CITY OF SAN DIEGO v. ROE - OR HOW A SAN DIEGO POLICE OFFICER'S VIDEOTAPED STRIPTEASE AND MASTURBATION LED TO THE RESTORATION OF THE TWO-STEP *PICKERING/CONNICK* TEST IN ASSESSING GOVERNMENT WORKER'S FREEDOM OF EXPRESSION

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The naked truth . . . is that the Constitution's free speech guarantee doesn't protect a police officer who used the Internet to sell videotapes of himself stripping off his uniform and pretending to write tickets.[1]

In its recent, per curiam decision in *City of San Diego v. Roe*,[2] the U.S. Supreme Court revisited the constitutionality of restrictions imposed on the First Amendment rights of public sector employees, and clarified the test that is employed to balance the rights of the government worker to engage in speech concerning matters of public concern, and the obligation of the government as employer to promote efficiency in the performance of public services.[3] In doing so, the Court appears to have both narrowed the scope of matters of public concern and broadened the nexus between the proffered speech and the government workplace, thereby significantly strengthening the hands of government agencies in restricting the speech of their employees.

(1) Striptease expression and matters of public concern: the threshold inquiry.

In *City of San Diego v. Roe*,[4] the U.S. Supreme Court ruled that the City of San Diego could fire John Roe, a member of the San Diego police force, for selling on the adults-only section of eBay videotapes showing himself stripping off a police uniform and masturbating.[5] While the uniform removed in the videotape was not a San Diego police uniform, Roe identified himself as law enforcement officer, employed the user name "Codestud3@aol.com," a variation of a high priority police radio call, and sold custom videos, police equipment, and official uniforms of the San Diego Police Department on his website.[6]

Roe's police sergeant discovered Roe's entrepreneurial activities, when he came across an official San Diego Police Department uniform offered for sale on eBay by an individual with the user name Codestud3@aol.com.[7] Investigating further, the police sergeant discovered listings for Roe's videotapes, recognized Roe's picture, printed pictures of Roe's proffered wares, and shared them with his and Roe's police captain.[8] The police captain alerted San Diego Police Department's internal affairs office, which initiated its own investigation.[9] As part of that investigation, an undercover officer ordered, and Roe produced and sold, a custom video showing Roe in a police uniform writing a traffic ticket, but revoking it after undoing the uniform and masturbating.[10] Concluding that Roe's activities violated police department policies, the San Diego Police Department ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials . . . via the internet, U.S. mail, commercial vendors or distributors, or any other medium available to the public."[11] Discovering that Roe continued to offer his two videos and other custom videos for sale, the San Diego Police Department initiated termination proceedings, which resulted in Roe's being fired from the police force.[12]

Roe initiated a lawsuit under Rev. Stat. § 1979, 42 U.S.C. § 1983 in Federal District Court, alleging that the termination of his employment as a San Diego police officer violated his First Amendment right to free speech.[13] Ruling that Roe failed to demonstrate his entrepreneurial activities qualified as speech related to a matter of public concern, the District Court entered summary judgment in favor of the City of San Diego.[14] The Ninth Circuit Court of Appeals reversed the District Court, and ruled that Roe's activities were expressive conduct that took place while he was off-duty and outside the workplace, was unrelated to his employment responsibilities, and fell within the protected realm of citizen comment on matters of public concern.[15]

In its per curiam opinion reversing the decision of the Ninth Circuit, the U.S. Supreme Court concluded that Roe's activities not only directly related to his employment but were injurious to the "legitimate and substantial interests" of the San Diego Police Department.[16] Because Roe's activities directly related to the government workplace, the Court determined that it was necessary to employ the two-step process established in *Pickering v. Board of Education*[17] and refined in *Connick v. Myers*[18]: (1) ascertaining whether the public employee's speech touch on a matter of "public concern,"[19] and, if so, (2) balancing the interests of the public employee as a citizen to comment on matters of public concern and the interest of the government in promoting the efficiency of public services provided through its employees.[20]

In order to ascertain whether the public employee's speech concerns matters of public concern, the U.S. Supreme Court applied the same standard used in common law invasion of privacy actions: "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of the publication."[21] Applying that standard to the speech undertaken by Roe, the Court "had no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test."[22] Because the first step in the *Pickering* test was answered in the negative, the balancing provision in the second step need not be considered.[23] Having concluded that Roe's speech was detrimental to the San Diego Police Department and was not a mater of public concern, the Court reversed the judgment of the Court of Appeals.[24]

In order to better understand the impact of *City of San Diego v. Row*, two lines of cases should be reviewed. The first line of cases addresses government regulations that restrict the right of government employees to speak on matters of public concern, and the second line of cases examines the decision to fire public sector employees who exercise their right to speak on matters of public concern.

(b) Government regulations restricting government worker speech on matters of public concern.

The leading case in the first category is *United States v. National Treasury Employees Union*,[25] in which the U.S. Supreme Court struck down Section 501(b) of the Ethics in Government Act of 1978, which prohibited federal government workers from accepting honoraria for making speeches or publishing articles.[26] In *NTEU* several career, government workers employed full-time in various executive agencies and departments challenged the constitutionality of the honoraria ban.[27] A mail handler who was paid modest fees for lectures on the Quaker religion, an aerospace engineer who received $100 payments for speeches on black history, a microbiologist who earned almost $3,000 per year for writing articles and making broadcast appearances reviewing dance performances, and a tax examiner who received similar pay for articles on the environment, claimed that the honoraria ban wrongfully deprived them of compensation for their expressive activities.[28]

Recognizing that the ban on honoraria was designed to promote the integrity of, and public confidence in, the federal government, the Federal District Court nonetheless ruled that, with respect to career civil employees below grade GS-16, the statute restricted more speech than was necessary and improperly permitted some forms of speech and not others.[29] The Court of Appeals for the District of Columbia affirmed, holding that the objective of promoting the integrity and efficiency of public service and avoiding the appearance of impropriety was not advanced by the substantial burden on speech,[30] that the statute improperly failed to consider the lack of any connection between the restrained speech and the government employee's job responsibilities,[31] and that the government failed to justify the burden on speech imposed by the ban on honoraria.[32]

The U.S. Supreme Court, determining the benefits of the honoraria ban were insufficient to justify the restraint on the government workers' right to engage in expressive activities, affirmed.[33] Citing the literary contributions of Nathaniel Hawthorne, Herman Melville, Walt Whitman and Bret Harte, all of whom wrote for publication in their spare time while employed by the federal government,[34] the Court acknowledged that the government workers who challenged the ban on honoraria also sought compensation for their expressive work undertaken in their role as citizens, rather than as government employees.[35] Noting that the content of their speech had nothing to do with either their jobs or the efficiency of the offices in which they worked,[36] that their audience was the general public not co-workers or supervisors,[37] and that their speech concerned matters of public concern (rather than employee comments related to their workplace),[38] the Court ruled that the government provided no evidence of misconduct related to the honoraria received by government workers below grade GS-16,[39] incorrectly assumed that giving honoraria to "federal employees below grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles," created an appearance of impropriety,[40] and failed to establish any connection between the honoraria ban and workplace efficiency.[41] Because the heavy burden imposed on the government worker's expressive activities could not be justified by the speculative benefits claimed by the government from the honoraria ban, the Court ruled that Section 501(b) violates the First Amendment with respect to those employees of the Executive Branch below grade GS-16.[42]

The U.S. Supreme Court decision in *NTEU* stands in dramatic contrast to its prior decision in *Civil Service Comm'n v. Letter Carriers*,[43] in which the Court ruled that the 1939 Hatch Act prohibiting government workers from engaging in partisan political activities was constitutional.[44] In upholding the Hatch Act, the Court relied on a century-long, indisputable recognition "that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited."[45] Restricting federal government workers from engaging in partisan political activities insures significant benefits: (1) government employees will "administer the law in accordance with the will of congress, rather than in accordance with their own or the will of a political party,"[46] (2) government employees will impartially execute the laws if they do not hold formal positions in political parties, do not play substantial roles in partisan political campaigns, and do not run for office on partisan political tickets,[47] (3) public perception that government employees are undertaking activities for political gain will be avoided,[48] (4) government employees will be free from political pressure to act in a particular way, and can perform their duties in accordance with their own judgment and belief to advance in government service rather than to curry political favor,[49] and (5) the federal government's workforce will not be converted into "a powerful, invincible, and

perhaps corrupt political machine."[50] Accordingly, the Court ruled that "plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited."[51] Doing so preserves the government worker's rights, and combats the "demonstrated ill effects" of partisan political activities in the government workplace.[52]

It appears, then, that the government cannot prohibit its career civil service employees from earning honoraria for speech activities that are unrelated to the employees' job responsibilities, do not affect their job performance or workplace, are directed to the general public rather than co-workers or supervisors, and deal with topics irrelevant to their job responsibilities and workplace. On the other hand, the government may prohibit its employees from engaging in political or speech activities if those activities interfere with the meritorious performance of their job responsibilities, threaten the efficiency of the government workplace, undermine the impartiality and independence of government workers in performing their responsibilities, or create the perception that government employees are acting in their own interest rather than the interest of the public.

(c) Firing government workers for engaging in speech on matters of public concern.

The second line of cases that clarifies the impact of *City of San Diego v. Roe* involves the firing public sector employees for exercising their right to speak on matters of public concern. Seven such cases warrant discussion. First, in *Keyishian v. Board of Regents*,[53] the U.S. Supreme Court struck down a New York statute that disqualified members of the Communist party for employment in the public schools or state government, and required the removal of those who advocate or teach doctrine of forcible overthrow of government from such employment.[54] While acknowledging the legitimacy of the interest of New York in protecting its education system from subversion,[55] the Court concluded that the "complicated plan" and "intricate administrative machinery for its enforcement"[56] - particularly the annual review of all teachers to insure that they had made no utterance inside or outside the classroom that might be deemed subversive, including the writing of papers, distribution of pamphlets, endorsement of speeches or articles, or failure to report any teacher who may be guilty of subversive activity[57] - broadly stifled fundamental personal liberty when far narrower means of achieving the goal of keeping subversives out of the teaching ranks could have been employed.[58] Because the draconian approach employed by New York excessively constrained speech, the Court ruled it was unconstitutional under the First Amendment:

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. For the threat of sanctions may deter almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. (citations and internal quotation marks omitted)

Notably, in striking down the anti-subversion statute, the Court acknowledged that government workers do not necessarily relinquish their freedom of expression by virtue of their public employment, and that those freedoms may be infringed by the threat of denial of such employment.[59] That language became a recurring theme in the remaining six cases discussed below.

About sixteen months later, in *Pickering v. Board of Education*,[60] the U.S. Supreme Court ruled that firing a high school teacher for writing and sending a letter critical of the Board of Education and the district superintendent of schools to a local newspaper violated the First Amendment.[61] The letter in question, published in the midst of a campaign by the Board and the superintendent to encourage the approval of a tax increase to fund educational programs of the Township High School District in Will County, Illinois,[62] criticized the manner in which the Board and superintendent handled prior proposals to raise school district revenues and allocated financial resources between educational and athletic programs.[63] The Board fired Pickering for writing and publishing the letter, and, pursuant to Illinois law, conducted a hearing on the dismissal.[64] Affirming its decision to fire Pickering, the Board concluded that statements in the letter were false, impugned the reputations of Board members and the school administration, and fomented controversy and conflict among the teachers, administrators and Board members.[65] Pickering's dismissal from his teaching position was subsequently upheld by the Illinois Supreme Court.[66]

The U.S. Supreme Court reversed the Illinois Supreme Court.[67] Noting initially that the state's interest in regulating the speech of its employees differs significantly from the state's interest in regulating the speech of its citizens, the Court emphasized that a balance must be achieved between the right of the teacher as a citizen in commenting on public issues and the interest of the government as an employer in promoting efficiency in public services through its employees.[68] Examining the statements contained in the published letter, the Court noted that, while they questioned the need for additional tax revenues, they were not directed toward any individuals with whom Pickering worked on a daily basis and hence could not affect either discipline or harmony among coworkers.[69] Further, because Pickering did not have a close working relationship with either the Board or the superintendent, the Court questioned whether his comments breached or strained their interactions as claimed by the Board.[70] Likewise, because Pickering's comments on matters of public concern were "substantially correct," the Court rejected the Board's position that they furnished valid grounds for his dismissal.[71]

Moreover, the Court emphasized that the questions raised by Pickering in his letter related to matters of public concern that are best resolved through free and open debate, and that Pickering, as a teacher in the school district, likely formulated, and should not be prohibited from providing, a relevant opinion about the manner in which school funds should be expended.[72] Finally, the Court noted that, while Pickering's statements were critical of his ultimate employer, they had no negative impact on the performance of his daily duties as a teacher or the operations of the high school,[73] and consequently should be treated no differently than comments of members of the general public.[74] More particularly, "absent proof of false statements knowingly or recklessly made by him, 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."[75]

Pickering provides significant First Amendment protection to government employees by focusing on several key inquiries: whether the speech in question was directed to individuals which whom, or under whose supervision, the employee worked; whether the speech impacted either the discipline of, or harmony among, government workers; whether the speech has a negative impact on the performance of government workers' daily responsibilities; and whether the speech is related to, and provides relevant information about, topics best resolved by free and open debate. More particularly, to the extent the employee's speech contributes to debate about issues of public concern without negatively impacting the government workplace or operations, it should be permitted; in contrast, to the extent the employee's speech interferes with efficient delivery of public services by the government agency or department and fails to contribute to public debate about issues of public concern, it can be restrained.

A similar result was achieved in *Perry v. Sindermann*.[76] Having taught in the state college system of the State of Texas for ten years, Robert Sindermann was elected president of the Texas Junior College Teachers Association for the 1968-1969 academic year, and in that capacity left his teaching duties at Odessa Junior College on several occasions to testify before committees of the Texas Legislature,[77] during which he expressed publicly his disagreement with the policy of the Board of Regents not to elevate Odessa Junior College to four-year status.[78] In May 1969, Sindermann's one-year employment contract ended, and the Board of Regents voted not to offer him a new contract for the next academic year.[79] While a press release issued by the Regents cited Sindermann's insubordination as the cause of his nonrenewal, they provided him with no official statement explaining and failed to provide a hearing in which he could protest his nonrenewal.[80]

Sindermann brought an action in the Federal District Court claiming his nonrenewal was based on his criticism of the policies of the Board of Regents and violated his right to free speech.[81] The Federal District Court concluded that Sindermann failed to state a cause of action against the Odessa Junior College, because his employment contract ended on May 31, 1969, Odessa Junior College had not adopted a tenure system, and Sindermann has no expectation his employment contract would be renewed for the next academic year.[82] The Court of Appeals reversed the decision of the Federal District Court, because issues of fact regarding the reasons for Sindermann's nonrenewal existed, and because Sindermann should be provided the opportunity to demonstrate he had an expectation of re-employment.[83]

The U.S. Supreme Court determined that the lack of a tenure system did not defeat Sindermann's claim that the termination of his employment contract violated the First Amendment.[84] Rather, "[Sindermann's] lack of a contractual or tenure 'right' to re-employment . . . is irrelevant to his free speech claim,"[85] and "the nonrenewal of [his] one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights."[86] Because there were a genuine issues of fact regarding the reasons Sindermann's was fired[87] - perhaps as a reprisal for the exercise of his constitutional rights in testifying before the legislative committees[88] - and because the record demonstrated that Odessa Junior College had a *de facto* tenure program under which there was an expectation of contract renewal "as long as teaching services are satisfactory,"[89] the U.S. Supreme Court ruled that the granting of summary judgment against Sindermann was improper.[90] Hence, *Perry v. Sindermann*, like *Pickering*, holds that a teacher in a public institution cannot be denied a one-year renewal of his or her employment contact solely because the teacher exercised his or her First Amendment right to express opinions on an issue of public concern

Pickering and *Perry* having established that a public employee cannot be fired solely because of his expressive activities when there is no negative impact on the government workplace, the logical next step was whether a public employee can be fired because of his political beliefs as manifested in an affiliation with a political party. This precise question was resolved in *Branti v. Finkel*,[91] in which two Rockland County assistant public defenders brought a civil rights action based on allegations they were fired from their jobs because they were Republicans.[92] The Federal District Court found that the two assistant public defenders were fired from their jobs solely because they were Republicans and did not have Democratic sponsors[93]; that they were competent attorneys who had performed their responsibilities as assistant public defenders satisfactorily[94]; and that the assistant public defenders did not occupy policy making positions in which political affiliation plays an important role.[95] Ruling that the termination of the two public defenders' employment violated their First Amendment rights,[96] the Federal District Court issued a permanent injunction prohibiting the Public Defender of Rockland County from terminating their employment "upon the sole grounds of their political beliefs,"[97] The Second Circuit Court of Appeals affirmed.[98]

In affirming the Second Circuit, the U.S. Supreme Court emphasized the similarity between being fired for expressing views and being fired for possessing beliefs:

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis,

> unless the government can demonstrate an overriding interest of vital importance, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment. (citations and internal quotation marks omitted.)[99]

The U.S. Supreme Court also rejected the argument that, as long as the assistant public defenders were not discharged from their employment because they refused to change political parties or contribute to or work for the party's candidates, the public defenders could be fired with impunity: "[T]here is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. To prevail in this type of action, it is sufficient . . . for respondents to prove that they were discharged solely for the reason that they were not affiliated with or sponsored by the Democratic Party."[100]

Clearly *Pickering*, *Perry* and *Branti* stand for the proposition public employees cannot be fired for expressing their views on issues of public concern or their political affiliation when those expressed views and political beliefs have little or no impact on the public workplace: Pickering's published letter did not interfere with his high school teaching activities; Sindermann's public testimony advocating the conferral of four-year status on his junior college did not impede his classroom instruction; and the assistant public defenders' political beliefs played no role in their ability to advocate for their clients.

A far different issue is presented, however, when the views advocated by the public employee have a potentially negative effect on the government workplace, as occurred in *Connick v. Myers*.[101] In *Connick*, the District Attorney of New Orleans proposed to transfer an Assistant District Attorney from one section of the criminal court to another, requiring her to prosecute different criminal matters.[102] The Assistant District Attorney objected to the transfer and, in an effort to bolster her position, developed and distributed to fifteen assistant district attorneys a questionnaire designed to solicit their views concerning the transfer policy, office morale, confidence in supervisors, the need for a grievance committee, and pressure to work in political campaigns.[103] When the District Attorney learned of the questionnaire, he fired the Assistant District Attorney, because she refused to accept the transfer and because he considered her distribution of the questionnaire an act of insubordination.[104] The discharged Assistant District Attorney filed suit under 42 U.S.C. § 1983, alleging her employment termination improperly infringed on her right to free speech.[105] The Federal District Court concluded that the Assistant District Attorney was fired because of the questionnaire, that the questionnaire involved matters of public concern, and that the state had not demonstrated that the survey interfered with the operations of the District Attorney's office.[106] It ordered her reinstated to her job, and awarded her backpay, damages and attorney's fees.[107] The Court of Appeals for the Fifth Circuit affirmed, and the District Attorney appealed to the U.S. Supreme Court.[108]

The U.S. Supreme Court framed the issues presented as seeking "a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[109] The first step in ascertaining how to balance the two interests is to establish whether the government employee's speech addresses a matter of public concern.[110] This is "determined by the content, form, and context of a given statement, as revealed by the whole record."[111] Applying this test to the speech of the fired Assistant District Attorney, the Court concluded that her speech "with one exception" failed to "fall under the rubric of matters of public concern."[112] More particularly, the Court determined that the responses to the Assistant District Attorney's questions relating to the transfer policy, office morale, confidence in supervisors, and the need for a grievance committee were merely "extensions of [her] dispute over [her] transfer to another section of the criminal court,"[113] and would convey no information of interest to the public other than her disagreement with the transfer,[114] because the information gathered fails to address the performance of the office of the District Attorney.[115] Further, the Court stated, the disaffected employee simply seeks "to gather ammunition for another round of controversy with her superiors" and to turn her displeasure with the proposed transfer to another criminal section into a "cause celebre."[116] Likewise, the Court noted, "a questionnaire not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest."[117] Indeed, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark - and certainly every criticism directed at a public official - would plant the seed of a constitutional case,"[118] and transform all personnel issues into First Amendment controversies.[119] Observing that "as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees," the Court cautioned that the First Amendment does not require government offices to engage in roundtable discussions of employee gripes about internal office matters.[120] Significantly, then, because the four above enumerated issues did not constitute matters of public concern, there was no need to address the balance between the speech interests of the fired assistant district attorney and the need of the District Attorney to promote the operational efficiency of his office.

Nonetheless, the Court also decided that one question in the questionnaire did "touch upon a matter of public concern,"[121] namely, whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates."[122] That being so, the government is required to justify the employee's discharge in light of the nature of the employee's expression.[123] The Court noted that the government's interest in maintaining "efficiency and integrity in the discharge of official duties" and "proper discipline in the public service"[124] should be accorded "full consideration," because, as an employer, it requires "wide discretion and control over the management of its personnel and internal affairs," including "the prerogative to remove employees whose conduct hinders efficient operation and to do so with

dispatch," in order to avoid disruptions in employee morale, harmony and efficiency.[125] The Court also observed that the District Attorney characterized the actions of his dismissed Assistant District Attorney as an act of insubordination that interfered with employee working relationships and triggered a "mini-insurrection,"[126] and that the government as an employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[127] Likewise, the Court concluded that "the time, place and manner" in which the questionnaire was distributed supported the firing of the Assistant District Attorney: the survey was distributed in, and completed by co-workers, in the workplace during working hours, and the survey questions themselves buttressed the District Attorney's concern that the questionnaire would disrupt office operations.[128] Similarly, the Court emphasized that the administration of the questionnaire in the context of an internal transfer dispute constituted a threat to the authority of the District Attorney to manage the office.[129] In contrast, the Court characterized the nature of the questionnaire as touching "in only a most limited sense" on issues of public concern,[130] because it related largely to "an employee grievance concerning an internal office policy," and accordingly had only "limited First Amendment interest."[131] On balance, then, the Court decided that, given the underwhelming First Amendment significance of the questionnaire compared to the disruption in office operations, the challenge to the District Attorney's authority, and the negative impact on office working relationships, firing of the assistant district attorney "did not offend the First Amendment."[132]

Clearly *Connick* counterbalances *Pickering*, *Perry* and *Branti* in those instances in which the government worker's expression disrupts, or threatens to disrupt, the operations of the government workplace. To begin with, to the extent the issues raised by the disaffected government worker are related to internal workforce issues, the U.S. Supreme Court will eschew treating them as issues of public concern. Second, in framing the balance that must be struck between the interest of efficient government operations required to deliver public services and the public sector employee's right to comment on matters of public concern, the U.S. Supreme Court in *Connick* narrowly circumscribes the issues raised by the discharged employee if they involved internal personnel matters, encourages "full consideration" of possible disruption in the delivery of public services, and expresses grave concern about transforming personnel issues into First Amendment controversies that unnecessarily burden the disposition of employee complaints about internal office matters. Hence, the U.S. Supreme Court in *Connick* essentially denigrates any First Amendment concerns about government worker speech in instances in which the employee's expression disrupts government office operations, undermines the authority of government supervisors, camouflages internal personnel matters as broader First Amendment issues, threatens government worker morale, or seeks to gather ammunition with which to dispute personnel decisions.

In contrast to *Connick*, sometimes the government employee engages in highly politicized expression that has little to do with, and has little or no impact on, the operations of the government office, as illustrated by *Rankin v. McPherson*.[133] In *Rankin*, a data entry clerical worker employed in the Constable's Office of Harris County, Texas, [134] was fired because, upon hearing on an office radio that there was an attempted assassination attempt on President Ronald Reagan, she was overheard to remark to a co-worker that, "if they go for him again, I hope they get him."[135] Another deputy constable who overheard the remark reported it to the Constable, who in turn summoned her to discuss the incident.[136] During their conversation, the deputy constable admitted making the remark, but claimed she “didn’t mean anything by it.”[137] After their discussion, the Constable fired the deputy constable.[138]

The fired deputy constable initiated suit in the Federal District Court, claiming that the Constable violated her First Amendment rights in discharging her.[139] Holding that the deputy constable’s remark was unprotected speech, the Federal District Court granted summary judgment in favor of the Constable. Determining that there were substantial issues of material fact regarding the context in which the remark was made, the Fifth Circuit Court of Appeals reversed and remanded the matter for trial.[140] Upon remand, the Federal District Court conducted another hearing, and ruled once again that the statements of the deputy constable were not protected speech.[141] The Fifth Circuit again reversed, holding that the deputy constable’s remark addressed a matter of public concern and that the deputy constable’s first amendment right outweighed the government’s interest in maintaining an efficient and disciplined workplace.[142]

The U.S. Supreme Court granted certiorari and affirmed the judgment of the Fifth Circuit.[143] In describing necessary balance that must be maintained between the interest of the employee as a citizen in expressing views on matters of public concern and the interest of the government as an employer to promote efficient provision of public service, the Court reiterated its two-sided concern that public discourse not be stifled and that internal personnel matters not be converted into First Amendment controversies:

> This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, the threat of dismissal from public employment is . . . a potent means of inhibiting speech. 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 employee’s speech. (citations and internal quotation marks omitted)[144]

The Court then proceeded to apply the two-part *Pickering/Connick* test to the remark made by the deputy constable. With respect to the threshold question - whether the assistant constable's remark constituted speech on matter of public concern - the Court reiterated the test developed in *Connick*: "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."[145] Determining that the deputy constable's remark "was made in the course of a conversation addressing the policies of the President's administration," "came on the heels of a news bulletin" announcing an attempt on the life of the President, and involved a criticism of public policy and its implementation,[146] the Court concluded the fired employee's remark constituted speech on a matter of public concern.[147]

The threshold question having been answered affirmatively, the Court addressed the balance between the deputy constable's interest in making her statement and the interest of the government as an employer in promoting the efficiency of public services provided through its employees.[148] The Court noted that there was no evidence demonstrating the deputy constable's remark interfered with the efficient functions of the office, disrupted or disturbed other employees, or harmed the reputation of the office.[149] Likewise, the Court observed that the remark was made in a private conversation with another employee in an area of the office "to which there was ordinarily no public access,"[150] that there was no evidence any member of the public was present or heard the remark,[151] that the remark was not related to any office function,[152] and that the remark had nothing to do with the deputy constable's fitness to perform her work.[153] Further, because there was negligible interaction between the fired assistant constable and the constable,[154] because the fired assistant constable had no involvement with the law enforcement operations of the Constable's office,[155] and because her position responsibilities involved only clerical data entry operations,[156] the Court concluded that the deputy constable's First Amendment Rights outweighed the Constable's interest in firing her.[157]

Under *Rankin*, then, a government supervisor who has minimal contact with an employee cannot fire him or her for making a highly politicized remark in a private conversation with a co-worker when that remark is not said in the presence of, or overheard by, a member the public, has nothing to do with the function of the government office, has little or no impact on co-workers or the operations of the office, brings no discredit to the government office, and does not relate to the employee's fitness to perform his or her job.

Notably, in the six cases discussed above, there was no dispute about the content of the speech or the political belief that triggered the termination of employment. In *Keyishian*, the faculty members refused to sign statements regarding their affiliation with the Communist party or doctrine that supports the overthrow of the government. In *Pickering*, the high school teacher authored and published a letter in the local newspaper. In *Perry*, the faculty member disagreed with the Board of Regents in testimony before legislative committees. In *Branti*, the assistant public defenders were fired because they were members of the Republican party and lacked Democratic party sponsors. In *Connick*, the assistant district attorney authored and distributed a questionnaire to fifteen assistant district attorneys. In *Rankin*, the deputy constable admitted making a political remark in a conversation with a co-worker.

An interesting variation of those six situations arose in *Waters v. Churchill*.[158] More particularly, the government agency and the fired government worker disagreed about what the employee actually said and meant in making the comments that lead to her discharge. This disagreement, in turn, created three possible scenarios for the application of the *Pickering/Connick* test: apply the test to what the employer thinks the employee said; apply the test to what the employer reasonably believes the employee said; or apply the test to what the fact finder determines the employee actually said.[159]

The manner in which the incident unfolded in *Waters* explains best how the three alternatives emerged. Cheryl Churchill was employed as a nurse in the obstetrics department of McDonough District Hospital.[160] During a dinner-break conversation with Melanie Perkins-Graham, a nurse employed in another department who was considering transferring to the obstetrics department, Churchill talked about working conditions in obstetrics.[161] Three people overheard the conversation between Churchill and Perkins-Graham: Mary Lou Ballew, a nurse who worked in obstetrics, Jean Welty, another nurse employed in obstetrics, and Dr. Thomas Koch, the clinical head of obstetrics.[162] Ballew reported what she heard to Cynthia Waters, Churchill's supervisor.[163] According Ballew, Churchill "was knocking the obstetrics department," said the obstetrics department was a "bad place to work," and claimed Waters "was trying to find reasons to fire her."[164] Ballew also reported to Waters that Perkins-Graham decided not to transfer to obstetrics because of her conversation with Churchill.[165] Together with Kathleen Davis, the vice president of nursing, Waters confirmed Ballew's version of the conversation with Perkins-Graham, who said Churchill "had indeed said unkind and inappropriate negative things about [Waters]," complained about a negative performance evaluation Waters gave Churchill, stated "that just in general things were not good in OB and hospital administration was responsible," and claimed that Davis was ruining the hospital.[166]

Churchill's version of the conversation was remarkably different.[167] Churchill claimed that for several months she "had been concerned about the hospital's 'cross-training' policy, under which nurses from one department could work in another when their usual location was overstaffed."[168] Churchill thought the cross-training policy "threatened patient care because it was designed not to train nurses but to cover staff shortages,"[169] and she brought her concerns to the attention of Waters and Davis.[170] Churchill maintained that the bulk of her conversation with Perkins-Graham primarily related to her concerns over the cross-training policy.[171] Churchill also admitted criticizing Davis in the conversation, because her staffing policies "threatened to ruin the hospital" and "seemed to be impeding nursing care."[172] Churchill denied making the other statements attributed to her by Bellew, and claimed she actually defended Waters in the conversation and encouraged

Perkins-Graham to transfer to obstetrics.[173] Churchill also claimed Ballew "was biased against [her] because of an incident in which Ballew apparently made an error and Churchill had to cover for her."[174]

While "Koch's and Welty's recollections of the conversation matched Churchill's," Davis and Waters failed to talk to them about the incident, and did not seek Churchill's version "until the time they told her she was fired."[175] After being fired, Churchill pursued an internal grievance.[176] The president of the hospital interviewed Churchill to get her version of the story, reviewed written reports prepared by Waters and Davis, and directed the vice president of human resources to interview Ballew one more time.[177] After reviewing all of the assembled information, the president rejected Churchill's grievance.[178]

Churchill then pursued a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983, claiming her freedom of speech protected under *Connick* was violated.[179] Holding (1) that the speech in question was not a matter of public concern and therefore that it made no difference whose version of the conversation was protected under *Connick*, and (2) that, even if the speech in question was a matter of public concern, the disruption it created in the government workplace stripped it of First Amendment protection, the Federal District Court entered summary judgment in favor of the hospital officials.[180]

The Court of Appeals for the Seventh Circuit reversed, holding "that Churchill's speech, viewed in the light most favorable to her, was protected speech under the *Connick* test," because it reflected on a matter of public concern (quality of nursing care provided by public institution) and was not disruptive.[181] Significantly, however, the Seventh Circuit also determined that, "[i]f the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct,"[182] the finder of fact was required to establish what Churchill's speech actually was.[183]

On appeal to the U.S. Supreme Court, the Court in a plurality opinion[184] reiterated the nature of the First Amendment issue before it,[185] and enumerated the three choices it had for applying the *Connick* test: (1) the speech as determined by the finder of fact (urged by the Seventh Circuit), (2) the speech as determined by the employer prior to firing the employee (urged by the hospital), or (3) the speech as determined in a reasonable manner by the employer (urged by Churchill). In resolving this issue, the Court described the contrasting demands imposed on the government in regulating the speech of its non-employee citizens and its citizen-employees, and noted that the government as employer requires broader powers in controlling speech of employees that it does in controlling the speech of its citizens,[186] because:

- Speech that can be tolerated by government on the part of its citizens (e.g. "verbal tumult, discord, and even offensive utterance") cannot be tolerated when made by employees in the government workplace to members of the public or co-workers.[187]
- While there is no such thing as a "false idea" in citizens' public discussion, the government worker's supervisor is clearly allowed to direct the government worker to cease encouraging her co-workers to perform their jobs ineffectively.[188]
- Although the nation is committed to "uninhibited, robust and wide-open" discussion of public issues, government officials are clearly entitled to fire their high-ranking deputies for publicly discrediting their legislative policy.[189]
- Active participation in political campaigns and holding political office are at the core of protected First Amendment activities; government employees, however, may be prohibited from engaging in those activities.[190]
- Government regulations must clearly and precisely define the speech targeted for regulation, but government supervisors can certainly and consistently with the First Amendment instruct its employees not to be rude to customers, a standard entirely too vague if applied to the public at large.[191]
- Government employees have first-hand knowledge of their agencies' inadequacies, can provide helpful information about improving government operations, and have a legitimate interest in providing their insights on matters of public concern.[192] Nonetheless, government agencies must make sure their employees perform their responsibilities as effectively and efficiently as possible, and do not say or do things that disrupt the operations of the agency and the delivery of government services.[193]

These contrasting demands, the Court concluded, required the government to elevate its interest in effective delivery of public services when addressing the free speech rights of its employees:

> The key to First Amendment analysis of government employment decisions, then, is this: 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. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Having thus set the stage, the Court proceeded to assess the three options presented. The Court rejected the approach advanced by the Seventh Circuit, because it required the government agency to resort to judicial fact finding, to follow procedures that mirror the evidentiary rules used in court, to eschew employee reports that might be considered hearsay, to ignore the supervisor's working experience with the disciplined employee, and to evaluate information on the basis of how a jury might react to it rather than applying the supervisor's own judgment and experience.[194] On the contrary,

the Court said, the First Amendment permits government employers to "use personnel procedures that differ from the evidentiary rules used by courts, without fear that those differences will lead to liability."[195]

Left with a choice between the two remaining alternatives – the facts as the employer thought them to be or the facts as the employer reasonably concluded they were – the Court selected the latter: "we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions."[196] The Court then described such a reasonable conclusion:

> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, 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 - discharge, suspension, reprimand, or whatever else - of the sort involved in a particular case. . . . [W]e believe that the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary.[197]

The Court noted that it was highly likely (1) the hospital president acted reasonably in conducting his investigation and concluding Perkins-Graham's and Ballew's story was believable,[198] and (2) Churchill's statement was disruptive to the workplace, dampened Perkins-Graham's interest in working in obstetrics, undermined her supervisor's authority, and raised questions about Churchill's future effectiveness.[199] Accordingly, if they caused workplace disruption, Churchill's remarks would lose First Amendment protection,[200] even if part of her comments were directed to matters of public concern.[201] Nonetheless, even though "Davis and Waters would have been justified in firing Churchill for [her] statements," an issue of fact existed with respect to "whether Churchill was actually fired because of those statements, or because of something else."[202] Accordingly, the Court remanded the matter for further proceedings to resolve the outstanding issue of fact.

By way of summary, government workers are provided significant First Amendment protection against the loss of their jobs if their speech relates to matters of public concern and if the exercise of that speech does not negatively affect the government workplace and the efficiency of its operations. First, *Keyishian* acknowledges that government workers do not give up their right to engage in speech by virtue of their employment and that denial of employment because of their expression may violate the First Amendment.

Second, the balancing test developed in *Pickering* requires the court to weigh the right of the government employee as a citizen to comment on public issues and the interest of the government as an employer to promote efficiency in public services through its employees. If the speech contributes to debate about issues of public concern without negatively impacting the government workplace or operations, it should be permitted. If the employee's speech interferes with efficient delivery of public services by the government agency or department and fails to contribute to public debate about issues of public concern, it can be restrained.

Third, under *Perry* and *Branti*, even if there is no contractual requirement that a government worker's employment contract be renewed, the refusal to do so because the employee engaged in speech related to a matter of public concern or holds a political belief may violate the First Amendment.

Fourth, in applying the *Pickering* balancing test, *Connick* requires the court to answer in the affirmative the following threshold question: whether, given the content, form and context of the expression, the government employee's speech addresses a matter of public concern. In order to do so, the speech must convey information of interest to the public. If the information focuses principally on internal personnel issues or operations of the government office, it is not deemed to be an issue of public concern. If the threshold question is answered in the affirmative, the court may then balance the value of the government employee's speech against the impact of the speech on the government office and operations. Notably, the latter interest is given elevated status, because the government as employer must maintain efficiency and integrity in discharging its duties and providing public service. First Amendment protection will not be given to government employee speech which disrupts government office operations, undermines the authority of government supervisors, camouflages internal personnel matters as broader First Amendment issues, threatens government worker morale, or seeks to gather ammunition with which to dispute personnel decisions.

Fifth, under *Rankin*, government employee speech that relates to matters of public concern - even highly politicized remarks - cannot be used to fire a government worker, when the speech has nothing to do with the function of the government office, has little or no impact on co-workers or the operations of the office, brings no discredit to the government office, and does not relate to the employee's fitness to perform his or her job.

Finally, under *Waters*, where there is a legitimate factual dispute over the content of government employee's speech, the government department is required to act reasonably in ascertaining what was actually said. If the government can demonstrate it acted in a reasonable manner in ascertaining what was said, and if that speech as ascertained by the government causes or threatens to cause workplace disruption, the government may fire the employee, even if part of the employee's comments were directed to matters of public concern.

(d) Coming full circle back to *City of San Diego v. Doe*

As indicated in the beginning of this article, the U.S. Supreme Court in *City of San Diego v. Doe* appears to have narrowed the scope of matters of public concern and broadened the nexus between the proffered speech and the government workplace, thereby strengthening the hands of government agencies in restricting the speech of their employees. Two aspects of the Court's decision trigger this observation.

First, the U.S. Supreme Court disagreed with the analysis used by the Fifth Circuit in addressing the threshold question of the *Pickering/Connick* test. In its opinion, the Fifth Circuit took an interesting approach in answering the initial question in the balancing test - whether the employees speech addressed a matter of public concern - that makes it easier to achieve an affirmative answer.[203] More particularly, the Fifth Circuit decided "that when the employee's speech is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace, that speech satisfies the public concern test because such speech is not related to the employee's status in the workplace."[204] The Court's conclusion was based on the following considerations: (1) the "community interest" inquiry is "designed . . . to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set the outer limits on all that is,"[205] (2) "*all* public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of *purely 'personal concern' to the employee - most typically, a private personnel grievance"* (emphasis in original),[206] and (3) the "purpose of the test is to prevent the constitutionalization of 'employee complaints over internal office affairs.'"[207] In other words, in the Fifth Circuit's view, if the government employee's speech falls into the category of "personnel disputes and grievances," it is not constitutionally protected, and the threshold question is answered in the negative.[208] On the other hand, if the government employee's speech does not involve an internal office matter, and fails to fall within a category of unprotected speech, it is protected speech and passes the threshold inquiry under *Pickney/Connick.*[209]

The U.S. Supreme Court rejected this approach, insisting the threshold "public concern" question required the court to examine the "content, form, and context of a given statement, as revealed by the whole record," and to determine whether the employee's statement is a matter of public concern by using "the same standard used to determine whether a common-law action for invasion of privacy is present,"[210] i.e., "something that is a subject of legitimate news interest . . . [or] a subject of general interest and value and concern to the public at the time of publication."[211] Using this standard, the U.S. Supreme Court had "no difficulty in concluding that Roe's expression does not qualify as a matter of pubic concern under any view of the public concern test."[212] Because Roe's expression was not a matter of public concern, it flunked the threshold test, and there was no need to engage in the balancing of the employee's and the government's interests.[213]

The Fifth Circuit also concluded that Roe's videos were unrelated to his workplace, because they do not fall into the category of personnel disputes and grievances,[214] there was no indication Roe's failure to discontinue his website sales was intended as expression of protest against the police department,[215] the videos were distributed and sold outside the workplace,[216] and Roe did not address co-workers or supervisors[217] Hence, the Fifth Circuit held:

> Roe's expressive conduct was not about private personnel matters, was directed to a segment of the general public, occurred outside the workplace and was not motivated by an employment-related grievance. Thus, he was not speaking as an employee on matters related to his personal status in the workplace. Under the public concern test, Roe's so the district court erred in dismissing his First Amendment claim without proceeding to *Pickering* balancing.[218]

The U.S. Supreme Court summarily rejected this analysis as well:

> Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in a field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.[219]

Further, because Roe's speech was injurious to the police department, "contrary to its regulations, and harmful to the proper functioning of the police force,"[220] it clearly affected and "compromised" genuine and important interests of the government employer.[221] Accordingly, because Roe's speech was related to his employment and had a negative effect on the mission and purpose of the employer, and because there was "no basis for finding it was of concern to the community,"[222] the U.S. Supreme Court reversed the judgment of the Court of Appeals.[223]

In short, the approach taken by the Fifth Circuit to facilitate the conclusion that employee speech was a matter of public concern was rejected, and courts must examine the content, form, and context of the employee's speech as revealed by the whole record, and determine it is a subject of legitimate news interest or a matter of interest, value and concern to the public. Likewise, even if there is no direct connection between the employee's speech and the workplace, it will fail the threshold "public concern" test if it is harmful to, interferes with, or brings disrepute to the operations of the government office.

SUMMARY

In its recent, per curiam decision in *City of San Diego v. Roe*, the U.S. Supreme Court decided that the City of San Diego could fire John Roe, a member of the San Diego police force, for selling on the adults-only section of eBay videotapes showing himself stripping off a police uniform and masturbating.

Two lines of cases examined in the article form the backdrop to the Supreme Court's analysis: the first addresses government regulations that restrict the right of government employees to speak on matters of public concern, and the second examines the decision to fire public sector employees who exercise their right to speak on matters of public concern.

In reaching its decision, the Court reinforced the *Pickering/Connick* test that balances the rights of the government worker to engage in speech concerning matters of public concern and the obligation of the government as employer to promote efficiency in the performance of public services. By rejecting the Fifth Circuit's approach in applying the test, the U.S. Supreme Court tightened the threshold test of determining whether the employee's speech related to a matter of public concern and broadened the scope of matters that can be deemed related and harmful to the government workplace. Both of these results reduce the likelihood that employee speech having a negative impact on the government workplace will be protected by the First Amendment, and thereby prevent the transformation of government agency personnel issues into First Amendment controversies.

FOOTNOTES

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[1] Gina Holland, *High court allows firing of cop over strip-tease act*, COURIER POST, December 7, 2004, at 5A.

[2] 125 S. Ct. 521 (2004).

[3] *See* Pickering v. Board of Education, 391 U.S. 563, 568 (1968) ("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 public services it performs through its employees.")

[4] 125 S. Ct. 521 (2004).

[5] City of San Diego v. Roe, 125 S. Ct. 521, 522, 526 (2004).

[6] *Id*. at 522-23.

[7] *Id*. at 523.

[8] *Id*.

[9] *Id.*

[10] *Id*.

[11] *Id.*

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*. and Roe v. City of San Diego, 356 F.3d 1108, 1122 (2004). In reaching this conclusion, the Ninth Circuit relied on the "concession" by the City of San Diego that Roe's activities were "unrelated" to his employment. City of San Diego, 356 F.3d at 1122. The U.S. Supreme Court disagreed with the Ninth Circuit's interpretation of the term "unrelated." In the U.S. Supreme Court's view, the concession Roe's activities were "unrelated" to his employment meant only that Roe's speech did not comment on the workings or functioning of the San Diego Police Department. City of San Diego v. Roe, 125 S. Ct. at 524.

[16] City of San Diego v. Roe, 125 S. Ct. at 524.

[17] 391 U.S. 563, 568 (1968). *Pickering* is discussed more fully below at notes 60 through 75.

[18] 461 U.S. 138 (1983). *Connick* is discussed more fully below at notes 101-133.

[19] City of San Diego v. Roe, 125 S. Ct. at 525.

[20] *Id*.

[21] *Id*. at 526, citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and Time, Inc. v. Hill, 385 U.S. 374 (1967).

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] 513 U.S. 454 (1995) (*NTEU*).

[26] 103 Stat. 1760, 5 U.S.C. § 501(b) ("An individual may not receive any honorarium while that individual is a Member, officer or employee.")

[27] *NTEU*, 513 U.S. at 461.

[28] *Id*. at 461-62.

[29] *Id*. at 462.

[30] *Id*.

[31] *Id*. 463

[32] *Id*.
[33] *Id*. at 477.
[34] *Id*. at 464-65.
[35] *Id.* at 465.
[36] *Id.*
[37] *Id*.
[38] *Id*. at 466.
[39] *Id*. at 472.
[40] *Id*. at 473.
[41] *Id*.
[42] *Id*. at 477-78.
[43] 413 U.S. 548 (1973).
[44] Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 556 (1973).
[45] *Id*. at 557.
[46] *Id*. at 565.
[47] *Id.*
[48] *Id*.
[49] *Id*.
[50] *Id*. at 566.
[51] *Id*. at 567.
[52] *NTEU*, 513 U.S. at 471.
[53] 385 U.S. 589 (1967).
[54] Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).
[55] *Id*. at 602.
[56] *Id*. at 601.
[57] *Id*. at 602.
[58] *Id*.
[59] *Id*. at 605-06.
[60] 391 U.S. 563 (1968).
[61] Pickering v. Board of Education, 391 U.S. 563, 575 (1968).
[62] *Id*. at 564, 566.
[63] *Id*. at 566.
[64] *Id*.
[65] *Id*. at 567.
[66] *Id*.
[67] *Id*. at 574.
[68] *Id*. at 568.
[69] *Id*. at 569-70.
[70] *Id*. at 570.
[71] *Id*.
[72] *Id*. at 572.
[73] *Id*. at 573.
[74] *Id*.
[75] *Id*. at 574. *Accord* Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) (nonrenewal of independent contractor's trash hauling contact in retaliation for criticisms of the Board of County Commissioners violated the First Amendment).
[76] 408 U.S. 593 (1972).
[77] Perry v. Sindermann, 408 U.S. 593, 595-96 (1972).
[78] *Id*. at 595.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 596.
[83] *Id*.
[84] *Id*.
[85] *Id*. 598.
[86] *Id*.
[87] *Id*.

[88] *Id.*
[89] *Id*. at 601.
[90] *Id*. at 598.
[91] Branti v. Finkel, 445 U.S. 507 (1980).
[92] *Id*. at 508.
[93] *Id*. at 510.
[94] *Id*.
[95] *Id*. at 511
[96] *Id*.
[97] *Id*. at 508-09.
[98] *Id*. at 509, 511.
[99] *Id*. at 515-16.
[100] *Id*. at 517. *Accord* O'Hare Truck Service Inc., v. City of Northlake, 518 U.S. 712 (1996) (Private towing service cannot be removed from city's rotating list of available towing service contractors because its owner refused to contribute to the mayor's reelection campaign).
[101] 461 U.S. 138 (1983).
[102] Connick v. Myers, 461 U.S. 138, 140 (1983).
[103] *Id*. at 141.
[104] *Id*.
[105] *Id*.
[106] *Id*. at 142.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*. at 147.
[111] *Id*. at 147-48.
[112] *Id*. at 148.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*. at n.8.
[118] *Id*. at 149.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] *Id*. at 150.
[124] *Id*. at 151.
[125] *Id*.
[126] *Id*.
[127] *Id*. at 152.
[128] *Id*. at 153.
[129] *Id*.
[130] *Id*. at 154.
[131] *Id*.
[132] *Id*.
[133] 483 U.S. 378 (1987).
[134] Rankin v. McPherson, 483 U.S. 378, 380-81 (1987) ("[Her] duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access. Her job was to type data from court papers into a computer that maintained an automated record of the status of civil process in the county. Her training consisted of two days of instruction in the operation of her computer terminal.")
[135] *Id*. at 379-80 (1987).
[136] *Id*. at 382.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*.

[141] *Id.* at 383.
[142] *Id*. ("Given the nature of [the deputy constable's] job and the fact that she was not a law enforcement officer, was not brought by virtue of her job into contact with the public, and did not have access to sensitive information, the Court of Appeals deemed her 'duties . . . so utterly ministerial and her potential for undermining the office's mission so trivial' as to forbid her dismissal for expression of her political opinion. 'However ill-considered [her] opinion was,' the Court of Appeals concluded, 'it did not make her unfit' for the job she held in [the Constable's] office.")
[143] *Id*.
[144] *Id*. at 384.
[145] *Id*. at 384-85, citing *Connick*, 461 U.S. at 147-48.
[146] *Id.* at 386-87.
[147] *Id*. at 388.
[148] *Id*.
[149] *Id.* at 388-89.
[150] *Id*. at 389.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*. at 392
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] Waters v. Churchill, 511 U.S. 661 (1994).
[159] *Id*. at 668 ("The dispute is over how the factual basis for applying the test - what the speech was, in what tone it was delivered, what the listener's reactions were - is to be determined. 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? The Court of Appeals held that the employer's factual conclusions were irrelevant, and that the jury should engage in its own fact finding. Petitioners argue that the employer's factual conclusions should be dispositive. Respondents take a middle course: They suggest that the court should accept the employer's factual conclusions, but only if those conclusions were arrived at reasonably.") (citations omitted)
[160] *Id*. at 664.
[161] *Id*. at 664-65.
[162] *Id*. at 665.
[163] *Id*. at 665.
[164] *Id*.
[165] *Id*. at 665.
[166] *Id.* at 665-66.
[167] *Id*. at 666.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *Id*.
[175] *Id*.
[176] *Id.*
[177] *Id*. at 666-67.
[178] *Id*. at 667.
[179] *Id*.
[180] *Id.*
[181] *Id*.
[182] *Id.*
[183] *Id.*
[184] *Id*. at 662 (opinion of O'Connor, J., in which Rehnquist, C.J., Souter, J., and Ginsburg, J. joined).
[185] *Id*. at 668 ("To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself 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 through its employees.") (internal quotation marks omitted)
[186] *Id.* at 671.

[187] *Id*. at 672
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*. at 673.
[192] *Id*. at 674.
[193] *Id*. at 674-75.
[194] *Id*. at 675-76.
[195] *Id*. at 676-77. These concerns also reflect the Court's apprehension previously expressed in *Connick* and *Rankin* that overly restricting the government employer's ability to discipline and discharge government employees will elevate all personnel decisions to First Amendment. *See* discussion *supra* at notes 118 and 119 and at note 144.
[196] *Id*. at 677. In their concurring opinion, Justices Scalia, Kennedy and Thomas adopted the latter choice: the employee fails to state a claim if the government employer honestly (even if unreasonably) believes the employee's remarks are unprotected, and the government violates the First Amendment of its employees only if it acts in retaliation against the employee for constitutionally protected remarks. Because Waters and Davis honestly Churchill's remarks were disruptive, they could fire Churchill with impunity. *Id*. at 686-94 (Scalia, J., concurring).
[197] *Id*. at 677-78.
[198] *Id.* at 680.
[199] *Id*. at 680-81.
[200] *Id*. at 681.
[201] *Id.* at 681-82. ("So long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. The *Connick* test is to be applied to the speech for which Churchill was fired. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.") (citations omitted)
[202] *Id.* ("Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation. Churchill had criticized the cross-training policy in the past; management had exhibited some sensitivity about the criticisms; Churchill pointed to some other conduct by hospital management that, if viewed in the light most favorable to her, would show that they were hostile to her because of her criticisms. A reasonable fact finder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier. If this is so, then the court will have to determine whether those statements were protected speech, a different matter than the one before us now.") (citations omitted)
[203] Roe v. City of San Diego, 356 F.2d 1108, 1119-20 (2004).
[204] *Id*.
[205] *Id*. at 1119
[206] *Id.*
[207] *Id.* at 1120.
[208] *Id.*
[209] *Id*. at 1121
[210] City of San Diego v. Roe, 125 S. Ct. at 525.
[211] *Id*.
[212] *Id*.
[213] *Id.*
[214] Roe v. City of San Diego, 356 F.3d at 1121.
[215] *Id.*
[216] *Id*.
[217] *Id*.
[218] *Id*.
[219] City of San Diego v. Roe, 125 S. Ct. at 524.
[220] *Id*.
[221] *Id*.
[222] *Id*. at 526.
[223] *Id.*