Western New England Law Review

Volume 3 3 (1980-1981)
Issue 2

Article 11

1-1-1980

FIRST AMENDMENT RIGHTS—PUBLIC EMPLOYEES MAY SPEAK A LITTLE EVIL—Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)

John A. Koltes III

FIRST AMENDMENT RIGHTS—PUBLIC EMPLOYEES MAY SPEAK A LITTLE EVIL—*Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

I. INTRODUCTION

The first amendment to the Constitution[1] prohibits government[2] from abridging citizens' freedom of speech. The simplicity of this concept belies the difficulty that courts have had in interpreting it to guarantee fundamental first amendment rights to citizens who have become state employees. Traditionally, states could legitimately condition public employment on the relinquishment of first amendment rights by requiring loyalty oaths[3] and other guarantees of nonsubversive activity by their employees. More recently, however, public employees' first amendment rights have begun to receive protection[4] through a balancing of the interest of the state, as employer, against the interest of the employee, as citizen, in commenting on matters of public concern.[5] In conformity with the progressive expansion of first amendment protection afforded public employees, the United States Supreme Court in *Givhan v. Western Line Consolidated School District*[6] held that first amendment protection extends to the private communications between a public employee and her employer.[7] This holding significantly expands the scope of first amendment protection previously afforded public employees. Its subsequent treatment by the courts has expanded the contours of the first amendment for private citizens as well.[8]

---

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

2. The first amendment applies to the federal government by its expess terms, and to the states through the fourteenth amendment. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

3. Garner v. Board of Pub. Works of Los Angeles, 341 U.S. 716 (1951); *cf.* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951). *See generally* R. S. BROWN, LOYALTY & SECURITY 92-118 (1958); Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROB. 487 (1963).

4. *See* notes 45-48 *infra* and accompanying text.

5. *See* notes 53-61 *infra* and accompanying text.

6. 439 U.S. 410 (1979).

7. *Id.* at 415-16.

8. *See* notes 128-37 *infra* and accompanying text.

II. FACTS

In 1970, plaintiff Bessie Givhan, a nontenured,[9] black school teacher, was transferred to the previously all-white Glen Allan School in accordance with the terms of a court-ordered desegregation decree enunciated in *Singleton v. Jackson Municipal Separate School District*.[10] At the Glen Allan School, friction developed between Mrs. Givhan and the principal, James Leach, over what she termed "requests"[11] for changes in practices she perceived to be racially discriminatory.[12] As a result of this conflict Principal Leach recommended that Mrs. Givhan not be rehired at the end of the 1970 school year, and in fact she was not rehired.[13]

Mrs. Givhan alleged that her dismissal was in violation of the desegregation provisions of *Singleton*, which require that "objective and reasonable nondiscriminatory standards"[14] be used in selecting staff members for dismissal or demotion. She then filed a class action[15] suit against the school district seeking reinstatement.[16] The court denied the class action suit[17] and dismissed the complaint.[18] Mrs. Givhan, however, was granted the right to intervene in *Ayers v. Western Line Consolidated School District*,[19] which addressed the school district's compliance with *Singleton*.

Mrs. Givhan subsequently intervened and sought reinstate-

---

9. Mississippi public school teachers have been prohibited by statute from being tenured from the time this case arose until the present. MISS. CODE ANN. § 37-9-17 (1972). The school can dismiss any teacher for any reason which does not infringe a constitutional right. Givhan v. Western Line Consol. School Dist., 555 F.2d 1309, 1314 (5th Cir. 1977), *rev'd*, 439 U.S. at 410. Because of plaintiff's untenured status she lacked an interest in continued employment. *Id.* This precluded plaintiff from claiming a procedural due process violation, and none was asserted. *Id.*

10. 419 F.2d 1211 (5th Cir. 1969), *rev'd and remanded sub nom.* Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1969), *on remand*, 425 F.2d 1211 (5th Cir. 1970).

11. 555 F.2d at 1313. *See also* notes 22-24 *infra* and accompanying text.

12. 439 U.S. at 413.

13. *Id.* at 411.

14. *Singleton* required that "objective and reasonable non-discriminatory standards" be used in selecting staff members for dismissal or demotion. 419 F.2d at 1218.

15. Suit was commenced in the names of Bessie Givhan, Mary Butler, and Dolleye Hodges individually, and for the benefit of three classes of black teachers and employees who had been discharged or not rehired by the Board of Education of Western Line Consolidated School District. 555 F.2d at 1311.

16. Givhan v. Board of Educ. W. Line Consol. School Dist., 363 F. Supp. 714 (N.D. Miss. 1973), *rev'd*, 555 F.2d at 1309, *rev'd*, 439 U.S. at 410.

17. *Id.* at 717.

18. *Id.*

19. 555 F.2d 1309 (5th Cir. 1977), *vacated*, 439 U.S. at 410.

ment on two grounds: First, that nonrenewal of her contract violated the rule enunciated in *Singleton*; and second, that it violated her first and fourteenth amendment rights of free speech.[20] The school district defended its action on several grounds.[21] At trial, Principal Leach testified to the race and discipline problems rampant in the Glen Allan School and to Mrs. Givhan's announced intention not to cooperate with him. Essentially, however, Principal Leach's recommendation not to rehire Mrs. Givhan was based on the "demands" she had made on him throughout the school year.[22] Principal Leach maintained that Mrs. Givhan was arrogant, antagonistic, and hostile, particularly with regard to her "unreasonable demands."[23] Mrs. Givhan had given him a list of what he termed "demands" and what she termed "requests," which all involved "Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment."[24]

The United States District Court for the Northern District of Mississippi agreed with Mrs. Givhan, holding that nonrenewal of her contract violated her first amendment rights.[25] The court found that, while Mrs. Givhan had made "demands" on two occasions,

---

20. *Id.* at 1311.

21. The school district reiterated the reasons the district superintendent had given Mrs. Givhan in a letter advising her of her dismissal. The three reasons stated in this letter were: 1) Givhan's refusal to administer a nationalized test for her students; 2) her intention not to cooperate with the school administrators; and 3) an antagonistic and hostile attitude. *Id.* at 1312 n.6. Additionally, defendants attempted to prove:

> (1) That Givhan "downgraded" the papers of white students; (2) that she was one of a number of teachers who walked out of a meeting about desegregation in the fall of 1969 and attempted to disrupt it by blowing automobile horns outside the gymnasium; (3) that the school district had received a threat by Givhan and other teachers not to return to work when schools reopened on a unitary basis in February, 1970; and (4) that Givhan had protected a student during a weapons shakedown at Riverside in March, 1970 by concealing a student's knife until completion of the search. The evidence on the first three of these points was inconclusive and the district judge did not clearly err in rejecting or ignoring it. Givhan admitted the fourth incident, but the district judge properly rejected that as a justification for her not being rehired, as there was no evidence that Leach relied on it in making his recommendation.

Id. at 1313 n.7.

22. Mrs. Givhan had given Leach demands seeking placement of blacks in the "choice" ticket taking jobs in the cafeteria, better integration of the administrative staff, and assignment of the black Neighborhood Youth Corps workers to semi-clerical tasks rather than solely janitorial positions. *Id.* at 1313.

23. *Id.* at 1314.

24. *Id.* at 1313.

25. 439 U.S. at 412.

they had been neither "petty" nor "unreasonable" since they involved what Mrs. Givhan perceived to be racially discriminatory practices.[26] In the court's opinion, plaintiff's criticism of the policies and practices of the school board was the primary reason for nonrenewal of her contract.[27] The district court, therefore, ordered her reinstated.

Judge Gewin of the United States Court of Appeals for the Fifth Circuit reversed, holding that no constitutional right had been implicated in Mrs. Givhan's dismissal. Because Mrs. Givhan had communicated *privately* with her employer, the circuit court held the communication to be unprotected. This principle, that "private expression by a public employee is not constitutionally protected,"[28] was asserted to be the "strong implication"[29] of *Pickering v. Board of Education*,[30] *Perry v. Sindermann*,[31] and *Mt. Healthy City School District Board of Education v. Doyle*.[32]

The United States Supreme Court reversed the Fifth Circuit, holding that first amendment freedom is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[33] Justice Rehnquist stated that, although *Pickering*, *Perry*, and *Doyle* each focused on protection of a public employee's *public* expression, this fact was merely coincidental,[34] and the rule to be derived from these cases should not preclude protection of a public employee's *private* expressions.[35] *Givhan*, therefore, was remanded in light of the Supreme Court's expanded view of first amendment expression.[36]

This casenote will place *Givhan* in an historical perspective by reviewing the gradual development of the law relating to public employees' first amendment rights. With this background, the circuit court opinion can be analyzed in the proper perspective. Finally, the Supreme Court's holding and its subsequent applica-

---

26. *Id.* at 412-13.
27. 555 F.2d at 1314.
28. *Id.* at 1318.
29. *Id.*
30. 391 U.S. 563 (1968).
31. 408 U.S. 593 (1972).
32. 429 U.S. 274 (1977).
33. 439 U.S. at 415-16.
34. *Id.* at 414.
35. For a detailed discussion of *Pickering*, *Perry*, and *Doyle*, *see* text accompanying notes 69-73 *infra*.
36. 429 U.S. at 417.

tion by lower courts will illustrate the significance and current status of the *Givhan* decision.

III. Historical Development of Public Employees' First Amendment Rights

A. *Historical Background*

Historically, public employment was perceived as a privilege which could be conditioned upon relinquishment of constitutional rights.[37] For example, courts have upheld the validity of statutes requiring dismissal of teachers belonging to "subversive organizations"[38] and prohibiting membership in organizations advocating overthrow of the government.[39] The basis for this rule has been traced to Justice Holmes' statement that a public servant "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[40] History illustrates that the conditioning of public employment upon the relinquishment of constitutional rights was a direct result of the theory that public employment was a privilege, not a right.[41] Since it was considered a privilege, the state had the power to impose conditions on public employment which it could not impose on the population in general. As recently as 1952, the United States Supreme Court, in *Adler v. Board of Education*,[42] reaffirmed this position by holding that persons seeking public employment are subject to "the reasonable terms laid down by the proper authorities of [the state] . . . ."[43] While the right-privilege distinction held sway, states could condition public employment on a variety of constitutionally impermissible grounds.[44]

---

37. *See* Comment, *Development in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1065 (1968); Comment, *First Amendment Rights and Teacher Dismissal: A Survey*, 4 OHIO N. L. REV. 392, 392 (1977); Note, *Judicial Protection of Teachers' Speech: The Aftermath of* Pickering, 59 IOWA L. REV. 1256, 1256 (1974).

38. *See* Adler v. Board of Educ., 342 U.S. 485 (1952) (court upheld validity of statute requiring dismissal of any teacher belonging to "subversive organizations").

39. Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951).

40. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

41. *Id.*

42. 342 U.S. 485 (1952).

43. *Id.* at 492.

44. *See generally* Adler v. Board of Educ., *id.* at 485; Fenstermacher's Appeal, 36 Pa. D.&C. 373 (1939); Van Alstyne, *supra* note 40.

B. *The* Keyishian *Case—Decline of the Right-Privilege Doctrine*

In *Keyishian v. Board of Regents*,[45] the Supreme Court repudiated the right-privilege distinction and specifically rejected the basis on which *Adler* had been decided.[46] The appellants in *Keyishian* were teachers who had been dismissed for refusing to sign a certificate denying membership in any organization which advocated overthrow of the government. The Supreme Court reversed the lower court, holding the statute to be unconstitutional because it was vague and overbroad, and ordered the teachers reinstated. The Court then enunciated a new, greatly expanded ruling to protect teachers. Academic freedom was characterized as a "transcendent value" of "special concern" to the first amendment.[47] In conformity to this new standard the Court expressly rejected the premise upon which *Adler* had been decided, "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[48]

Unfortunately, what *Keyishian* gave to the individual in increased constitutional protection, it took from the states by failing to define explicitly the circumstances under which states could limit employees' speech.[49] For example, in several decisions the Supreme Court has noted the impact that teachers can have on the minds of young people[50] and on our democratic way

---

45. 385 U.S. 589 (1967).

46. *Id.* at 605-06. The Court again addressed the constitutionality of the Feinburg Law, N.Y. EDUC. LAW § 3022 (McKinney 1970), which made membership in the Communist Party a prima facie ground for dismissal. The Court held the "constitutional doctrine which has emerged since [*Adler*] has rejected its major premise." 385 U.S. at 605.

> 47. Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the first amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

48. *Id.* at 605. Among the cases cited by the Court as leading to the result announced in *Keyishian* were: Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Educ., 350 U.S. 551 (1950).

49. Van Alstyne, *supra* note 40, at 1448; Note, *supra* note 37, at 1260-61.

50. *See* Shelton v. Tucker, 364 U.S. 479, 485 (1960); Adler v. Board of Educ., 342 U.S. at 485.

> A teacher works in a sensitive area in a schoolroom. There he shapes attitudes of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen . . . teachers . . .

of life.[51] Commentators also have called attention to the teacher's special role as interpreter of school board policy, a role which requires the teacher to inculcate in students values consistent with parental expectations.[52] *Keyishian* abandoned these important state interests by failing to identify them as factors which the Court should weigh in its decisionmaking process. *Keyishian* shifted radically from the previous right-privilege analysis but failed to effectively account for the states' interest in the calculus of values to be protected.

C. *The* Pickering *Case—A Balance*

One year after *Keyishian*, in *Pickering v. Board of Education*,[53] the Court addressed more specifically the extent to which the state's interest as employer could be weighed against the employee's interest in exercising his constitutional right of free speech. *Pickering* was the first in a line of important cases[54] to balance the teacher's first amendment rights against the state's own legitimate interests.

In *Pickering*, a teacher was fired for writing a letter to the editor of a local newspaper. The letter denounced the school board for its handling of past proposals to raise new revenue and for its allocation of funds between the academic and athletic facilities. The school board found the letter detrimental to the efficient operation and administration of the school and ordered the plaintiff, Marvin Pickering, dismissed.[55] The Illinois Supreme Court affirmed the dismissal on the ground that either the letter was not entitled to first amendment protection or that Pickering had waived his constitutional right of free speech by accepting public employment.[56]

The United States Supreme Court reversed the lower court, ordering Pickering reinstated, and admonished the Illinois Supreme Court for allowing a state agency to infringe a teacher's con-

---

as to their fitness to maintain the integrity of the schools cannot be doubted. *Id.* at 493.

51. Ambach v. Norwick, 441 U.S. 68, 79 (1979).

52. Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 846 (1974).

53. 391 U.S. at 563.

54. The three most important cases are: Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. at 274; Perry v. Sindermann, 408 U.S. at 593; and Pickering v. Board of Educ., 391 U.S. at 563.

55. Pickering v. Board of Educ., 391 U.S. at 566-67.

56. Pickering v. Board of Educ., 36 Ill. 2d 568, 225 N.E.2d 1 (1967), *rev'd*, 391 U.S. at 564.

stitutional right to comment on matters of public interest in connection with the operation of the public schools.[57] Justice Marshall then enunciated the *Pickering* test, the first aspect of which requires a weighing of the "interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[58] This test specifically prohibits the imposition of constitutionally impermissible conditions on public employment[59] while at the same time recognizes the state's need to regulate the speech of its employees in certain circumstances.[60] By allowing states to regulate employees' speech in certain situations, the Court corrected the major problem resulting from the *Keyishian* decision. *Keyishian* had granted excessive protection to employees' speech by prohibiting states from restricting employees' speech even when it would be reasonable to do so.[61] The new test struck a reasonable balance between the fundamental interests of both the employee and the state.

This new test's full potential remained unfulfilled, however, because the Court failed to create a general standard for future application which detailed the weight to be accorded the state's and the employee's interests. Instead, it provided only a general indication of the interests which states can constitutionally assert to defeat a teacher's first amendment right. The maintenance of discipline and harmony among superiors and co-workers,[62] the proper performance of daily duties,[63] and freedom from interference in the regular operation of the schools[64] were recognized as compelling state interests. In addition, the public interest in free

---

57. To the extent the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on the 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. at 568.

58. *Id.*

59. *Id.*

60. *Id. See* notes 62-65 *infra* and accompanying text.

61. *See* notes 49-52 *supra* and accompanying text.

62. 391 U.S. at 570. The Court, however, does not indicate the level of discord it will tolerate between supervisors and co-workers in attempting to enforce employees' first amendment rights.

63. *Id.* at 572-73.

64. *Id.* at 573.

debate[65] on matters of public concern was a factor to be considered in some undetermined manner. The Court did not indicate the relative values to be accorded these factors and left some confusion regarding the proper scope of the state's interest.[66]

The second aspect of the *Pickering* test was a *New York Times Co. v. Sullivan*[67] standard for employee statements critical of employers. Such statements, if false, could not constitute grounds for dismissal absent proof that the statements had been made with knowledge of their falsity or with reckless disregard for their truth or falsity. While there may have been some confusion about the weight to be given the state's interests in the *Pickering* balancing test, application of the *New York Times* standard to employee criticisms illustrated the Court's insistence on a strong first amendment right for public employees as well as for the citizenry at large.[68] Untruthful criticisms of an employer will have a tremendously negative impact on the relationship between employers and employees, yet, under *Pickering*, the employee is still within the bounds of first amendment protection unless he makes the statements with knowledge of, or reckless disregard for, their falsity. The Court failed to account for this detrimental consequence, and it established a right of practically unhindered first amendment expression for public employees.

D. *The* Perry *Decision—Support for* Pickering

Two subsequent decisions by the Supreme Court, *Perry v. Sindermann*[69] and *Mt. Healthy City School District Board of Education v. Doyle*,[70] helped to extend and clarify the *Pickering* balancing test. In *Perry*, a nontenured college professor was denied contract renewal following a series of public disputes with the college's board of regents.[71] Robert Sindermann challenged his dismissal

---

65. *Id.*

66. *See* Note, *Teacher's Freedom of Expression Outside the Classroom: An Analysis of the Application of* Pickering *and* Tinker, 8 GA. L. REV. 900, 917 (1974).

67. 376 U.S. 254 (1964).

68. The Court, however, has characterized some forms of speech, such as obscenity, as unprotected. *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press").

69. 408 U.S. at 593.

70. 429 U.S. at 274.

71. These disputes involved Sindermann's testimony before committees of the Texas Legislature and a newspaper advertisement over the respondent's name which was highly critical of the regents. 408 U.S. at 594-95.

and brought two issues before the Supreme Court: First, whether lack of tenure defeated his first and fourteenth amendment claims; and second, whether the college's failure to provide him with a hearing violated his due process right despite his lack of tenure. The Supreme Court, affirming the Fifth Circuit, held that lack of tenure would not defeat his first and fourteenth amendment claims because the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[72] Sindermann alleged that he had been fired in retaliation for his public criticisms of the board of regents' policies. The Court held that a bona fide constitutional claim had been raised. *Pickering* was then cited by the Court for the proposition that "a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment."[73] Within the confines of this first issue, *Perry* reaffirmed the Court's insistence on strong support for public employees' first amendment rights. The second issue, however, laid the groundwork for the qualitative refinement of the *Pickering* test subsequently adopted in *Doyle*.

Sindermann's lack of tenure did not bar his due process claim, but it was relevant to the Court's analysis. Previously, in *Board of Regents v. Roth*,[74] the Court held that no constitutional right to a hearing existed unless, despite a lack of tenure, a "liberty"[75] or "property"[76] interest in continued employment could be shown. Sindermann was able to prove that there was a de facto tenure program[77] at the state college. He therefore had a "property" interest in continued employment and was entitled to a hearing.

---

72. *Id.* at 597. The Court went on to say:

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.

Id. (footnotes omitted).

73. *Id.* at 598.

74. 408 U.S. 564 (1972). This was a companion case to Perry v. Sindermann, 408 U.S. at 593.

75. A liberty interest guarantees the plaintiff the right to notice and an opportunity to be heard. Failure to provide notice and a hearing when due deprives the plaintiff of a constitutionally guaranteed right. For a definition of a liberty interest, *see* Board of Regents v. Roth, 408 U.S. at 572.

76. *Id.* at 601.

77. *Id.* at 600-01.

Placing the burden on the employee to prove he had some constitutionally protected interest presaged the Court's later refinements of the *Pickering* balancing test as pronounced in *Doyle*.

E. *The* Doyle *Decision—Refining* Pickering

Doyle, a nontenured teacher, communicated to a local radio station the substance of a school memorandum setting standards for teachers' dress and appearance. The radio station announced the dress code as a news item. Subsequently, Doyle was not recommended for rehiring by the school principal and was not offered a contract by the school board for the following year. As justification for nonrenewal of Doyle's contract, the board cited the radio station incident and another occurrence in which Doyle had made an obscene gesture at two students.[78] The district court held that Doyle's telephone call to the radio station was protected under the first and fourteenth amendments.[79] Furthermore, because Doyle's speech had impermissibly played a "substantial part" in the board's decision not to renew his contract, it ordered Doyle reinstated with back pay.[80]

The Supreme Court, applying the *Pickering* balancing test,[81] accepted the district court's conclusion that Doyle's speech was constitutionally protected. It did not, however, accept the district court's analysis, which lacked standards for future application.[82] The Justices were concerned that the lower court's rule would require reinstatement in cases when the school board's decision not to rehire would have been the same regardless of the teacher's first amendment expressions.[83] Justice Rehnquist, writing for a unanimous Court, held that a person's first amendment interest is sufficiently vindicated if he is placed in "no worse a position than if he had not engaged in the [protected] conduct."[84] The Court sought

---

78. 429 U.S. at 282-83.
79. *Id.* at 283-85.
80. *Id.* at 283.
81. *Id.* at 284.
82. *Id.* at 283-84.
83. *Id.* at 285-86.
84. *Id.* Justice Rehnquist went on to say that:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the pro-

to insure that a public employee's exercise of a constitutional right was not instrumental in his dismissal. At the same time, the Court did not want to improve an employee's position simply because he had exercised a constitutional right. The Court's goal, therefore, was to devise a test that "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[85]

The test developed by the Court achieved these goals. In addition, it advanced the development of the law in the area of public employees' first amendment rights while incorporating aspects of previously established standards. Under the terms of the *Doyle* test, a public employee first has the burden of showing that his speech was constitutionally protected.[86] This portion of the test was derived indirectly from *Roth*[87] and *Perry*[88] and, by necessity, incorporates the *Pickering* balancing test. Without first weighing the competing interests of employee and state as required by *Pickering*, it would be impossible to argue that the employee's speech was protected. Having proved that his conduct was constitutionally protected, the employee must then show that "this conduct was a 'substantial factor' . . . in the . . . decision not to rehire him."[89] If this burden is met, the onus is on the employer to prove by a preponderance of the evidence that he would have made the same decision regardless of the employee's conduct.[90] This aspect of the test distinguishes an impermissible result, that is, failure to rehire solely on the basis of an employee's exercise of his constitutional rights, from one caused by alternative factors unrelated to the exercise of constitutional rights.

---

tected conduct makes the employer more certain of the correctness of his decision.

Id. at 285-86.

85. *Id.* at 287.

86. *Id.*

87. *See* Board of Regents v. Roth, 408 U.S. at 571, in which the Court required Roth to prove that he had a "liberty" or "property" interest in continued employment before he could seek reinstatement.

88. *See* Perry v. Sindermann, 408 U.S. at 599, in which the Court held that the opportunity for a hearing is predicated upon the employee proving the decision not to rehire him deprived him of a "liberty" or "property" interest.

89. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. at 287 (footnotes omitted). This aspect of the test was derived from both the lower court decision and the Supreme Court's previous decision in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976), which held that a constitutional infringement must be a "motivating" factor in a state action before it will be constitutionally impermissible. *Id.* at 266.

90. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. at 287.

With this historical perspective, analysis of the Fifth Circuit's opinion[91] will shed light on the Supreme Court's subsequent reversal[92] and will elucidate its significance in relation to *Pickering*, *Perry*, and *Doyle*.

IV. THE *GIVHAN* CASE

A. *The Circuit Court Opinion*

Judge Gewin of the Fifth Circuit recognized that the decision whether to reinstate Mrs. Givhan would be controlled by the recently articulated *Doyle* standard.[93] Under *Doyle*, the primary question was the constitutional status of Mrs. Givhan's private communications.[94] If her statements were constitutionally protected, the burden then would shift to the state to prove that it would have fired Mrs. Givhan regardless of her comments.[95] Normally, the *Pickering* balancing test would be used to determine whether Mrs. Givhan's statements merited constitutional protection, but the circuit court first sought to determine an even more fundamental question: whether private communications could ever be constitutionally protected.[96] Since this was a question of first impression, [97] the court sought the answer in general first amendment principles and in the three leading cases of *Pickering*, *Perry*, and *Doyle*.

The circuit court read *Pickering*, *Perry*, and *Doyle* narrowly, excluding private communications by a public employee from con-

---

91. *See* notes 93-108 *infra* and accompanying text.

92. *See* notes 109-27 *infra* and accompanying text.

93. *Doyle* was decided by the Supreme Court while *Givhan* was being considered by the Court of Appeals for the Fifth Circuit.

94. The court of appeals accepted the district court's findings of fact. Significantly, the district court found that Givhan's dismissal was motivated primarily by her "demands." 555 F.2d at 1315. Since the second aspect of the *Doyle* test had already been satisfied, the ultimate issue was whether Givhan's conduct was constitutionally protected.

95. *See* notes 86-90 *supra* and accompanying text.

96. The court stated that before applying the *Pickering* test it "must determine whether on the facts of this case the teacher had a First Amendment interest *as a citizen* in making complaints to the principal." 555 F.2d at 1316 (emphasis in original).

97. Prior to *Givhan*, only the Third Circuit had considered whether private communications were constitutionally protected. In Roseman v. Indiana Univ. of Pa., 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976), the Third Circuit essentially held that private communications were not constitutionally protected. It should be noted, however, that the Third Circuit applied the *Pickering* standard and the speech was unprotected in part due to its "potentially disruptive impact on the functioning of the Department." *Id.* at 1368.

stitutional protection.[98] In each of these three cases, emphasis was placed on the public nature of the employee's criticisms.[99] The Fifth Circuit believed that the dichotomy of protection it was establishing between public and private speech was supported by several recent cases.[100] Analysis of several of the cited cases,[101] however, shows continued emphasis on the public nature of the protected speech. In essence, the court read the language in these cases so narrowly that a negative inference was derived from a variety of public employment contexts. In other words, because only public speech had been protected in the cited cases, the court inferred that only public speech would be protected and that private speech was therefore beyond the scope of first amendment protection.

As further support for his decision not to protect private communications, Judge Gewin invoked the "captive audience" rationale.[102] Principal Leach was considered to be incapable of avoiding Mrs. Givhan's demands, requests, or complaints because they both worked in the same building.[103] This proximity made the principal a captive audience. Judge Gewin felt Principal Leach's privacy interest aided in defeating Mrs. Givhan's first amendment right, in part, because of the high degree of captivity in the workplace.[104] The court did not want to force principals to become ombudsmen for anyone interested in public education.[105] Judge Gewin, therefore, held that "neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views."[106]

---

98. 555 F.2d at 1318.

99. *Id.* at 1317-18.

100. *See, e.g.*, City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976); Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973). These cases were cited by the court at 555 F.2d at 1318 n.15.

101. Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976); Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975); Lewis v. Spencer, 490 F.2d 93 (5th Cir. 1974), *aff'g* 369 F. Supp. 1219 (S.D. Tex. 1973).

102. 555 F.2d at 1319. This doctrine limits an individual's first amendment right by preventing her from imposing her message on an audience incapable of avoiding it.

103. *Id.* at n.16.

104. *Id.*

105. *Id.* at 1319.

106. *Id.*

Since Mrs. Givhan's constitutional claim was defeated, the court reversed and remanded the case for consideration of her *Singleton* claim[107] under which it was asserted that her dismissal was not based on objective nondiscriminatory factors.[108] The court did not consider application of the *Pickering* and *Doyle* standards because there was no first amendment claim on which to rule.

B. *The Supreme Court Decision*

Justice Rehnquist, writing for a unanimous Court, reversed the circuit court, holding that private expression of one's view *is* constitutionally protected.[109] In a direct rebuke to the circuit court, Justice Rehnquist explained that the

> decisions in *Pickering*, *Perry* and [*Doyle*] . . . do not support the conclusion that a public employee forfeits his protection against government abridgement of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.[110]

Having held that a public employee's private expressions were constitutionally protected, Justice Rehnquist sought to explain both the error in the circuit court's reasoning and *Givhan*'s relation to the analytical framework established by prior case law. Justice Rehnquist briefly synopsized *Pickering* and the balancing test it established: "the interests of the employee, as a citizen, in commenting on matters of public concern," are weighed against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[111] He then suggested that the Fifth Circuit decision not to protect private communications might have been based on the destructive impact Mrs. Givhan's comments had on her working relationship with her superior.[112]

---

107. *Id.* at 1320.

108. *See* notes 10-14 *supra* and accompanying text.

109. 439 U.S. at 413.

110. *Id.* at 414.

111. *Id.* (quoting Pickering v. Board of Educ., 391 U.S. at 568).

112. *Id.* at 414-15. "Here the opinion of the Court of Appeals may be read to turn in part on its view that the working relationship between the principal and teacher is significantly different from the relationship between the parties in *Pickering*. . . ." *Id.* Recall that one of the factors to be weighed in the *Pickering* test is the

Justice Rehnquist's subsequent language,[113] however, indicates that if the circuit court had held private communications by a public employee to be constitutionally protected and then had applied the *Pickering* standard, Mrs. Givhan's conduct still would have defeated the school's interest.[114] In the same sentence, the Court noted that the *Pickering* decision had been influenced by the lack of any adverse effect on the working relationship between the parties. Together, these passages suggest that the most important factor in the *Pickering* analysis is whether the teacher's conduct adversely affects her working relationship with the objects of her criticism,[115] but the language also suggests that the Court will tolerate substantial interference by a public employee before first amendment expression is outweighed by the state's interests. This is probably due, in part, to the fact that *Doyle* allows the state to discharge an employee if the state can prove it would have done so anyway, regardless of the employee's first amendment expression.[116] The Court's emphasis on the effect of speech on the working relationship between the employee and the objects of her criticism clarifies *Pickering* by assigning a relative weight to each of the numerous factors cited in that decision. In addition, the Court's decision had the beneficial effect of expanding teachers' first amendment right to express themselves while providing the state with a means for discharging disruptive employees under the *Doyle* test. It is significant that the Court continued to emphasize harmony, discipline, and institutional efficiency as compelling state interests in the *Pickering* test, yet the overall weight of these factors has been diminished due to the Court's willingness in *Givhan* to tolerate potentially substantial interferences with the working relationship.[117]

---

working relationship between the teacher and the objects of her criticism. *See* notes 30-34 *supra* and accompanying text.

> 113. But we do not feel confident that the Court of Appeals' decision would have been placed on that ground [i.e. interference in the working relationship between Leach and Givhan sufficient to justify nonprotection of Givhan's speech] notwithstanding its view that the First Amendment does not require the same sort of *Pickering* balancing for the private expression. . . .

439 U.S. at 415.

114. *Id.*

115. *Id.* at n.4. Included under the rubric "working relationship" are considerations of discipline, harmony, personal loyalty, and confidence which are necessary to the proper functioning of those relationships.

116. *See* notes 86-90 *supra* and accompanying text.

117. *See* Smith v. United States, 502 F.2d 512, 517 (5th Cir. 1974), which held

Some exceptionally important language was relegated to footnote four.[118] There, Justice Rehnquist explained that private communications are subject to a greater number of state restrictions than public speech. When a public employee expresses herself publicly, the *content* of the speech must be assessed to determine whether it interferes with either the proper performance of her duties or the normal operation of the school where she is employed.[119] Private expression, on the other hand, is under a greater degree of restraint, being subject to both content assessment and time, place, and manner restrictions.[120]

A significantly different level of protection is afforded public and private speech. For public speech, *Pickering* focuses judicial inquiry on the speech's effect on the working relationship and institutional efficiency to determine whether the speech warrants constitutional protection.[121] In *Givhan*, the Court indicated that in addition to content assessment, the time, place, and manner in which speech takes place are additional factors to weigh in the *Pickering* balance when private speech is at issue. These additional restrictions affect a court's determination of whether particular speech is protected by the first amendment, and they may preclude an employee from obtaining consideration of reinstatement under *Doyle*.

Justice Rehnquist established time, place, and manner restrictions on private speech because private speech frequently will have a greater impact than public speech on the working relationship between employees and employers. Public communications are less likely to contain the acerbic tone that often is present in personal, private confrontations; therefore, they are subject only to content assessment. Courts are more likely to find speech protected when only its content, rather than the time, place, and manner of its delivery, is appraised. Consideration of the environment in which speech takes place underscores the importance the Court places on working relationships and institutional efficiency although the

---

that the employee's speech must substantially and materially affect the discharge of duties.

118. 439 U.S. at 415 n.4 (citing Pickering v. Board of Educ., 391 U.S. at 564).

119. *Id.*

120. Private expression, however, may in some situations bring additional factors into the *Pickering* calculus. "When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Id.*

121. *See* notes 57-61 *supra* and accompanying text.

Court seems willing to allow a substantial interference in these areas to protect the first amendment rights of public employees.[122]

Following his discussion of *Pickering*, Justice Rehnquist turned to *Perry* and *Doyle* and reiterated that the public nature of the speech protected in these cases was not determinative of their outcome.[123] The captive audience rationale, asserted by the circuit court as a justification for holding Mrs. Givhan's speech unprotected, was then destroyed in one sentence: "[h]aving opened his office door to petitioner, the principal was hardly in a position to argue that he was the '*unwilling* recipient' of her views."[124] The Court then articulated the rule of the case, that a public employee has a first amendment right to express her views to her employer privately.[125]

Finally, the Court addressed *Doyle*'s impact on the facts in *Givhan*. Because *Doyle* had not been decided at the time Mrs. Givhan intervened in *Ayers*, the district court had not been able to apply the more refined *Doyle* standard.[126] Consequently, the circuit court was unable to find that Mrs. Givhan would have been rehired *but for* her criticism.[127] The decision of the circuit court, therefore, was vacated and remanded to determine whether the state would have made the same decision regardless of Mrs. Givhan's criticism. Justice Stevens, in a concurring opinion, agreed with the circuit court that the state had failed to meet the *Doyle* standard but nevertheless recommended remanding the case to the district court to allow it to determine whether the state's *Doyle* burden was met.

V. POST-*GIVHAN*

In *Givhan*, the Supreme Court expressly held private communications subject to constitutional protection. Subsequent cases illustrate that this principle has not been limited solely to teachers or public employees. Private communications have been protected in labor relation disputes,[128] and the principle also has been ex-

122. *See* text accompanying notes 67-68 *supra*.
123. 439 U.S. at 415.
124. *Id.* (emphasis in original).
125. *Id.* at 415-16.
126. *Id.* at 417.
127. *Id.*
128. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 313 (1979). "[T]he Constitution guarantees workers the right individually or collectively to voice their views to their employer." *Id.*

tended to protect ordinary citizens' telephone conversations.[129] Courts also have held that involuntary transfers, not simply dismissals, resulting from a public employee's speech, sufficiently chill first amendment freedoms to warrant application of *Pickering*, *Doyle*, and *Givhan*.[130]

Cases construing *Givhan* have not, however, limited its principle solely to private communication. In *Janusaitis v. Middlebury Volunteer Fire Department*[131] and *Barbre v. Garland Independent School District*,[132] the time, place, and manner restrictions imposed upon private speech in *Givhan*[133] were held applicable to both public and private criticism of an employer.[134] This expanded reading of the *Givhan* opinion's footnote four language[135] works to the detriment of public employees' first amendment rights. By applying time, place, and manner restrictions to public speech, these courts have added factors to the *Pickering* test which should not be considered[136] in balancing an employee's right to make public statements against the state's interests. In some circumstances consideration of the time, place, and manner of public speech will tip the scale improperly against the employee. Once the employee's public speech is ruled unprotected, *Doyle* is inapplicable, and the employee is powerless to obtain reinstatement on the basis of a first amendment violation.

Other recent cases illustrate that the *Doyle* test, approved in *Givhan*, is the appropriate standard for proving causation in situa-

---

129. Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 48 U.S.L.W. 3750 (1980) (first amendment provides citizens with a constitutionally protected right of free private discussion).

130. McGill v. Board of Educ., 602 F.2d 774, 778-80 (7th Cir. 1979).

131. 607 F.2d 17, 25 (2d Cir. 1979). Janusaitis was a volunteer fireman with the defendant fire department who publicly and privately criticized the policies and practices of the department. Among other things, Janusaitis threatened to report the department to the Internal Revenue Service for failing to keep accurate accounting methods, frequently criticized the executives in the department, and contributed to a newspaper account, which detailed his complaints.

132. 474 F. Supp. 687 (N.D. Tex. 1979). Barbre, an untenured teacher's aide, claimed that she was discharged from her position for asserting at a public school board meeting that her salary was below that required by Texas law. In addition to her complaints at the public school board meeting, she also contacted members of the Texas Legislature to determine the validity of the school board's implementation of the applicable statute.

133. 439 U.S. at 415 n.4.

134. Janusaitis v. Middlebury Vol. Fire Dep't, 607 F.2d at 26; Barbre v. Garland Independent School Dist., 474 F. Supp. at 698-99.

135. *See* text accompanying notes 118-22 *supra*.

136. *See* notes 119 & 120 *supra* and accompanying text.

tions involving improperly motivated dismissals. In *Fisher v. Flynn*,[137] a sex discrimination case, the court held that a plaintiff must prove the "but for" causation, established by *Givhan* and *Doyle*, before he or she may recover. Similarly, the First Circuit employed the *Doyle* standard in *Texas Instruments, Inc. v. NLRB*[138] to determine whether improper motives led to employee discharges. Both of these cases illustrate the utility of the *Doyle* test and the ease with which it can be applied to diverse fact situations. There is no reason to doubt that the *Doyle* test will continue to aid courts in all cases involving questions of wrongfully motivated dismissals, whether they concern age, sex, race, or any other form of discrimination.

VI. CONCLUSION

Bessie Givhan was discharged from her teaching position for privately expressing to the principal her dissatisfaction with school policies and practices perceived by her to be racially discriminatory. The United States Supreme Court held that the first amendment protects the private communications of a public employee in commenting upon matters of public concern. This holding represents a radical shift from the earlier view that public employment was a privilege that could legitimately be conditioned upon the relinquishment of constitutional rights. It also represented the culmination of a line of cases which sought to balance the conflicting fundamental interests of the employee as citizen and the state as employer.

Pickering v. Board of Education[139] was the first and most fundamental step in the process of securing for public employees the same first amendment rights guaranteed to all other citizens. The test developed in *Pickering* balanced the teacher's first amendment right to comment upon matters of public concern against the state's interest in promoting the efficiency of its services. Unfortunately, the Court left some confusion regarding the proper weight to be accorded the various state interests, and later cases served to clarify and refine the *Pickering* test.

Perry v. Sindermann[140] reaffirmed the Court's insistence on strong support for public employees' first amendment rights. By its

137. 598 F.2d 663, 665 (1st Cir. 1979).
138. 599 F.2d 1067, 1073 n.6 (1st Cir. 1979).
139. 391 U.S. at 563.
140. 408 U.S. at 593.

allocation of the burden of proof between the parties, *Perry* also established the groundwork for the test later devised in *Mt. Healthy City School District Board of Education v. Doyle*.[141]

The *Doyle* test remedied one of the major problems resulting from *Pickering*. Prior to *Doyle* a state could not fire an employee who had engaged in first amendment activity even if the state had a legitimate reason for firing that employee. *Doyle* established a test requiring the employee first to prove that his speech is protected under the *Pickering* standard. Under this test, once the employee proves that his speech is protected, the burden then shifts to the state to prove by a preponderance of the evidence that the employee would have been fired regardless of his speech.

Givhan v. Western Line Consolidated School District[142] represents the culmination of *Pickering*, *Perry*, and *Doyle*. *Givhan* established *Doyle* as the standard for cases involving employee dismissals which were motivated by first amendment expression. *Givhan* also added several factors to the *Pickering* balancing test. Most importantly, language in footnote four of the *Givhan* opinion states that private communications are protected by the first amendment, but that the private communications of a public employee are subject to both content assessment and time, place, and manner restrictions. Furthermore, the Court has indicated a general willingness to allow a substantial interference in the working relationship between a public employee and his or her employer before the employee's speech will be held unprotected. The time, place, and manner restrictions on private speech, however, indicate that it is easier to find a sufficiently detrimental impact on the working relationship when an employee communicates privately to his or her employer than when an employee publicly expresses his or her ideas.

Subsequent cases illustrate that *Givhan* has been adopted and read broadly by numerous courts, resulting in expansion of all citizens' first amendment rights. Several courts, however, have taken an overly broad view of the time, place, and manner restrictions placed on private speech by applying them to public speech as well. This improper reading of the *Givhan* Court's footnote four language unnecessarily limits public employees' first amendment freedoms. Nevertheless, *Givhan* clarified the weight to be ac-

141. 429 U.S. at 274.
142. 439 U.S. at 410.

corded the factors set forth in *Pickering* and established *Doyle* as the test for cases in which employees assert that their dismissal or transfer was unconstitutionally motivated. *Givhan* also established constitutional protection for private communications in general, creating rights which previously did not exist.

John A. Koltes, III