



1996

Constitutional Law—First Amendment and Freedom of Speech—Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee's Speech Is Protected Before Discharging the Employee Based Upon the Speech. *Waters v. Churchill*, 114 S. Ct. 1878 (1994).

D. Keith Fortner

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

D. Keith Fortner, *Constitutional Law—First Amendment and Freedom of Speech—Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee's Speech Is Protected Before Discharging the Employee Based Upon the Speech. *Waters v. Churchill*, 114 S. Ct. 1878 (1994).*, 18 U. ARK. LITTLE ROCK L. REV. 463 (1996).

Available at: <https://lawrepository.ualr.edu/lawreview/vol18/iss3/4>

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

CONSTITUTIONAL LAW—FIRST AMENDMENT AND FREEDOM OF SPEECH—PUBLIC EMPLOYERS MUST CONDUCT A REASONABLE INVESTIGATION TO DETERMINE IF AN EMPLOYEE’S SPEECH IS PROTECTED BEFORE DISCHARGING THE EMPLOYEE BASED UPON THE SPEECH. *WATERS V. CHURCHILL*, 114 S. Ct. 1878 (1994).

I. INTRODUCTION

In *Waters v. Churchill*,¹ a divided United States Supreme Court² held that the First Amendment requires a government employer to conduct a reasonable, good faith investigation into the nature of the speech to determine if it is protected³ before taking any disciplinary action against the employee.⁴ The Court also noted, however, that the government, in its role as an employer, has by necessity a greater power over the speech of its employees while on the job and is therefore entitled to a certain amount of deference from the Court in its employment decisions.⁵

This decision effectively expands the procedural rights given government employees in the Court’s prior ruling, *Connick v. Myers*,⁶ under which an employee who voiced dissatisfactions to her superiors or co-workers did so at the risk of joining the ranks of the unemployed.⁷ Nevertheless, the heralding of the *Waters* decision as “protection to insubordinate public workers”⁸ is almost certainly premature, because the vague, broad test of *Waters* may pose

1. 114 S. Ct. 1878 (1994).

2. The plurality opinion of the Court was written by Justice O’Connor, joined by Chief Justice Rehnquist and Justices Souter (also filing a concurring opinion) and Ginsburg. *Id.* at 1882, 1891. Justice Scalia filed an opinion concurring in the judgment, joined by Justices Kennedy and Thomas. *Id.* at 1893. Justice Stevens, joined by Justice Blackmun, filed a dissenting opinion. *Id.* at 1898.

3. Speech of a government employee is protected if it is on a matter of public concern and the employee’s interest in the expression outweighs the potential for harm to the interests of the government employer in efficient public service. *Id.* at 1884. The test for whether speech is on a matter of public concern is the same as that for determining if a common law action for invasion of privacy lies. *Connick v. Myers*, 461 U.S. 138, 143 n.5 (1983). The Restatement test provides:

The scope of a matter of legitimate concern to the public is not limited to “news,” in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977).

4. *Waters*, 114 S. Ct. at 1888-89.

5. *Id.* at 1886-87.

6. 461 U.S. 138 (1983).

7. See *infra* part III.C.2 for a discussion of *Connick*.

8. See Joan Biskupic, *High Court Grants Speech Protection to Insubordinate Public Workers*, WASH. POST, June 1, 1994, at A4 (calling the *Waters* decision “the first time the [C]ourt has given procedural rights under the First Amendment to public employees whose speech may be disruptive”).

potential problems for judicial interpretation and application in the future, thereby further complicating an already murky area of First Amendment law.⁹

II. FACTS

A. Background

Cheryl Churchill ("Churchill") was hired by McDonough District Hospital (the "Hospital")¹⁰ as a part-time nurse in the obstetrics department in 1982.¹¹ She became a full-time nurse in 1985.¹² In 1986, the Hospital hired Kathy Davis ("Davis") as vice-president of nursing.¹³ Davis made many changes in the nursing department, including the implementation of "cross-training," a policy where full-time nurses in the general medical areas of the Hospital would be pulled from their duties and trained in more specialized areas, such as obstetrics, in order to provide flexible staffing for the Hospital on an as-needed basis.¹⁴ The institution of cross-training generated some controversy within the Hospital, Davis and Waters supporting the policy and Churchill opposing it.¹⁵

On August 21, 1986, a medical emergency known as a "code pink" occurred in the obstetrics department.¹⁶ Dr. Thomas Koch ("Koch"), the clinical head of the department, was on duty; he ordered Mary Lou Ballew

9. See, e.g., *Waters*, 114 S. Ct. at 1896-97 (Scalia, J., concurring in the judgment) ("The approach to this case adopted by [the Court's] . . . opinion provides more questions than answers, subjecting public employers to intolerable legal uncertainty . . . [and] creat[ing] yet another speech-related puzzle[] that government employers, judges and juries must struggle to solve.").

10. By virtue of its existence as a municipal corporation, the Hospital is a government (or "public") employer. *Waters*, 114 S. Ct. at 1882. See Joan D. Boman, *When a Public Employer Fires an Employee for Speech Protected by the First Amendment: Is Employer Ignorance a Defense?*, PREVIEW OF UNITED STATES SUPREME COURT CASES, November 29, 1993, at 95 ("Every government and governmental agency in the country—federal, state, and local—is a public employer.").

11. *Churchill v. Waters*, 731 F. Supp. 311, 312 (C.D. Ill. 1990), *rev'd*, 977 F.2d 1114 (7th Cir. 1992); *vacated and remanded*, 114 S. Ct. 1878 (1994). Churchill was an at-will government employee during the entire course of her employment. *Waters*, 114 S. Ct. at 1890. For a discussion of employment at will, see JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* 92-95 (3d ed. 1990) (stating the general view held by courts that, in lieu of a definite time the employment is to last, the employment may be terminated "at will" by either party).

12. *Churchill*, 977 F.2d at 1116.

13. *Churchill*, 731 F. Supp. at 312.

14. *Id.*

15. *Id.*

16. *Id.* A "code pink" requires all available medical and nursing personnel to report to the delivery room to handle a pregnancy-related medical emergency where the life of the baby, mother, or both is in immediate danger. *Churchill*, 977 F.2d at 1117 n.2.

("Ballew"), a probationary employee, to sound an alert for the code pink.¹⁷ Ballew failed to alert all necessary personnel, so Koch directed Churchill to prepare the delivery room for the impending Caesarean section and alerted the necessary personnel himself.¹⁸ During the procedure, Waters entered the delivery room and asked Churchill about one of Churchill's patients.¹⁹ Churchill checked on the patient and returned to the delivery room. Waters asked her again about the patient, to which Churchill responded: "You don't have to tell me how to do my job."²⁰

Koch reprimanded Waters for interfering with his orders to Churchill, but Waters subsequently refused to discuss the matter with Koch and instead contacted Stephen Hopper ("Hopper"), the president and CEO of the Hospital.²¹ Later, Hopper, Koch, and Waters met, during which Koch complained about Waters's actions as well as the new nursing policies instituted by Davis and Waters.²² A subsequent meeting between Davis, Hopper, and Waters resulted in the issuance of a written warning to Churchill for insubordination in her response to Waters during the code pink.²³ Churchill did not submit a written response or file a grievance protesting this warning.²⁴

The conversation that ultimately resulted in Churchill's dismissal and subsequent lawsuit occurred on January 16, 1987, when Churchill and Melanie Perkins-Graham ("Graham"), a nurse in cross-training for the obstetrics department who was considering a permanent transfer to obstetrics, were having dinner together in an area near the nurse's station in obstetrics, where Ballew was then on-duty.²⁵ Koch entered the area where they were eating, and he, Churchill, and Graham had the following conversation: Graham told Koch about her planned transfer, and Koch then expressed to Graham his general dislike for the cross-training policy, with which Churchill concurred.²⁶ Churchill further stated that "Davis's policy was going to 'ruin the hospital'"

17. *Churchill*, 731 F. Supp. at 313.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Waters, Davis, and Hopper alleged that Churchill "repeatedly engaged in behavior" towards Waters that was "rude and insubordinate," and that this behavior was caused by Churchill and Koch developing a "close personal relationship" in 1986. Brief of Petitioners at 4, 5 n.7, *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (92-1450).

24. *Churchill*, 731 F. Supp. at 313. Churchill claimed that she made the statement to Waters during the code pink to defend her professional judgment and that she did not intend for the statement to be insubordinate. Brief of Respondents at 8, *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (92-1450).

25. *Churchill*, 731 F. Supp. at 313-14.

26. *Id.*

and might violate state regulations.²⁷ Graham said to Koch and Churchill that although she wanted to transfer she hesitated to do so because of negative things she had heard about Waters; Churchill nevertheless encouraged her to transfer and did not make disparaging comments about Waters to Graham.²⁸

Ballew had overheard portions of the above conversation, and because she construed it as intending to discourage Graham from transferring to obstetrics, she reported it to Waters, who then reported it to Hopper on January 21, 1987.²⁹ Hopper, Davis, and Waters met with Graham two days later, and Graham confirmed Churchill made generally negative statements to her about Waters, Davis, and the Hospital's policies.³⁰ On January 26, 1987, Waters, Davis, Hopper, and the Hospital's personnel director met and decided to discharge Churchill, which Waters did the next day.³¹ Churchill filed a subsequent grievance with Hopper,³² which he denied,³³ thereby upholding the discharge.³⁴

B. Procedural History

Churchill filed suit against Waters, Davis, Hopper, and the Hospital pursuant to 42 U.S.C. § 1983,³⁵ alleging that her discharge violated her First and Fourteenth Amendment rights.³⁶ The district court granted summary judgment to the defendants on Churchill's claim they violated her First Amendment due process rights by discharging her for speech on a matter of public concern (*i.e.*, her comments on Davis's allegedly inadequate implemen-

27. *Id.* at 314.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* The Hospital's employee handbook, a copy of which Churchill received when she was hired, stated that "willful refusal to obey a supervisor" was an offense that might result in suspension without pay, and that repetition of this offense (among others listed in the handbook) would usually result in the discharge of the employee. *Id.* at 317.

32. At that time, Churchill was unaware of Hopper's involvement in the decision to fire her. *Id.* at 314.

33. *Id.* Hopper met with Churchill to hear her version of the conversation, reviewed the written reports submitted by Waters and Davis regarding Ballew and Graham's versions, and had the Hospital's vice-president of human resources interview Ballew again before making the decision to discharge Churchill. *Waters v. Churchill*, 114 S. Ct. 1878, 1883 (1994).

34. *Churchill*, 731 F. Supp. at 314.

35. This section provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." 42 U.S.C. § 1983 (1988).

36. *Churchill*, 731 F. Supp. at 312. Churchill alleged the defendants violated her rights to free speech and freedom of association with Koch. *Churchill v. Waters*, 977 F.2d 1114, 1119 (7th Cir. 1992).

tation of cross-training), without first determining if she was engaged in protected speech.³⁷ The court held Churchill's speech unprotected as a matter of law and found that even if the speech were protected the Hospital's interest in maintaining a harmonious working environment outweighed Churchill's right to express to Graham her opposition to cross-training.³⁸

On appeal, the United States Court of Appeals for the Seventh Circuit reversed,³⁹ holding that Churchill's motive for making statements about cross-training created material issues of fact over the content of her speech; thus, the district court erred by granting the defendants' motion.⁴⁰

The United States Supreme Court granted certiorari⁴¹ to resolve the issue whether a court's inquiry into a government employee's particular speech should be based on what the speech actually was, or only on what the government employer believed it to be.⁴² In a plurality opinion, the Court held that a government employer could terminate an employee for her speech based upon the facts as the employer reasonably thought them to be at the time of termination, provided the employer acted in good faith in reaching its conclusions and conducted a reasonable investigation to determine the content of the employee's speech.⁴³

III. BACKGROUND

Through the late nineteenth and into the twentieth century, the Court took the position that public employees took conditions and restrictions on employment as they found them and that these restraints presented no

37. *Churchill*, 977 F.2d at 1119-20. Speech is "protected" if it is on a matter of public concern or if it "relat[es] to any matter of political, social, or other concern to the community" *Connick v. Myers*, 461 U.S. 138, 146 (1983).

38. *Churchill*, 977 F.2d at 1120.

39. *Id.* at 1129.

40. *Id.* The court stated:

[W]hen an employee claims to have been terminated for engaging in protected speech, the public employer must establish "by a preponderance of the evidence that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct," . . . [and,] [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, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental.

Id. at 1127 (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)) (first alteration in original).

41. *Waters v. Churchill*, 113 S. Ct. 2991 (1993).

42. *Waters*, 114 S. Ct. at 1884.

43. *Id.* at 1888-89.

constitutional objections.⁴⁴ In the words of Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, a policeman dismissed for political activities in violation of a police regulation "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁴⁵ This statement was indicative of the contractual view of employment at the time⁴⁶ and illustrative of the fact the First Amendment had not yet been recognized as applicable to the states via the incorporation doctrine.⁴⁷ Although the Court would subsequently hold the First Amendment applicable to the states,⁴⁸ this holding began the Court's long struggle with defining the rights and limitations the First Amendment gives to and imposes upon public employers and employees (as well as the citizenry in general).⁴⁹ These decisions were seldom

44. *Connick v. Myers*, 461 U.S. 138, 143 (1983). This was the case even when a public employer imposed restrictions on an employee's exercising of recognized constitutional rights; viz., speech and expression. *Id.*

45. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). Justice Holmes further stated that "[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech . . . by the implied terms of his contract. [He] cannot complain, as he takes the employment on the terms which are offered to him." *Id.* at 517-18. However, even at this early time, a policeman was statutorily guaranteed a hearing before termination. *Id.* at 517. Although the policeman in this case did receive a hearing, Justice Holmes noted the allegations by the mayor against the policeman might be required to be more specific under other circumstances. *Id.* at 518. This could very well be a precursor to the "reasonable investigation" requirement announced by the Court 102 years later in *Waters*.

There are also early indications of concern by the Court that the government have the ability to function without undue interference of employees' First Amendment activities. In passing on the constitutionality of an act of Congress prohibiting, on threat of discharge, United States government employees from receiving "anything of value for political purposes" from any co-employee, the Court stated "[t]he . . . purpose of Congress . . . to promote efficiency and integrity in the discharge of official duties, and . . . maintain . . . discipline in the public service . . . is within the just scope of legislative power . . ." *Ex parte Curtis*, 106 U.S. 371, 373 (1882). *Accord* *United States v. Wurzbach*, 280 U.S. 396, 398-99 (1930) ("It hardly needs argument . . . that Congress may provide that its . . . employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their . . . employment. If argument [is] . . . needed, [it] will be found in *Ex parte Curtis*." (citation omitted)).

46. *See, e.g., Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 540-42 (1922) (discussing state court cases holding state statutes requiring employers to provide former employees with explanatory termination letters unconstitutional, the state courts basing their decisions on the employers' Fourteenth Amendment equal protection rights to be free from interference with their "liberty of contract").

47. The *Prudential* Court stated: "[N]either the Fourteenth Amendment nor any other provision of the Constitution . . . imposes upon the states any restrictions about 'freedom of speech' . . ." *Id.* at 543.

48. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court, almost casually, stated the freedom of speech protected by the First Amendment was applicable to the states by the due process clause of the Fourteenth Amendment, and dismissed as "incidental" the contrary statement made earlier in *Prudential*. *Id.* at 666.

49. An early distinction made by the Court was that the First Amendment did not give citizens an unchecked right to speak whenever and wherever they pleased, nor did it prevent

unanimous, and since the 1950s, the Court has become more sharply divided—possibly due to the effects of the Cold War—on First Amendment liberties, as will be examined below.

A. Historical Restrictions on Public Employee Speech

1. *The Employer's Concern for Employee Efficiency*

As noted above, from roughly 1880 to 1950 the Court gave considerable deference to the government as an employer, holding restrictions on speech and related First Amendment activities by public employees as constitutional, while also noting the need for efficient government service. For example, in *United Public Workers of America v. Mitchell*,⁵⁰ the Court held that the Hatch Act⁵¹ did not unconstitutionally infringe on public employees' First Amendment rights.⁵² The Court viewed the issue as the employees' right to free speech versus the efficient supervision of administrative personnel,⁵³ citing *Ex parte Curtis* and *United States v. Wurzbach* for support.⁵⁴ Noting that First Amendment rights were not absolute and were subject to the need for order,⁵⁵ the Court deferred to Congress's and the Executive's responsibility for efficient public service, stating it was not unconstitutional to prohibit political participation by public employees in order for them to accomplish this goal.⁵⁶

punishment of those who passed this limitation. *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). However, the Court has emphasized the First Amendment, at a minimum, protects the right of citizens to speak publicly on "all matters of public concern." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

50. 330 U.S. 75 (1947).

51. 5 U.S.C. § 7324 (1988 & Supp. V 1993). The Hatch Act was originally enacted in 1940. *United Pub. Workers of America*, 330 U.S. at 78. The act prohibits United States government employees from engaging in political activity while on duty, while in any building used for the employees' duties, while wearing an official uniform or insignia, or while using any government vehicle. 5 U.S.C. § 7324(a).

52. *United Pub. Workers of America*, 330 U.S. at 103.

53. *Id.* at 94.

54. *Id.* at 96-98.

55. *Id.* at 95.

56. *Id.* at 99. The Court held Congress and administrative agencies had exclusive authority over public employees and, when Congress determines employees' actions jeopardize efficient and competent service, they can constitutionally take action to prohibit the same. *Id.* at 103.

2. *The Cold War and Public Employees' First Amendment Rights: The Court's Continued Deference to Public Employers' Concerns*

The Court continued in the early 1950s with deference to the government as employer, but not without the appearance of dissension within the Court's ranks.

In *Garner v. Board of Public Works of Los Angeles*,⁵⁷ a city ordinance required public employees to take an oath swearing they had not been a member of any group advocating the overthrow of the government and to execute an affidavit disclosing whether they were or ever had been a member of the Communist Party.⁵⁸ The Court held the affidavit requirement a valid inquiry by the employer into the employee's competence for public service.⁵⁹ The Court construed the oath requirement to be constitutional so long as the City applied it subsequent to its 1941 adoption, and not in a manner so as to be an ex post facto ordinance punishing an employee's conduct that was legal before the ordinance.⁶⁰

Similarly, in *Adler v. Board of Education*,⁶¹ the Court held New York's Feinburg Law⁶² not violative of the freedoms of speech and assembly.⁶³ The Court reasoned that, if a person is denied the privilege of employment as a public school teacher because of membership in a subversive group, it did not follow this was a denial of free speech, and the State could constitutionally consider a person's past and present membership in organizations when making an employment decision.⁶⁴ The Feinburg Law also entitled a person to a

57. 341 U.S. 716 (1951).

58. *Id.* at 717-19.

59. *Id.* at 720.

60. *Id.* at 720-21. The Court further noted:

Likewise, as a regulation of political activity of municipal employees, the [ordinance] was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, . . . and a State is not without power to do as much.

Id. at 721 (citation omitted). The Court cited *United Pub. Workers of America* as support. *Id.*

Indicating the beginning of dissension in the Court, Justices Frankfurter, Burton, Douglas and Black all dissented in whole or in part. *Id.* At 724-37.

61. 342 U.S. 485 (1952).

62. The law prohibited members of "subversive groups" (specifically the Communist Party) from state employment and, more particularly, employment in New York's public schools. *Id.* at 489.

63. *Id.* at 492. The Court again cited *United Pub. Workers of America* as authority for the statement that public employees, while having the right "to assemble, speak, think and believe as they will," had "no right to work for the State in the school system on their own terms." *Id.*

64. *Id.* at 492-93.

hearing and thus met the requirements of procedural due process to the Court's satisfaction.⁶⁵ As in *Garner*, Justices Black, Frankfurter, and Douglas again dissented.⁶⁶

B. The Tide Turns: The Shifting of the Court on Public Employee Speech

In 1952, the same year the Court decided *Adler* and only one year after the *Garner* decision, the Court began to shift away from its emphasis on public employers' concerns for efficiency and toward the rights of public employees. In *Wieman v. Updegraff*,⁶⁷ the Court narrowed its earlier decisions in *Garner* and *Adler* by holding that Oklahoma state employees, required by statute to take a loyalty oath for employment,⁶⁸ must knowingly associate with communist or subversive groups, as opposed to mere innocent association,⁶⁹ before they can be denied employment.⁷⁰ The Court found that the statute violated due process, because the Oklahoma Supreme Court had interpreted the statute so that it did not require knowing association.⁷¹

65. *Id.* at 495.

66. *Id.* at 496-511. See *supra* note 60.

67. 344 U.S. 183 (1952).

68. *Id.* at 188.

69. The Court seemed to make this distinction based on the fact that a person could join an originally legitimate group, but the group could "later com[e] under the influence of those who would turn it toward illegitimate ends." *Id.* at 190.

70. *Id.* at 189-91.

71. *Id.* at 191. In passing on the question of whether a right to public employment existed, the Court noted it was "sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192. Perhaps of greater relevance to the *Waters* decision is Justice Black's concurrence: he stated "the right to speak on matters of public concern must be wholly free or eventually be wholly lost," and that this right meant "individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest." *Id.* at 193-94 (Black, J., concurring). See *infra* part IV.C for Justice Stevens's similarly reasoned dissent in *Waters*.

In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court passed upon the constitutionality of the California Constitution, which required taxpayers (ironic in this case is the fact that the taxpayers were World War II veterans) to take an oath that they did not advocate the overthrow of the government before they could claim a veterans' property tax exemption. *Id.* at 514-15. The Court noted the denial of the tax exemption for engaging in speech was a limitation on speech, *id.* at 518, and because the difference between protected and unprotected speech was a sometimes subtle one, due process required the state to bear the burden of proving the speech unprotected. *Id.* at 525-26. Because California had not provided adequate procedural safeguards in this case to protect legitimate speech, the taxpayers in this case could not be required to take the oath. *Id.* at 528-29. As in *Wieman*, Justice Black again concurred, stating he was convinced penalizing people for their views and expressions on government was "hopelessly repugnant" to the First Amendment, which, in his opinion, granted an absolute right to discuss all governmental affairs and to argue for all desired changes in the existing order. *Speiser*, 357 U.S. at 531 (Black, J., concurring).

In *Shelton v. Tucker*,⁷² a case originating in Arkansas, the Court passed upon the constitutionality of an Arkansas statute requiring teachers to file affidavits enumerating every organization to which they belonged in the previous five years.⁷³ In another divided opinion, the Court noted that to require a teacher to disclose all associational ties impairs that teacher's right to free association, a right which, like free speech, lies at the foundation of a free society.⁷⁴ Citing *Wieman*,⁷⁵ the Court held the statute unconstitutional.⁷⁶

In a watershed decision in the area of public employment and the First Amendment, the Court, in *Keyishian v. Board of Regents*,⁷⁷ agreed that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."⁷⁸ The Court then held New York's Feinburg Law, which prevented the hiring or retaining of public employees that were members of listed groups, without requiring proof that the persons intended to further the group's unlawful aims, unconstitutionally overbroad.⁷⁹

72. 364 U.S. 479 (1960).

73. *Id.* at 480. Shelton was a twenty-five year employee of the Little Rock Special School District; when he declined to file the affidavit after being requested to do so, his contract was not renewed by the District. *Id.* at 482-83.

74. *Id.* at 485-86.

75. *Id.* at 487.

76. The Court stated "The unlimited and indiscriminate sweep of the statute . . . brings it within the ban of our prior cases. [Its] comprehensive interference with associational freedoms goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

77. 385 U.S. 589 (1967). In the interim between *Cramp* and *Keyishian*, the Court further addressed the issue of the First Amendment and employment, continuing to limit the government's ability to infringe on First Amendment protections. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (holding unconstitutional Maryland's requirement for a declaration of a belief in God for public employment); *Sherbert v. Verner*, 374 U.S. 398, 406-10 (1963) (holding unconstitutional a denial of unemployment benefits based upon a Seventh-day Adventist's refusal to accept employment that would require work on Saturdays as contrary to her religious beliefs); *Baggett v. Bullitt*, 377 U.S. 360, 361, 365, 366-67, 371 (1964) (holding a Washington statute requiring the faculty of the University of Washington, as public employees, to take an oath "disclaim[ing] being a subversive person and membership in the Communist Party" to be unconstitutionally vague and a violation of due process).

78. *Keyishian*, 385 U.S. at 605-06 (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

79. *Id.* at 608-10. The Court specifically noted that this was the case even though the law applied to New York teachers "who have captive audiences of young minds"; the statute was subject to the First Amendment protections of freedom of expression and association. *Id.* at 607.

C. The Court's Development of Protection for Speech on "Matters of Public Concern"

After *Keyishian* and its predecessors were decided, the Court developed a doctrine for public employment touched on over twenty years earlier in *Thornhill v. Alabama*⁸⁰—protection for employee speech on matters of public concern.⁸¹

1. *Public Concern and Public Employment*

If *Keyishian* was a watershed decision by the Court in the area of public employment, then *Pickering v. Board of Education*⁸² is the touchstone upon which all subsequent decisions in the area of public employees' speech on matters of public concern have been founded. In *Pickering*, the Court solidified twenty years of judicial development by holding that a public school teacher, dismissed for sending a letter to a newspaper criticizing the school board,⁸³ could not be dismissed from public employment on that basis.⁸⁴ The Court flatly rejected the implication in the Illinois Supreme Court's prior decision that *Pickering* as well as other public employees could be compelled by a public employer to refrain from exercising their First Amendment right to

80. 310 U.S. 88 (1940). See *supra* note 49 for a brief discussion of this case.

81. The Court in *Thornhill* noted that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period." *Thornhill*, 310 U.S. at 102.

82. 391 U.S. 563 (1968).

83. The letter was critical of the school board's past handling of revenue proposals. *Id.* at 564.

84. *Id.* at 574-75. The Court specifically held "that . . . 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." *Id.* (footnote omitted).

The most significant and enduring statement to come from *Pickering* has become known as the *Pickering* "balancing" test: balancing the interests of a public employee, as a citizen, in commenting on matters of public concern with the interests of the government, as a public employer, in employees' efficient public service. *Id.* at 568. This test has remained a constant in the Court's struggle with employee speech. See generally Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1110-11 (1988) (discussing the Court's subsequent applications of *Pickering*).

comment on their employment,⁸⁵ citing *Wieman*,⁸⁶ *Shelton*⁸⁷ and *Keyishian*⁸⁸ for support.⁸⁹

In *Perry v. Sindermann*,⁹⁰ the Court held that a state college teacher's lack of tenure did not inhibit his right to challenge the nonrenewal of his contract which the state based on First Amendment grounds.⁹¹ The Court stated that it had "made clear that even though a person has no 'right' to a valuable government benefit . . . , there are some reasons upon which the government may not rely. It may not deny a benefit . . . on a basis that infringes [on] constitutionally protected interests—especially . . . freedom of speech."⁹² However, in the companion case of *Board of Regents v. Roth*,⁹³ decided the same day as *Perry*, the Court held, where a nontenured state college faculty member did not have his contract renewed by the college,⁹⁴ and the college did not give any negative reason for nonrenewal,⁹⁵ the teacher was not deprived of due process merely because his contract was not renewed.⁹⁶ The Court noted, "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific

85. *Pickering*, 391 U.S. at 568. The Court further noted:

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

Id.

86. See *supra* note 67 and accompanying text for a discussion of this case.

87. See *supra* note 72 and accompanying text for a discussion of this case.

88. See *supra* note 77 and accompanying text for a discussion of this case.

89. *Pickering*, 391 U.S. at 568. For a more detailed analysis of the *Pickering* decision, see Stephen Allred, Note, Connick v. Myers: *Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429, 437-40 (1984) (stating that the three factors the Court in *Pickering* considered in balancing the First Amendment rights of public employees with the concerns of public employers were: the parties' working relationship, the detrimental effect of the employee's speech on the employer, and the nature of the speech as being on a matter of public concern and the employee's interest in that speech).

90. 408 U.S. 593 (1972).

91. *Id.* at 594-96.

92. *Id.* at 597. As support for this statement, the Court cites eleven of its prior decisions discussed herein at *supra* part III, including *Pickering*. *Perry*, 408 U.S. at 597.

93. 408 U.S. 564 (1972).

94. *Id.* at 566-67.

95. *Id.* at 573. The Court noted, had the college given a reason that "might seriously damage" the teacher's reputation, due process would require the teacher to be afforded a hearing to answer the charges. *Id.*

96. *Id.* at 578. The Court also held the teacher's right of free speech, standing alone, insufficient to encompass his interest in being a state employee, and therefore that right could not raise a First Amendment issue. *Id.* at 575 n.14.

benefits,⁹⁷ and a person must have a "legitimate claim of entitlement," rather than a mere "abstract need or desire," to have a property interest that may implicate the Fourteenth Amendment.⁹⁸

Ultimately, these and other fragmented decisions⁹⁹ led the Court to confront what test to apply in determining the constitutionality of a public employer's dismissal of an employee for speech that allegedly disrupted the workplace. Such was the issue in *Connick v. Myers*,¹⁰⁰ where the Court would develop the present day test.

2. *The Connick Test*

Shelia Myers was an assistant district attorney in New Orleans and was being considered by her supervisors (including Harry Connick, the District Attorney) for a transfer from the criminal division to a different department.¹⁰¹

97. *Id.* at 576.

98. *Id.* at 577. The Court ultimately held the teacher did not have a property interest sufficient enough for the Fourteenth Amendment to require the school to provide him a hearing upon nonrenewal of his contract. *Id.* at 578.

99. See *Arnett v. Kennedy*, 416 U.S. 134 (1974), where a three Justice plurality held the Lloyd-La Follette Act's provision that federal employees could be removed "for such cause as will promote the efficiency of the service," *id.* at 140, was consistent with procedural due process. *Id.* at 157-58. The opinion also cites *Pickering*, stating "in certain situations the discharge of a Government employee may be based on his speech without offending the guarantees of the First Amendment." *Id.* at 160. See also *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (5-4 decision holding the Fourteenth Amendment did not require federal courts to review incorrect employment decisions by public employers in the absence of any claim by the employee of termination for exercising constitutionally protected rights); *Elrod v. Burns*, 427 U.S. 347, 349-50, 373 (1976) (a three Justice plurality holding dismissals of public employees based on patronage (*i.e.*, not being affiliated with an incoming elected official's party) violated the First and Fourteenth Amendments); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 285 (1977) (holding that there is not always a constitutional violation when a public employer makes an employment decision where an employee's protected conduct played a "substantial part" in the actual decision); *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding a public employee's right to engage in protected speech is not lost when she communicates privately with her employer rather than the public at large); *Branti v. Finkel*, 445 U.S. 507, 509-10, 519-20 (1980) (a 6-3 decision holding a newly elected Democratic public defender could not, consistent with the First and Fourteenth Amendments, discharge Republican assistant public defenders solely for their political beliefs).

Mt. Healthy has subsequently been recognized as allowing a public employer, when the employee has proven his protected conduct was a "substantial factor" in the employer's actions against the employee, to nevertheless take action if the employer can prove it would have made the same decision "even in the absence of protected conduct." *Mt. Healthy*, 429 U.S. at 287. See *Allred*, *supra* note 89, at 443 (stating that *Mt. Healthy* altered the *Pickering* test by allowing a public employer's action to stand "[i]f the employer could show that irrespective of the protected conduct it would still have taken the action").

100. 461 U.S. 138 (1983).

101. *Id.* at 140-41.

When her protests concerning the transfer were unavailing, she prepared and distributed a questionnaire surveying numerous office policies and employee morale.¹⁰² Shortly thereafter, she was terminated for refusing to accept the transfer and for insubordination in distributing the questionnaire.¹⁰³ Myers filed suit under 42 U.S.C. § 1983, alleging that she had been terminated for exercising her First Amendment rights.¹⁰⁴ The district court found for Myers,¹⁰⁵ the Fifth Circuit affirmed,¹⁰⁶ and Connick appealed to the United States Supreme Court.

The Court noted it had previously decided that conditions of public employment could not infringe on freedom of expression by employees,¹⁰⁷ and the goal was to balance the employee's interest in commenting on matters of public concern with the government-employer's interest in its employees' efficiency.¹⁰⁸ After examining its prior decisions,¹⁰⁹ the Court concluded if Myers's questionnaire was not on a matter of public concern, there would be no need for the Court to review her discharge;¹¹⁰ even if "unfair," a discharge from public employment, without other factors present to implicate constitutional protections, was not subject to review by the courts.¹¹¹

As for Myers's speech in this case, the Court viewed¹¹² all of the questions in the questionnaire except one¹¹³ as "mere extensions" of her disagreement

102. *Id.*

103. *Id.* at 141.

104. *Id.*

105. *Myers v. Connick*, 507 F. Supp. 752 (E.D. La. 1981).

106. *Connick v. Myers*, 654 F.2d 719 (5th Cir. 1981).

107. *Connick*, 461 U.S. at 142. The Court cited *Keyishian, Pickering, Perry, and Branti* for precedents establishing this proposition. *Id.* See *supra* notes 77, 82-85, 90-92, and 99, respectively, and accompanying text for a discussion of these cases.

108. *Connick*, 461 U.S. at 142 (quoting *Pickering*, 391 U.S. at 568).

109. *Id.* at 143-46 (discussing many of the cases in part III, *supra*).

110. *Id.* at 146 ("[W]here employee expression cannot fairly be considered as relating to any matter of [public] . . . concern . . . , government officials should enjoy a wide latitude in managing their offices without intrusive oversight by . . . the First Amendment.").

111. *Id.* at 146-47. In this respect, the Court held:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . a federal court is not the appropriate forum . . . to review the wisdom of a personnel decision taken by a public agency in reaction to the employee's behavior.

Id. at 147.

112. In viewing Myers's speech, the Court noted that in order to determine whether it was on a matter of public concern required looking at the entire record for the content, form, and context of the speech. *Id.* at 147-48. The Court described the *Pickering* balancing test it would apply to Myers's speech as comprising three considerations: the government's interest in the efficient discharge of its duties; the time, place and manner of the employee's speech; and the context of the dispute between the employee and employer. *Id.* at 150-53.

113. That question was: "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.* at 155.

with her supervisors over her transfer, rather than involving matters of public concern over the District Attorney's performance as a public official.¹¹⁴

As for the one question by Myers that did involve a matter of public concern, the Court noted that pressure by public employers on its employees to work for political candidates was a violation of those employees' constitutional rights and was therefore speech on a matter of public concern.¹¹⁵ Although this shifted the burden to Connick to justify Myers's discharge, the Court noted that the weight of this burden depended on the nature of Myers's expression.¹¹⁶ Even though the questionnaire did not impede Myers's ability to discharge her duties as an assistant district attorney, the Court seemingly approved of Connick's characterization of Myers's questionnaire as a "mini-insurrection."¹¹⁷ Applying *Pickering* to Myers's speech, the Court found her questionnaire to involve matters of public concern "in only a most limited sense"¹¹⁸ and therefore her discharge did not violate the First Amendment.¹¹⁹

114. *Id.* at 148.

115. *Id.* at 149. The Court cited *United Pub. Workers of America* and *Elrod* for support. For a discussion of these cases, see *supra* notes 50-56 and 99, respectively, and accompanying text.

116. *Connick*, 461 U.S. at 149-50. The Court noted that it had clearly established this varying burden on the state in *Pickering*. See *supra* note 82-85 and accompanying text for a discussion of *Pickering*.

117. *Connick*, 461 U.S. at 151-52. The Court noted:

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. [There is no need] for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. However, the Court added a heavier burden might apply to an employer if the employee's speech was more related to matters of public concern. *Id.* at 152.

118. *Id.* at 154.

119. *Id.* The Court noted it did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged," *id.* (quoting *Pickering*, 391 U.S. at 569), and that although Connick was successful in discharging Myers in this case, it was "no defeat for the First Amendment." *Id.*

Four Justices dissented in *Connick*. *Id.* at 156. Justice Brennan, writing for the dissenters, stated the majority had misapplied the *Pickering* balancing test and "impermissibly narrow[ed]" the subjects that public employees could speak on without fear of reprisal by their employers, in holding that Myers's speech was not on a matter of public concern. *Id.* at 157-58 (Brennan, J., dissenting).

Subsequent scholarly works in this area seem to agree with the *Connick* dissenters. See, e.g., Allred, *supra* note 89, at 432-33 (stating *Connick* had narrowed the First Amendment rights of public employees from what they had been under *Pickering* and its progeny, while making an understanding of this area of the law "more difficult" and potentially encouraging litigation); Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 49, 81 (1988) (stating that the Court in *Connick* made it harder for a public employee to receive a favorable outcome under the *Pickering* test, that *Connick* "unfairly burden[ed]" public employees by requiring them to prove their speech was on a matter of public concern, and concluding that the Court should abandon *Connick* and

3. *The Court's Application of the Connick Test: Rankin v. McPherson*

The Court would attempt its first application of the *Connick* test in *Rankin v. McPherson*.¹²⁰ McPherson was a deputy constable¹²¹ in Texas who was fired by Constable Rankin, her supervisor, over a comment she made at work to a co-worker upon hearing that then-President Ronald Reagan had been shot in an attempted assassination.¹²² Justice Marshall, in writing for the bare majority of the Court,¹²³ noted that, in applying the *Pickering* balancing test,¹²⁴ the "threshold" inquiry required by *Connick* was whether McPherson's speech was on a matter of public concern.¹²⁵ Justice Marshall noted that McPherson's

return to the *Pickering* test to avoid further "uncertainty and suppression of speech that should be heard"); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 19-20 (1987) (stating that *Connick*, when combined with the Court's prior decisions, resulted in "very narrow freedom of speech for public employees," and also provided public employers with the means to "be rid of nearly any troublesome employee").

For a somewhat different view of *Connick*, see generally Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 6 (1987). Epstein relates the doctrine of "unconstitutional conditions" (a state should not use its power to grant or deny a privilege or benefit in a manner that improperly induces the waiver of constitutional rights), *id.* at 6-7, to *Connick* and concludes as long as Myers was still able to criticize the district attorney's office after her termination, the necessary checks and balances on government were present. *Id.* at 69-70. Epstein states that because this was the case in *Connick*, the "normal rules of employment contracts should apply" and Myers's termination was therefore constitutional. *Id.* at 70.

120. 483 U.S. 378 (1987).

121. McPherson's job was purely clerical—all employees of the Constable's office had the title of "deputy constable," and McPherson was not a law enforcement officer. *Id.* at 380.

122. *Id.* at 381-82. McPherson's comment to her co-worker, upon hearing the assassination attempt on the radio, was "If they go for him again, I hope they get him." *Id.* at 381. This comment was overheard by another co-worker, who reported it to Rankin. *Id.* at 381-82. Rankin then called McPherson into his office, and after a short discussion with her over her comment, fired her. *Id.* at 382. In McPherson's subsequent § 1983 action against Rankin, the district court held her speech unprotected, but the Fifth Circuit reversed and held that her speech was on a matter of public concern. *Id.* at 382-83.

123. Justice Marshall's opinion was joined by Justices Brennan, Blackmun, Powell (who also wrote a concurring opinion) and Stevens. Justice Scalia's dissent was joined by Chief Justice Rehnquist, and Justices White and O'Connor (the author of the *Waters* opinion). *Id.* at 379.

124. *Id.* at 384. The Court stated in full:

The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. (quoting *Pickering*, 391 U.S. at 568) (alteration in original).

125. *Id.*

speech “plainly dealt with a matter of public concern” and therefore passed the threshold *Connick* test.¹²⁶

As for the *Pickering* balancing test, Justice Marshall noted that the time, place, manner, and context of the employee’s expression were to be considered along with such factors as whether the employee’s speech affected discipline or harmony among co-workers, impaired necessary loyalty or confidence in employee-employer relationships, was detrimental to the performance of the employee engaging in the speech, or interfered with normal operations in the workplace.¹²⁷ Although these considerations by the employer constitute a potentially “strong state interest,”¹²⁸ McPherson’s statement did not infringe upon that interest enough to outweigh her First Amendment protection to engage in the speech.¹²⁹ The Court therefore held that McPherson’s discharge violated her rights under the First Amendment and affirmed the Fifth Circuit’s decision.¹³⁰

As with the response to *Connick*, *Rankin* met with less than unanimous approval: some scholars felt that McPherson’s speech was clearly protected by the First Amendment and the Court therefore reached the correct result,¹³¹ while others felt the Court had unnecessarily expanded the protection for public employee speech at the expense of public employers.¹³² Some simply

126. *Id.* at 386-88. As for the substance of McPherson’s speech, Justice Marshall stated: The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. “[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

Id. at 387 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (alterations in original).

127. *Rankin*, 483 U.S. at 388.

128. *Id.*

129. *Id.* Justice Marshall noted McPherson’s statement was not shown to have interfered with the functioning of the office, disrupted or disturbed other co-workers, or publicly discredited the office. *Id.* at 388-90. Also, although Rankin argued McPherson’s statement made her unsuitable for employment in the Constable’s office, Justice Marshall noted “some attention must be paid to the responsibilities of the employee within the agency.” *Id.* at 390. In this case, McPherson’s responsibilities as an employee were such that she was not a public representative of the Constable’s office nor involved in office policy decisions; given this, Justice Marshall concluded “that Rankin’s interest in discharging her [did not] outweigh her rights under the First Amendment.” *Id.* at 390-92.

130. *Id.* at 392.

131. See, e.g., Massaro, *supra* note 119, at 71-72 (agreeing with the Court that McPherson’s speech was on a matter of public concern, but noting the fact the Court was split on the decision “only underscores the ambiguity of the matter of public concern criterion, as well as the ambivalence some [J]ustices feel toward extending [F]irst [A]mendment protection into the public sector workplace”).

132. See, e.g., W. Eric Dennison, Note, 55 TENN. L. REV. 175, 200-01 (1987) (stating *Rankin* expanded the protection afforded to any speech by a public employee, regardless of

disagreed with the very concept of the "public concern" test developed by the Court, commenting that it "provided just enough guidance to confuse everyone."¹³³ The Court in *Waters* would have its next and most recent opportunity to provide further guidance—or confusion—in this problematic area.¹³⁴

IV. REASONING OF THE COURT IN *WATERS*

In *Waters v. Churchill*,¹³⁵ the United States Supreme Court¹³⁶ held that a government employer could take disciplinary action¹³⁷ against an employee for her speech in the workplace, as long as that decision was based upon "the care that a reasonable manager would use before making an employment decision."¹³⁸ Justice O'Connor admitted that the Court could not define "a general test to determine when a procedural safeguard is required by the First Amendment"¹³⁹ for government employers dealing with their employees' speech;¹⁴⁰ therefore, the Court's holding on this issue¹⁴¹ was limited to the case's facts.¹⁴²

whether that was in a "confidential or policymaking role," and that this "went too far" in the protection of public employees and was at the expense of employers).

133. D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258 (1990). Smith noted "[t]he most fundamental problem with the public concern threshold test has emerged from attempts to apply it: no one knows what 'public concern' is." *Id.* at 258.

134. For further discussions of the problems produced by *Connick* and *Rankin*, see generally Cynthia K.Y. Lee, *supra* note 84, at 1116-21 (commenting on the conflicting signals the Court has sent in these two decisions; apparently narrowing the concept of public concern in *Connick*, but later appearing to broaden it in *Rankin*).

135. 114 S. Ct. 1878 (1994).

136. A plurality of four justices made up the lead opinion, with Justice O'Connor writing the opinion, and Chief Justice Rehnquist, Justice Souter, and Justice Ginsburg joining. *Id.* at 1882.

137. Examples of disciplinary actions include discharging, suspending, or reprimanding the employee. *Id.* at 1889.

138. *Id.*

139. *Id.* at 1885.

140. *Id.* at 1886.

141. The stated issue the Court addressed was whether the government employee's speech was to be viewed in the context of what the employer thought the employee said, or what the court ultimately determined was actually said by the employee. *Id.* at 1882.

142. Justice O'Connor noted "[n]one of us have discovered a general principle to determine [when or what type of procedural safeguard a government employer must use, and] . . . [w]e must therefore reconcile ourselves to answering the question on a case-by-case basis . . ." *Id.* at 1886.

A. The O'Connor/Majority Test

Justice O'Connor began with the test enunciated in *Connick v. Myers*¹⁴³ for determining when a government employer could use speech by a government employee to serve as the basis for discharging that employee.¹⁴⁴ In *Connick*, the Court held that, in balancing the interests of an employee in speaking on matters of public concern with the interests of the government employer in employee efficiency and public service,¹⁴⁵ the employee's speech was to be viewed in the content, form, and context of the statement in light of the entire record.¹⁴⁶ Justice O'Connor noted that in applying the *Connick* test, the employee's speech, to be protected, must be on a matter of public concern and the employee's interest in expression must outweigh the injuries the speech could effect to the interests of the government employer in employee efficiency.¹⁴⁷ In *Churchill*, the real dispute was whether the *Connick* test applied to the speech as the employer interpreted it, or whether it applied to the speech as the fact finder ultimately determined it to be.¹⁴⁸

Justice O'Connor noted the Court had previously held that the First Amendment required "reliable procedures" when there was the possibility that protected speech could be penalized,¹⁴⁹ and that these and other cases demonstrated that the First Amendment, in certain circumstances, prohibited a government employer from acting on protected speech, regardless whether the employer had a good faith belief in the speech being unprotected.¹⁵⁰ Further, this principle applies to administrative as well as judicial procedures.¹⁵¹

143. 461 U.S. 138 (1983). For a discussion of *Connick*, see *supra* part III.C.2.

144. *Waters*, 114 S. Ct. at 1882.

145. *Connick*, 461 U.S. at 142. See also *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (noting "the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

146. *Connick*, 461 U.S. at 147-48. It is a question of law whether speech is protected. *Id.* at 148 n.7.

147. *Waters*, 114 S. Ct. at 1884. The Court in *Connick* explained:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Connick, 461 U.S. at 146-47.

148. *Waters*, 114 S. Ct. at 1884.

149. *Id.* at 1884.

150. *Id.* at 1885.

151. *Id.* Justice O'Connor noted, "Speech can be chilled and punished by administrative

However, Justice O'Connor stated that the First Amendment did not require every procedural safeguard for protected speech.¹⁵² Although the test used by the Seventh Circuit¹⁵³ in essence provided Churchill with two opportunities to be vindicated (the Hospital's investigation, followed by a judicial determination),¹⁵⁴ and undoubtedly required an employer to disregard an employee's free speech rights at its peril, "the balance need not always be struck in that direction" to satisfy the First Amendment.¹⁵⁵ Justice O'Connor admitted that "the lack of . . . a test" for determining what procedural safeguards were required was "inconvenient," but the fact remained that the First Amendment does not always mandate procedural requirements.¹⁵⁶ The constitutionality of the procedure necessarily depends on the surrounding circumstances, such as the cost of the procedure and the increased or decreased risks to employees' First Amendment rights.¹⁵⁷

Justice O'Connor then turned to an examination of the underpinnings of the premise that a government employer has broader powers dealing with protected speech by an employee than it does in dealing with speech by citizens in its role as sovereign.¹⁵⁸ The functional realities of government employment require that the government have the ability to restrict the speech of its employees.¹⁵⁹ Moreover, the First Amendment's requirement that even offensive speech be tolerated for the sake of open debate on public issues has

action as much as by the judicial process . . ." *Id.* See also *Speiser v. Randall*, 357 U.S. 513, 515-18 (1958) (holding the denial of a tax exemption to persons in California who refused to take an oath stating, among other things, that they did not advocate overthrowing the government, was "the same as if the State were to fine them for this speech" and a clear infringement of free speech).

152. *Waters*, 114 S. Ct. at 1885.

153. The Seventh Circuit test was as follows:

[W]hen a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination. If 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, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental.

Churchill v. Waters, 977 F.2d 1114, 1127 (7th Cir. 1992).

154. *Waters*, 114 S. Ct. at 1885.

155. *Id.*

156. *Id.* at 1885-86.

157. *Id.* at 1886.

158. *Id.* See, e.g., *Connick v. Myers*, 461 U.S. 138, 146 (1983) (stating if a government employee's speech is not protected, the government employer "enjoy[s] wide latitude" regarding the First Amendment); *Pickering*, 391 U.S. at 568 (noting that the state has interests in the control of an employee's speech that it does not have with the speech of other citizens).

159. *Waters*, 114 S. Ct. at 1886.

not been applied to government employers in the past because it would not be reasonable to do so.¹⁶⁰

Just as the government has different powers regarding employee speech, the procedural requirements regarding that speech are also treated differently.¹⁶¹ Justice O'Connor noted "surely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."¹⁶² Similarly, greater leeway is given to the government's speculative reasons for placing restrictions on employee speech than is given to the government's attempts to justify the same types of restrictions on the general public.¹⁶³ This is so even where the speech is on a matter of public concern.¹⁶⁴ A government employer may make employment decisions on employee speech that is only of private concern, even if the speech is not disruptive and of some value to the speaker and listeners.¹⁶⁵ In sum, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."¹⁶⁶

Justice O'Connor found that the Seventh Circuit had not given sufficient weight to the efficiency interests of the Hospital when it terminated Churchill for her speech.¹⁶⁷ Under that court's approach, an employer would have to base an employment decision not on its own conclusions, but on what the employer thought a fact finder might determine the status of the speech to be with the benefit of hindsight.¹⁶⁸ Employers must often rely on other employees' reports

160. *Id. See, e.g., Branti v. Finkel*, 445 U.S. 507, 518 (1980) (noting "the Governor of a State may appropriately believe that the official duties of [his] various assistants . . . cannot be performed effectively unless these persons share his political beliefs and party commitments").

161. *Waters*, 114 S. Ct. at 1886.

162. *Id.* at 1886-87. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 158-59 (1974) (holding the Lloyd-LaFollette Act's standard for discharging a federal employee constitutional where the standard was "for such cause as will promote the efficiency of the service").

163. *Waters*, 114 S. Ct. at 1887. Justice O'Connor contrasts this situation with one where the government in its sovereign capacity might offer legislative speculations of possible harm resulting from citizens' speech as justification for the government's restriction of the same, where the Court's review of the government's actions would be "considerably less deferential." *Id.*

164. *Id.*

165. *Id.* However, a government employee may have a strong interest in speaking on matters of public concern, in which case the employer, to make an employment decision consistent with the First Amendment, may have to show that the speech would in fact be disruptive. *Id. See, e.g., Connick v. Myers*, 461 U.S. 138, 152 (1983) (noting if an employee's speech "substantially involved a matter of public concern," the employer may be required to make a strong showing of disruption before taking action).

166. *Waters*, 114 S. Ct. at 1887-88.

167. *Id.* at 1888.

168. *Id.*

on an employee's speech, or their own personal knowledge, and this will generally be the most productive way for the employer to make an employment decision regarding potentially disruptive speech.¹⁶⁹ The Court acknowledged that reliance on such procedures may occasionally punish protected speech,¹⁷⁰ but noted that a government employer may adopt other procedures to safeguard such speech, if it is so inclined.¹⁷¹

Despite the deference that employers are allowed, however, the First Amendment does require the employer to reach its decision in good faith and with a reasonable amount of care in investigating the precise content of the employee's speech before making an employment decision based upon that speech.¹⁷² The type and thoroughness of the investigation will vary with each case, with the guide being the investigation a reasonable employer would engage in.¹⁷³

Justice O'Connor noted it was not unconstitutional for a government employer to terminate an employee based on incorrect information.¹⁷⁴ Only where an employee has a property interest in her job does the Constitution afford any protection, and then only the right to an adequate procedure; thus, an at-will government employee (as Churchill apparently was) normally has no constitutional claim.¹⁷⁵ The protection that a government employer voluntarily gives an employee's speech may provide the employee with a remedy, but the Constitution does not require this additional protection.¹⁷⁶

Applying the above to Churchill, if the defendants had a good faith belief in Graham's and Ballew's versions of the conversation, and subsequently discharged Churchill because of this, they must prevail because that belief would have been reasonable in light of the investigation that was conducted.¹⁷⁷ Moreover, under the *Connick* test, Churchill's speech was unprotected; even if speech on cross-training was a matter of public concern, the potential for

169. *Id.*

170. *Id.*

171. *Id.*

172. Note there are two requirements; it is not sufficient that the employer merely act in good faith in making her decision. *Id.* at 1889.

173. *Id.*

174. *Id.* at 1890.

175. *Id.*

176. *Id.*

177. *Id.* Justice O'Connor appeared to approve of the investigation conducted by the defendants, stating:

Management can spend only so much of their time on any one employment decision. By the end of the termination process, Hopper . . . had the word of two trusted employees, the endorsement of . . . three hospital managers, and the benefit of a face-to-face meeting with the employee he fired. With that in hand, a reasonable manager could have concluded that no further time needed to be taken.

Id.

disruption¹⁷⁸ outweighed Churchill's First Amendment right to engage in the speech as a matter of law.¹⁷⁹ So long as Churchill was discharged for speech that was not on a matter of public concern, or on a matter of public concern but disruptive, it did not matter if other speech by Churchill in the same conversation was protected; the *Connick* test only applies to the speech causing the discharge.¹⁸⁰

In the end, however, Justice O'Connor agreed with the Seventh Circuit that Churchill had created a material issue of fact over whether she was discharged for disruptive statements or rather for other, possibly protected statements. Likewise, she agreed that the protected status of any other speech that was the possible motive for Churchill's discharge was a matter that would have to be determined on remand.¹⁸¹ She therefore vacated the Seventh Circuit's judgment and remanded the case for further proceedings consistent with the Court's opinion.¹⁸²

B. The Concurring Justices

Justice Souter wrote a concurring opinion in which he emphasized that the public employer must reasonably investigate the third-party account and in fact believe it.¹⁸³ Justice Souter's primary concern here was that even though the defendants conducted a reasonable investigation into Churchill's speech, they should still be found on remand to have violated Churchill's First Amendment rights if they unreasonably relied on the report and discharged her for protected speech.¹⁸⁴ Justice Souter's interpretation of the Court's opinion was that an employer whose conduct passes the Court's reasonableness test does not violate an employee's First Amendment rights, but he also agreed with Justice Stevens that an employer who fails the Court's reasonableness test has violated the Free Speech Clause.¹⁸⁵

178. Justice O'Connor noted that "[d]iscouraging people from coming to work for a department certainly qualifies as disruption." *Id.*

179. *Id.* at 1890-91.

180. *Id.* at 1891. Justice O'Connor observed that "[a]n employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements." *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (Souter, J., concurring). Justice Souter further noted, "A public employer who did not really believe that the employee engaged in disruptive . . . speech can assert no legitimate interest strong enough to justify chilling protected expression" *Id.*

184. *Id.* at 1892-93 (Souter, J., concurring).

185. *Id.* at 1893 (Souter, J., concurring).

Justice Scalia wrote an opinion concurring in the Court's judgment, and was joined by Justices Kennedy and Thomas.¹⁸⁶ He felt that the Court should continue to follow its prior holdings that a public employer violates the First Amendment by disciplining an employee only if retaliating for speech on a matter of public concern, and the Court's requirement that an employer conduct an investigation beforehand was both unnecessary and unprecedented.¹⁸⁷ He also noted prior decisions of the Court had held a public employee who did not have a property interest in her job could be constitutionally dismissed for any or no reason at all.¹⁸⁸ He believed the Court's opinion put public employers in between the proverbial rock and hard place in attempting to distinguish between protected and unprotected speech, in attempting to determine exactly how a reasonable supervisor would conduct an investigation, and in knowing on what he or she could or could not constitutionally rely in the way of evidence.¹⁸⁹

C. The Dissent

Justice Stevens wrote a dissenting opinion in which he stated he would affirm the judgment of the Seventh Circuit based upon the First Amendment; accordingly, as long as the speech was not unduly disruptive, Justice Stevens would not allow it to be the basis for an employer disciplining an employee.¹⁹⁰ He agreed with the Seventh Circuit that there was nothing unfair about placing the risk of mistake on an employer where an employee is discharged for protected speech,¹⁹¹ and the controlling issue should not be an employer's good faith, bad faith, or motives in investigating and disciplining an employee, but whether the employer violated the employee's First Amendment right to freedom of speech in disciplining the employee.¹⁹²

186. *Id.* (Scalia, J., concurring in the judgment).

187. *Id.* (Scalia, J., concurring in the judgment). Justice Scalia noted the Court made "no attempt to justify the right of investigation on historical grounds," and that it was "quite unheard of." *Id.* at 1895 (Scalia, J., concurring in the judgment).

188. *Id.* at 1894. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding a person must have a "legitimate claim of entitlement" to property, rather than a mere expectation of it, to have a property interest protected by procedural due process).

189. *Waters*, 114 S. Ct. at 1896-97.

190. *Id.* at 1898-1900 (Stevens, J., dissenting). Justice Blackmun joined the opinion.

191. *Id.* at 1900 (Stevens, J., dissenting).

192. *Id.* at 1899-1900 (Stevens, J., dissenting).

V. SIGNIFICANCE

In essence, *Waters* involved speech by a public employee that concerned matters of public and private concern.¹⁹³ The Court looks first at the surrounding circumstances to determine if an employee's speech is protected: if, as in *Connick*, the speech is found to be more personal than public, it is likely to be found unprotected;¹⁹⁴ but if, as in *Rankin*, it is found to be more on a matter of public concern, it is likely to be found protected.¹⁹⁵ If the speech be found disruptive, it does not seem to matter whether or not the speech was protected, and the analysis should end.¹⁹⁶

What role the reasonable investigation requirement will play in the Court's analysis is less clear. The *Waters* Court did not answer what, if any, First Amendment consequences accompany an employee's unprotected speech when the employer conducts an *unreasonable* investigation and subsequently disciplines the employee.¹⁹⁷

A more fundamental issue concerns defining a reasonable investigation. The *Waters* plurality apparently felt the Hospital's investigation was adequate: employee interviews were conducted, Churchill's supervisors met twice to discuss the incident, and Churchill had the opportunity to appeal her termina-

193. See *id.* at 1890-91, where the Court discusses both the personal (Churchill's comments about *Waters*) and public (Churchill's comments on the Hospital's cross-training program) aspects of Churchill's speech.

194. See generally *supra* part III.C.2 for a discussion of *Connick*. See also *Smith v. Fruin*, 28 F.3d 646, 651-53 (7th Cir. 1994) (citing *Connick* in holding a police detective's complaints about second-hand smoke in his workplace were matters of private concern, and therefore not protected by the First Amendment).

195. See generally *supra* part III.C.3 for a discussion of *Rankin*. See also *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539-40 (1994) (holding subpoenaed testimony by a county sheriff's department employee at the sheriff's discrimination trial (where the sheriff was the defendant) was speech on a matter of public concern, where the employee was subsequently discharged by the sheriff because of the testimony).

196. See *supra* note 117 and accompanying text for the *Connick* Court's discussion of disruptive speech.

197. In *Burkes v. Klauser*, 517 N.W.2d 503 (Wis. 1994), the director of a state investment board had approached the state's attorney general and state auditor with concerns over problems within the board, and was subsequently discharged by the board. *Id.* at 509. Although the Wisconsin Supreme Court did not base its decision on the unreasonableness of the board's investigation before discharging the director, it did note that, were it to apply the *Waters* test, it "might conclude that the defendants should have made an inquiry" into the director's meeting with the attorney general and auditor, since an inquiry would have "ma[de] clear that the [director] was speaking about matters of public concern." *Id.* at 515-16. *Burkes* gives at least an indication of how a court applying *Waters* might view the possible consequences of an unreasonable investigation.

tion.¹⁹⁸ In *Harper v. Crockett*,¹⁹⁹ a recent Arkansas district court opinion, the court gives one of the most thorough discussions yet by a lower court of *Waters* and its requirement of a reasonable investigation by the employer.²⁰⁰

In *Harper*, a Sherwood, Arkansas, patrolman (Harper) was off-duty and attempting to cash a check at a local bank when he became upset because of the ten percent fee the bank charged for cashing noncustomer checks.²⁰¹ As he exited the bank, Harper was overheard stating: "Just wait until the next time they're getting robbed and I'm the first one in getting shot at. That's my job you know, I am a policeman."²⁰² He was subsequently suspended for thirty days without pay by the chief of police (Crockett) for this statement.²⁰³

In finding that Crockett utilized reasonable investigation procedures regarding the statement, the court noted he reviewed all written and oral statements by the bank employees and customers who overheard Harper, gave Harper both written and oral opportunities to present his version of the events, read a statement given by Harper to a police investigator, and read the investigator's statement on Harper's demeanor during the investigation.²⁰⁴ Overall, *Harper* is a thoughtful application of the *Waters* test, and may be a good indicator for employers of what constitutes a reasonable investigation in the eyes of a court applying *Waters*.

The reasonable investigation requirement is but one aspect of the *Waters* opinion, and it remains to be seen what other roles this decision will play in the future of public employee speech. This note has endeavored to show the long, sometimes convoluted path the Court has travelled in this area of the law, and how *Waters* seems to add yet another layer to the complex analysis the Court applies in deciding between the competing, yet equally compelling, interests of government and its employees. The very fact *Waters* was a plurality decision shows the Court is probably far from the end of its journey.

D. Keith Fortner

198. See *supra* note 177 and accompanying text for the Court's discussion of the reasonableness of the Hospital's investigation.

199. 868 F. Supp. 1557 (E.D. Ark. 1994).

200. See generally *id.* at 1565-67. The court also discusses *Connick* and *Pickering* at some length. *Id.* at 1564-74.

201. *Id.* at 1563.

202. *Id.*

203. *Id.*

204. *Id.* at 1567-68.