public employer disciplines a nonpolicymaking employee because he or she supported a certain candidate or belongs to a certain political party, First Amendment free-association rights become meaningless to that worker.

Government agencies must be particularly loath to terminate an employee for public speech unrelated to the job.<sup>105</sup> Disciplining a public employee for writing a letter to the editor as a citizen concerned about a political issue raises clear First Amendment questions. When a public employee speaks about an important issue unrelated to the job, he or she should retain the same constitutional protections afforded the average citizen. Justice Brennan recognized this point when he wrote in his dissenting opinion in *Connick* that the *Pickering* balancing test “comes into play only when a public employee’s speech implicates the government’s interests as an employer.”<sup>106</sup>

While public employers must be able to ensure a productive and efficient workplace, as government entities they also are duty-bound to respect the Bill of Rights.



## Endnotes

- <sup>1</sup> 483 U.S. 378 (1987).
- <sup>2</sup> U.S. Dept. of Commerce, *Statistical Abstract of the United States* 330 (120 ed. 2000)(Table No. 525).
- <sup>3</sup> *Victor v. McElveen*, 150 F.3d 451 (5th Cir. 1998).
- <sup>4</sup> *Pereira v. Commissioner of Social Services*, 432 Mass. 251, 733 N.E.2d 112 (2000).
- <sup>5</sup> *Clark v. City of Tucson*, 2000 U.S. App. LEXIS 23326 (9th Cir. 2000).
- <sup>6</sup> *Brown v. Armenti*, 247 F.3d 69 (3rd Cir. 2001).
- <sup>7</sup> *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001).
- <sup>8</sup> *Sowards v. Loudoun County*, 203 F.3d 426 (6th Cir. 2000).
- <sup>9</sup> *Waters v. Churchill*, 511 U.S. 661 (1994).
- <sup>10</sup> *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).
- <sup>11</sup> *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).
- <sup>12</sup> Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U.L. Rev. 223, 297 (2000).
- <sup>13</sup> 155 Mass. 216, 29 N.E. 517 (1892).
- <sup>14</sup> *Id.* at 517.
- <sup>15</sup> *Lewis v. City of Omaha*, 153 Neb. 11, 43 N.W.2d 419 (1950).
- <sup>16</sup> 125 Cal. App. 2d 100, 270 P.2d 82 (1954).
- <sup>17</sup> *Id.* at 105.
- <sup>18</sup> 88 Cal. App. 2d 481, 199 P.2d 429 (1948).
- <sup>19</sup> *Id.* at 490; *Id.* at 434.
- <sup>20</sup> 342 U.S. 485 (1952).
- <sup>21</sup> *Id.* at 385.
- <sup>22</sup> 385 U.S. 589 (1967).
- <sup>23</sup> *Id.* at 595.
- <sup>24</sup> *Id.* at 600.
- <sup>25</sup> *Id.* at 605-606, quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2nd Cir. 1966).
- <sup>26</sup> 391 U.S. 563 (1968).
- <sup>27</sup> *Id.* at 568.
- <sup>28</sup> *Id.* at 569.
- <sup>29</sup> *Id.* at 574.
- <sup>30</sup> Robert M. O'Neil, *The Rights of Public Employees* (Carbondale, Ill.: Southern Illinois University Press, 1993)(2nd ed.), p. 34.
- <sup>31</sup> *Id.*
- <sup>32</sup> 408 U.S. 593 (1972).
- <sup>33</sup> 439 U.S. 410 (1979).
- <sup>34</sup> 408 U.S. at 597.
- <sup>35</sup> Interview with Robert Sindermann, 4/27/01.
- <sup>36</sup> 439 U.S. at 415-416.
- <sup>37</sup> 461 U.S. 138 (1983).
- <sup>38</sup> *Id.* at 148.
- <sup>39</sup> *Id.* at 149.
- <sup>40</sup> *Id.* at 150.
- <sup>41</sup> *Id.* at 151.
- <sup>42</sup> *Connick*, 461 U.S. at 146.
- <sup>43</sup> *Id.* at 147-148.
- <sup>44</sup> Rodric Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 Tex. Tech L. Rev. 5, 30 (1999).
- <sup>45</sup> *Id.* at 24.

# FIRST REPORTS

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- <sup>46</sup> *Buazard v. Meredith*, 172 F.3d 546, 548 (8th Cir. 1999).
- <sup>47</sup> 439 U.S. 410 (1979).
- <sup>48</sup> *Perry v. McGinnis*, 209 F.3d 597, 608 (6th Cir. 2000).
- <sup>49</sup> *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993).
- <sup>50</sup> Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 John Marshall L. Rev. 121, 125 (1996).
- <sup>51</sup> Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 Hastings Const. L.Q. 529, 556 (1998).
- <sup>52</sup> D. Gordon Smith, *Beyond 'Public Concern': New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249, 258 (1990).
- <sup>53</sup> *Weeks v. Bayer*, 246 F.3d 1231 (9th Cir. 2001).
- <sup>54</sup> Ma at p. 138.
- <sup>55</sup> Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 Vand. L. Rev. 993, 996 (1997).
- <sup>56</sup> Rosenthal at p. 557.
- <sup>57</sup> *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998).
- <sup>58</sup> Id. at 1143.
- <sup>59</sup> *Pereira v. Commissioner of Social Services*, 432 Mass. 251, 733 N.E.2d 112 (2000).
- <sup>60</sup> Id. at 263.
- <sup>61</sup> 483 U.S. 378 (1987).
- <sup>62</sup> Id. at 386.
- <sup>63</sup> Id. at 389.
- <sup>64</sup> Id. at 390-391.
- <sup>65</sup> Id. at 400-401 (J. Scalia, dissenting).
- <sup>66</sup> 511 U.S. 661 (1994).
- <sup>67</sup> Id. at 677 (J. O'Connor, plurality).
- <sup>68</sup> Id. at 679.
- <sup>69</sup> Id. at 681.
- <sup>70</sup> Id. at 694 (J. Scalia, concurring).
- <sup>71</sup> Id. at 694 (J. Stevens, dissenting).
- <sup>72</sup> Id. at 696.
- <sup>73</sup> Schoen at p. 39.
- <sup>74</sup> 518 U.S. 668 (1996).
- <sup>75</sup> Id. at 679-680.
- <sup>76</sup> 429 U.S. 274 (1977).
- <sup>77</sup> Id. at 287.
- <sup>78</sup> *Lybrook v. Members of the Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1340 (10th Cir. 2000).
- <sup>79</sup> Michael Wells, *Three Arguments Against Mt. Healthy: Tort Theory, Constitutional Torts and Freedom of Speech*, 51 Mercer L. Rev. 583, 598 (2000).
- <sup>80</sup> Id. at pp. 600-601.
- <sup>81</sup> 427 U.S. 347 (1976).
- <sup>82</sup> 445 U.S. 507 (1980).
- <sup>83</sup> 497 U.S. 62 (1990).
- <sup>84</sup> *Branti*, 445 U.S. at 518.
- <sup>85</sup> 427 U.S. at 363.
- <sup>86</sup> Id. at 367.
- <sup>87</sup> Id. at 368.
- <sup>88</sup> 445 U.S. 507, 518 (1980).
- <sup>89</sup> Id. at 524 (J. Powell, dissenting).
- <sup>90</sup> 97 F.3d 1536 (6th Cir. 1996).
- <sup>91</sup> Id. at 1557.
- <sup>92</sup> *Rutan*, 497 U.S. at 64.

## BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH

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<sup>93</sup> Id. at 73.

<sup>94</sup> Id. at 94 (J. Scalia, dissenting).

<sup>95</sup> Id. at 104.

<sup>96</sup> Telephone interview with Robert O'Neil, 5/10/01.

<sup>97</sup> 518 U.S. 712 (1996).

<sup>98</sup> Id. at 723.

<sup>99</sup> Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & Politics 341, 347 (1996).

<sup>100</sup> Id. at p. 354.

<sup>101</sup> Id. at p. 355.

<sup>102</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>103</sup> *Connick*, 461 U.S. at 162 (J. Brennan, dissenting).

<sup>104</sup> *Waters v. Churchill*, 511 U.S. at 674.

<sup>105</sup> Smith at p. 276.

<sup>106</sup> 461 U.S. at 157



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 peaceably to assemble, and to petition the Government for a redress of grievances.

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