Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 21 *Spring 2011* Article 1

Spring 2011

Gossip, The Office and The First Amendment

Jerome O'Callaghan

Rosemary Hartigan
University of Maryland University College, rosemary.hartigan@umuc.edu

Paula O'Callaghan
University of Maryland University College, pocallaghan@umuc.edu

GOSSIP, THE OFFICE AND THE FIRST AMENDMENT

by
Jerome O'Callaghan,[*] Rosemary Hartigan,[**] and Paula O'Callaghan[***]

"If you want to be absolutely literal, all human life is speech. Every time a person goes to work all he does is speak. Or write. Or listen to other people speaking. Or eat lunch."
—Supreme Court Justice Stephen Breyer[1]

"…gossip is a valuable aspect of free speech."
—C. Edwin Baker[2]

INTRODUCTION

In 2007 four employees of the town of Hooksett, New Hampshire, were fired for gossiping about a suspected romantic liaison between their boss, the Town Administrator, and a recently promoted town employee. The dismissed employees, all female, became known as the *Hooksett Four*.[3]

The Hooksett Four sued the town and identified themselves publicly, giving numerous interviews in local and national media.[4] The Town of Hooksett responded by issuing a public

[*]Associate Dean, Arts and Sciences, Associate Professor of Political Science, State University of New York at Cortland.

[**] Professor and Director, Business and Executive Programs, Graduate School of Management and Technology, University of Maryland University College.

[***] Assistant Professor, Business and Executive Programs, Graduate School of Management and Technology, University of Maryland University College.

statement explaining and defending the town's actions in firing the four,[5] and subsequently settled with the two plaintiffs who had filed suit in federal court.[6]

Although the cases associated with the Hooksett Four did not make it to trial, they raise interesting questions about the status of gossip as a category of protected speech under the First Amendment in the context of public employment. Private employers are generally immune from liability for abridging the free speech of employees, but the obligations/risks of a government employer are less clear. This review serves to illustrate the limitations of Supreme Court free speech doctrine as applied to this deceptively important category of speech.

WHAT IS GOSSIP?

A review of social science and management literature and numerous court cases indicates that there is much variation in the definition of "gossip." However, paraphrasing Justice Stewart Potter's famous comment -- about another much maligned and discredited form of communication, -- pornography -- despite the difficulty of defining it, most of us know it when we see or *hear* it;[7] or, at least, we think we do.

Hearsay, rumor, and gossip are related concepts. Often in common usage, the three terms are equated. All involve communication of derivative information (to a second party or parties) originally obtained from a third party. Segregating rumor from gossip involves very fine distinctions, for example: "Rumor's foundation is lack of evidence -- without regard for topic; gossip specifies the topic -- the moral doings of humans -- but ignores its factuality."[8] While gossip usually involves an arguably inappropriate disclosure of information, the information it conveys may be factual.[9]

The subject of this paper is, specifically, workplace gossip, which Kurland and Pelled define as "informal and evaluative talk in an organization, usually among no more than a few individuals, about another member of the organization who is not present."[10] They note that The American Management Association distinguished "the grapevine" from gossip, asserting that the former may involve a wide range of topics, but gossip is focused on information about people.[11]

For more than 100 years courts have taken notice of "gossip" in their opinions, but mostly in a dismissive manner, frequently using the phrase "mere gossip" in reference to hearsay statements that are not admissible for evidentiary purposes.[12] In the cases we examined where gossip (or rumor) was central in an employment action, most of the courts did not attempt to define gossip. Rather, they examined the operative definitions of prohibited behavior specified in the employers' written policies.[13] In a few cases, the courts relied on the same dictionary definition. In *Dillon v. Twin Peaks Charter Academy,*[14] the court found it necessary to define "gossip" in an employment action suit where the academy's code of conduct prohibited "malicious gossip and similar activities" but gave no definition in the code. The judge in *Dillon,* consulting several dictionaries, provided this definition: "Gossip" is defined consistently...as "idle talk" or "rumor," "especially about the affairs of others."[15] The Court in *Fitzgerald v. Stanley Roberts, Inc.*[16] relied on this same definition in a case involving the admissibility of gossip (as hearsay).

In this paper we limit our discussion of gossip to talk (which includes all forms of communication) about the affairs of individuals. We will not apply the dictionary definition, because the term "idle" makes general, commonly held, assumptions about the purpose and intent of gossip that are not always supported in fact. Rather, we will apply Kurland and

Pelled's value-neutral definition: "informal and evaluative talk in an organization, usually among no more than a few individuals, about another member of the organization who is not present."[17]

GOSSIP IN THE OFFICE – MANAGEMENT ISSUES

Formal and informal communication networks exist in all organizations. Formal communication networks are created to manage the content, flow and frequency of information throughout the organization.[18] Methods of formal communication may include meetings, newsletters, employee handbooks, and official company policies. Existing in parallel to, and supplementing the formal communication network, informal communication networks, commonly referred to as "the grapevine," spring up in all organizations. These informal networks are neither planned nor sanctioned by management, and depending on circumstances, may support or conflict with the employers' formal networks.[19] Gossip is widely recognized as a pillar of informal communication networks in organizations, but it has received surprisingly scant attention in management or organizational literature.[20]

Employers often view gossip as eroding employee cohesion and discipline, stealing time, and creating a work environment replete with unreliable information, innuendo, backstabbing, and distrust. Commentators[21] have noted that "popular" business literature tends to promote an overly simplistic and negative view of gossip, ignoring its potential benefits in organizations.[22]

The literature we examined presents a more balanced view, recognizing the positive and negative potential of gossip in organizations. Several authors noted that gossip serves a

valuable role in sustaining community/organizational norms, values, and morals, which are not always conveyed adequately through formal communication avenues.[23] Often small groups are more effective at regulating this type of behavior before it comes to the attention of the formal hierarchy and has a larger impact on the organization.[24]

In a study of four organizations, Hafen contends that gossip may promote positive "organizational citizenship behaviors" that benefit the organization or "workplace deviance behaviors" that undermine organizational efforts.[25] Gossip can have positive effects on an organization by communicating rules, values, morals, and organization tradition and history, thus facilitating group cohesion. Hafen discusses how management can benefit from some gossip, i.e., it can be transformed into useful information for organizational regulation when it is relayed to someone in authority in the organization. In this vein gossip about company "heroes" and "anti-heroes" serves as a "kind of social control."[26] Of course, gossip is also used in organizations to resist and undermine authority. Hafen found that gossip is used to resist regulation, "debunking implicitly the organizational creed of placing efficiency and productivity over human relations."[27]

GOSSIP IN THE OFFICE – LEGAL ISSUES

An employee discharged on the basis of originating or spreading gossip may be incredulous that such ubiquitous behavior can be legal grounds for termination. As one reviewer put it, "[G]ossip…appears to be a normal and necessary part of life for all but the rare hermit among us."[28] One study estimated that as much as 80% of human communication could be classified as gossip.[29]

Although there are not many judicial opinions concerning employees who have been terminated *purely* on the basis of office gossip, gossip has been cited as one of the grounds for termination in at least ten fully litigated cases in the United States in the past twelve years.[30] These are cases where published opinions are available. No doubt there are many more instances, such as the Hooksett Four cases, where the parties settle before trial[31] and incidents where terminated employees do not sue at all.[32] Of course, gossip also can be a form of informal resistance for employees in lieu of, or prior to, pursuing formal grievance or legal redress.

There are several legal approaches available to fired-for-gossip plaintiffs to challenge their termination including the public policy exception to the at-will employment doctrine under the common law, the employment discrimination statutes or hostile work environment theories, and the abridgement of free speech constitutional guarantees. With the common law and statutory theories having been explored in a prior paper,[33] the focus of this paper will be constitutional theories based on free speech.

The First Amendment Issue

While private employers are generally immune from liability for abridging the free speech of employees, that immunity does not necessarily extend to the governmental employer. A government employee retains the option of invoking the First Amendment, to allege that government has punished speech protected by the Constitution.

In the routine discussion of speech protected by the First Amendment, gossip is a category that receives scant attention. The heavy hitters in this area generate significant case law, law review comment, complex theories and ever-expanding hard-

cover casebooks. These are the categories that test the boundaries; they include defamation, sedition, obscenity, religious speech and commercial speech. Assuming one is not an absolutist, the business of understanding the free speech guarantee is the business of drawing boundaries around the concept of free speech.

Van Alstyne has analyzed different approaches to understanding those boundaries, particularly categories of speech that are either included or excluded from First Amendment protection.[34] In his review he identifies several frameworks that include a sliding scale of protection for various categories of speech. Political speech is usually under the "most protected" category, while criminal speech occupies the "least protected" zone. In between lie categories such as "private," "social," "aesthetic" and "scientific" speech.[35] The fact that political speech garners the most protection is not hard to explain – for many the key to the value of the free speech guarantee is its contribution to American democracy. [36]

Gossip is not explicitly addressed in Van Alstyne's analysis. Nevertheless gossip may be encompassed by the "social" or "private" categories. As government regulation rarely reaches the social/private, the issue is not one that draws a lot of case law or commentary. Nevertheless it is worth noting that in the Van Alstyne scheme, gossip might be deserving of a relatively high degree of protection.[37] If gossip can be shown to inform/instigate the exposure of corruption in government, then it would appear to veer toward political speech, requiring the most protection. The question of gossip's place in the strata of protected categories remains open, depending in large part on the words and their context.

At the level of the Supreme Court, litigation dealing with the free speech rights of public employees came to the fore in the

1950's and 1960's.[38] In *Pickering v. Board of Education* (1968) the court set new standards regarding the free speech rights of public employees.[39] Pickering was a school teacher who had written to a newspaper criticizing the school board and the superintendent. He was subsequently fired. On appeal the Supreme Court held that his free speech rights had been violated: "...absent proof of false statements knowingly or recklessly made by Pickering, 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."[40]

Pickering was predicated on a balancing of interests: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[41]

Subsequent decisions about the firing of public employees have come out of the *Pickering* mold. Over the course of thirty years the Court has considered a string of cases involving the firing of teachers, a nurse, two assistant district attorneys, and a deputy constable.[42] The Court has had the opportunity to explain the criteria that establish "matters of public concern" (*Connick* and *Rankin*),[43] the burdens on both sides (*Doyle* and *Rankin*),[44] speech conducted specifically in pursuance of job duties (*Garcetti*),[45] and the role of the courts in relation to the "facts" that might justify a termination (*Waters*).[46]

Garcetti, the most recent Supreme Court decision to address the issue of public employee free speech, has generated a significant debate about the reach of the First Amendment.[47] In *Garcetti* the Court held that employee speech made *pursuant to official duties* receives no First Amendment protection. A government employer is free to "exercise ... employer control

over what the employer itself has commissioned or created."[48] As gossip of any kind, and more particularly the Hooksett kind, is never commissioned by an employer, the *Garcetti* ruling is too narrow to address the problems created by gossip.

In *Waters v Churchill,* the word "gossip" is never used to describe a conversation between two nurses on a break at work. The employer's allegation was, however, that part of the conversation concerned negative comments about the plaintiff's supervisor who was out of earshot at the time. The Court found that the reason for the plaintiff's dismissal was unclear and therefore it was unable to determine if the speech for which she was terminated was protected speech.[49] Nevertheless, *Waters* reveals the Court, in a plurality opinion, leaning heavily toward deference to the employer's perception of harm in the workplace. Sachs' review of this opinion summarizes the key points:

> Although some speech may not be disruptive and may possibly be of value, the plurality noted that the Court has consistently declined any questioning of decisions made by government employers on matters regarding employee speech.
>
> All this notwithstanding, the plurality stated that the First Amendment should not necessarily be absent from all government employer decisions. ...[I]t is often the government employee who knows best the possible problems that plague the particular agency for whom he or she works. Where this is the case, the employee may have a strong interest in airing his or her views on public matters. In such a situation the employer would have to make a "substantial showing that

> the speech is, in fact, likely to be disruptive before it may be punished."
> ....[T]he plurality concluded that employer decision-making would not have an onerous burden placed on it by having courts "look to the facts as the employer reasonably found them to be."
> .... Even if [the employee's] speech addressed a matter of public concern, the potential disruptiveness of the speech as reported "was enough to outweigh whatever First Amendment value it might have had."[50]

While the Court's doctrine has shifted/evolved over time, the focal point remains some "issue of public concern." In all but one of these cases the government employees expressed concern over particular policies and/or individuals in management; there is a bona fide belief that errors have been made that are detrimental to the workplace. The nurse complained about a policy that she believed threatened patient care (the exact nature of her complaints remained in dispute throughout the litigation); the assistant district attorney inquired (via an office survey) about transfer policies and political pressure on prosecutors; the college professor publicly disagreed with the Board of Regents over school policy; and the school teacher disputed the Board of Education's fiscal policy decisions. At first glance there is little in these examples that overlaps with our conception of gossip. However the gap between complaints about office policy and gossip about employer behavior will in some cases, like Hooksett, be very hard to discern.

For the Supreme Court, two criteria are paramount: a) if the speaker, as a citizen, addressed a matter of public concern, and b) whether the employee's interest in expressing gossip outweighs any injury the speech could cause to the government's interest, as employer, in promoting the efficiency of the public services it performs through its employees.[51]

Fired-for-gossip cases are rare in the federal courts. *Waters* might be an exeeption to that rule, but even in *Waters* the relevance of gossip to the employer's action is disputed. A recent attempt to equate a ban on workplace gossip to prior restraint failed in the District Court. When a public school employee was fired for gossip, the court found as a matter of law that, "...a prohibition against 'gossip' cannot support a First Amendment prior restraint claim..."[52] In state courts, employees in disputes involving gossip also have been unsuccessful. Courts in Rhode Island and Ohio have ruled in favor of government employers on a variety of grounds in two cases where gossip was an element of the dispute.[53] It should be noted that in neither case did the employees invoke free speech rights.

One can readily imagine circumstances where the First Amendment claim is central in a public employment dispute. Returning to the Hooksett Four dispute described *supra*, we see a well-balanced clash between gossiping public employees and outraged town officials. In a public statement on the Hooksett Four,[54] the Town Council noted that the town "suffered from a lack of management continuity for at least four years" with six different individuals in the Town Administrator's office over a four-year period. It further noted that some of these administrators cited "serious personnel problems." In addition, the statement noted that the incidents of gossip were sparked when a woman who was one of the subjects of the gossip worked extra hours in the short-staffed Finance Department.

Had the Hooksett Four raised a federal free speech claim they would have encountered the issues that have dominated in

federal cases since *Pickering*:

a) did the employee speak as a citizen on a matter of public concern?

b) did the employee's interest in the expression of gossip outweigh any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs?

The first question should be answered in the affirmative. As the gossip concerned the public employees' legitimate interest in a situation where another employee may have been improperly promoted (or compensated), the reason for the gossip involves a nascent issue of public interest involving possible corruption, misuse of public funds, conflict of interest and violation of ethics laws. This is all the more important given the history of "serious personnel problems" in the office.

The second part of the test, requiring a balancing of interests, is more difficult to gauge. Is the interest of the Hooksett Four in discussing this issue valuable enough to justify any injury the speech could cause to the town's promotion of the efficiency of the public services it performs through its employees? From the Town Council point of view, the gossip was entirely false and very damaging.

> "[T]he issue was not one of idle gossip, but a conscious and concerted effort to damage reputations, to spread untrue stories with the knowledge that they were not true and evidently to retaliate for some perceived preferential treatment. The rumors, were they believed credible, could have been cause for removal of the Administrator and could have formed the basis for a sexual harassment suit against the town. Furthermore, the rumors were also intended to create tumult in the ranks; evident from a phone call that was placed to the home of the employee who was out on medical leave."[55]

From this perspective the injury is grave and the effort to "create tumult" in the workplace hinders the efficiency of public service. Is that injury sufficient to outweigh the interest of the gossipers in airing the allegation?

Given that, in most employment situations, neither side is certain of the truth at the time the gossip is communicated, the balancing of interests becomes extremely context-sensitive. In predicting how courts will read that balance of interests, the *Waters* decision reveals a distinct preference for valuing the employer's interest. The Court held in *Waters,* that "...employer decisionmaking will not be unduly burdened by having courts look to the facts as the *employer* reasonably found them to be."[56] [emphasis added]

The Court, in *Waters,* did not consider the role of gossip as a means of fact-finding in the workplace. Refuting the common belief that gossip leads to unreliable information, Ayim defends gossip as a mode of inquiry with similar standards of fact-finding as those applied in science.[57] Hafen finds that "to gossip is to both contest and wield power, authority, and discipline."[58] Indeed, gossip may be the only means for some individuals who have little power in the formal organization structure to obtain and assert influence.[59]

The following hypothetical situation will serve to illustrate how seemingly "trivial" gossip could deserve the protection of the First Amendment. Imagine that in January 2008 employees in the office of New York Governor Elliot Spitzer have begun to discuss the possibility that he has a mistress. Some

employees are aware of questions that are being raised by his advisors about mysterious accounts and expenditures. The gossip includes references to a woman visiting the Governor's hotel room during an out of town trip. None of the employees are aware of any ongoing criminal investigation. Learning about this gossip, the Governor's chief of staff fires an employee who had admitted to spreading the rumor. Several months after the firing, the Governor resigns in disgrace when the press reveals his relationship with a prostitute.[60]

With the benefit of hindsight it is easy to say that the employees were exercising free speech rights in a manner that was admittedly detrimental to the career of one governor, but it was also in fact to the benefit of the state and the *office* of the governor. In hindsight we know that the employees were on to something close to the truth. The difficulty is that, at the time of circulating the gossip, the employees had no way to tell how true the allegations were. No doubt there is a lot of gossip in most places of employment, gossip that circulates with no factual basis, and some of it has negative consequences for the integrity or the efficiency of providing public service. It is in that context that supervisors, such as the chief of staff, have to make a decision about the impact of gossip in the workplace.

CONCLUSION

Gossip is a difficult case. On one hand it relates easily to traditional understandings of the purpose of the free speech guarantee. Free speech fosters democracy and gossip is a democratic form of speech. In some contexts, gossip is an embryonic representation of issues that will come to fruition as corruption allegations or sexual discrimination/harassment allegations. Hence, the connection to "matters of public concern," governance, and politics matters. Free speech also fosters discovery of the truth – and the role of gossip in relation

to whistle-blowing activities is doubtless substantial. Finally, free speech is critical to self-realization. Gossip serves a key function in our networks (in and out of the workplace) and helps define our personalities and our values. On the other hand, the destructive impact of gossip is recognized time and again by courts as giving rise to a significant employer interest.

The application of the *Pickering* test adds another layer of difficulty. Rutherglen refers to the "uncertainty inherent in the balancing test" and concludes that "[t]oo few rights leave public employees as second-class citizens and the public itself uninformed about how the government actually operates. Too many rights risk paralyzing the operation of government itself as dissenting employees claim their right to speak out against policies that they have a duty to implement."[61] There is, however, a way to protect more employee speech under current doctrine. The courts should begin to demand more specific evidence of the harm done by employee speech. Mere reference to "promoting efficiency" is no match for demonstrating a diminishment of service to the public. That approach would put more bite in the *Pickering* test and serve to foster the First Amendment rights of employees.

In light of the most recent Supreme Court decisions, we see significant skepticism in the courts about the protection of employee speech in general and gossip in particular, more so in the case of public employment. The inevitability of gossip in complex organizations has not deterred the courts in giving leeway to employers who wish to punish it.

---

[1] Stephen Breyer, audio interview with Nina Totenberg for *All Things Considered*, National Public Radio, http://www.npr.org/templates/story/

story.php?storyId=4929668, (at 17:30), (last visited August 17, 2010). We thank Bruce Barry of Vanderbilt University for this quote which opens the first chapter of his book, BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE (Berrett-Koehler 2007).

[2] C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendement*, 21 SOCIAL PHILOSOPHY AND POLICY 2 (2004), at 260.

[3] Erika Hayasaki, *4 go through the mill over a rumor - Gossip about their boss cost women their town hall jobs. Now everybody's talking*, LOS ANGELES TIMES, July 24, 2007, http://articles.latimes.com/2007/jul/24/nation/na-rumor24 (last visited August 17, 2010).

[4] *Fired for gossiping, 2 N.H. women sue in federal court,* sunjournal.com, September 23, 2007, http://www.sunjournal.com/node/628630 (last visited August 17, 2010) See also, *Bonsteel v. Hooksett,* No. 1:2007cv00298 (filed September 21, 2007), http://dockets.justia.com/docket/court-nhdce/case_no-1:2007cv00298/case_id-31456/ (last visited August 17, 2010).

[5] *Town issues statement on 'Hooksett Four,'* UnionLeader.com, June 5, 2007, http://www.unionleader.com/article.aspx?headline=Town+issues+statement+on+%27Hooksett+Four%27&articleId=d3d21fdd-e95c-4580-959a-f2406d1514fb (last visited August 17, 2010).

[6] *2 fired Hooksett workers settle federal lawsuit*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, November 1, 2008 (in return for which "the women agreed to waive any age discrimination claims").

[7] Concurring, in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), Justice Stewart noted the difficulty of defining pornography, but commented that he, nonetheless, knew it when he saw it.

[8] Gary A. Fine, *Rumors and Gossiping* in HANDBOOK OF DISCOURSE ANALYSIS, v.3 at 223-237 (1985).

[9] See, for example, Margaret Holland, *What's Wrong With Telling the Truth? An Analysis of Gossip*, AMERICAN PHILOSOPHICAL QUARTERLY (April 1996) and Maryann Ayim, *Knowledge Through the Grapevine: Gossip as Inquiry* in GOOD GOSSIP at 85-99 (R. GOODMAN and A. BEN-ZE'EV eds., 1994).

[10] Nancy B. Kurland & Lisa Hope Pelled, *Passing the Word: Toward a Model of Gossip and Power in the Workplace*. 25 THE ACADEMY OF MANAGEMENT REVIEW 2 (April, 2000) at 429.

[11] *Id.* at 430.

[12] *Ilsley v. Sentinel Company,* 133 Wis. 20 (1907) (first noted case where the term "mere gossip" was used). Earlier cases such as *Smith v. Tennessee*, 9 Tenn. 228 (1829) have taken notice of gossip in some way in the court's analysis.

[13] See, for example, *Jackson v. Ritter and Wal-Mart, Inc. d/b/a Sam's Wholesale Club*, 1992 U.S. Dist. LEXIS 12114 (1992); *Brinson v. Barden Mississippi Gaming,* LLC, 2007 U.S. Dist. LEXIS 21965 (2007); *State ex rel. Wal-Mart v. Riley*, 159 Ohio App. 3d 598 (2005); *Letner v. Wal-Mart Discount Department Store*, 199 U.S. App. LEXIS 843 (1999); *Cruces v. Utah State Veterans Nursing Home*, 2007 U.S. App. LEXIS 7230 (2007).

[14] *Dillon v. Twin Peaks Charter Academy*, 2008 U.S. Dist. LEXIS 45615 (2008).

[15] *Id.*

[16] *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286 (2006) at 316. ("Thus, if an employee heard gossip that people who complained about work conditions were fired, the evidence might be admissible not to prove that people were in fact fired, but to explain her delay in reporting a problem.") ("…gossip is idle talk or rumor, especially about the personal or private affairs of others.") *Id.* at 315.

[17] Kurland & Pelled, *supra*, note 10 at 429.

[18] Grant Michaelson & V. Suchitra Mouly, *Do Loose Lips Sink Ships? The Meaning, Antecedents and Consequences of Rumour and Gossip in Organizations*, 9 CORPORATE COMMUNICATIONS 3 (2004) at 189.

[19] *Id.*

[20] *Id.* See also, Kurland & Pelled, *supra* note 10 at 428; Hafen, *infra*, note 25 at 223; and Noon & Delbridge, *News From Behind My Hand; Gossip in Organizations*, 23 ORGANIZATION STUDIES 14 (Winter, 1993).

[21] Noon & Delbridge, Id., and Michaelson & Mouly, *supra*, note 18.

[22] For example, Sam Chapman, CEO of *Empower Public Relations*, defines gossip as "negative communications outside the presence of the subject of the communication" and a "productivity killer." Marilyn Gardner, *Some employers get tough on workplace gossip,* CHRISTIAN SCIENCE MONITOR, June 2, 2008, Money & Values, at 13.

[23] See, for example, Noon & Delbridge, *supra*, note 20 and Aaron Ben-Ze'ev, *The Vindication of Gossip* in GOOD GOSSIP at 15, *supra* note 9.

[24] See, for example, Kevin M. Kniffin & David Wilson, *Utilities of Gossip Across Organizational Levels,* 16 HUMAN NATURE 3 (2005). In this study gossip was found to have the effect of rejecting or reforming a nonconforming individual's behavior.

[25] Susan Hafen, *Organizational Gossip: A Revolving Door of Regulation and Resistance*, 69 SOUTHERN COMMUNICATION JOURNAL 3 (Spring, 2004) at 223-224, defines organizational citizenship as "exhibiting behavior that is beyond one's job description ("extra role"), discretionary,

not explicitly rewarded by the organization, and important to the organization's success."

[26] *Id.* at 231.

[27] *Id.*

[28] Diane L. Zimmerman, *Requiem for a heavyweight: A farewell to Warren and Brandeis's privacy tort,* 68 CORNELL L. REV. 291, 334 (1983).

[29] Fiona Macrae, *You'll Never Guess What...We Spend 80% of Our Time Gossiping*, THE DAILY MAIL ONLINE, September 8, 2009, http://www.dailymail.co.uk/sciencetech/article-1211863/Youll-guess--We-spend-80-cent-time-gossiping.html (last visited August 17, 2010) (quoting research study of 300 people by Nicholas Emler).

[30] *Dillon v. Twin Peaks Charter Academy*, *supra*, note 14; *Pelletier v. City of Warwick*, 2008 R.I. Super. LEXIS 4 (2008); *Cruces v. Utah State Veterans Nursing Home, supra*, note 13; *Brinson v. Barden Mississippi Gaming*, 2007 U.S. Dist. LEXIS 21965 (Miss. 2007); *State ex rel. Wal-Mart v. Riley, supra*, note 13; *Delon v. McLaurin Parking*, 367 F. Supp. 2d 893 (N.C. 2005); *Bisbee v. Cuyahoga Bd. of Elections,* 2001 Ohio App. LEXIS 759 (2001); *Bick v. Harrah's,* 2001 U.S. App. LEXIS 455 (7th Cir. 2001); *Letner v. Wal-Mart*, *supra*, note 13; *Jackson v. Ritter*, *supra*, note 13 (listed by publication date, most recent first).

[31] *The Associated Press* reported that the town subsequently settled with the two plaintiffs who filed in federal court. See, *2 fired Hooksett workers settle federal lawsuit*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, November 1, 2008 (in return for which "the women agreed to waive any age discrimination claims.").

[32] One example allegedly occurred at a PR firm known as *Empower*, where the CEO claims to have fired three employees for gossip and then imposed a workplace policy of 'zero tolerance' for office gossip. See, Marilyn Gardner, *Some employers get tough on workplace gossip,* CHRISTIAN SCIENCE MONITOR, June 2, 2008, Money & Values, at 13.

[33] See, Rosemary Hartigan and Paula O'Callaghan, *Loose Lips Bring Pink Slips: Fired for Gossip at the Office*, 40 ACAD. LEGAL STUD. IN BUS. NAT'L PROC.__(2009), http://alsb.roundtablelive.org/Resources/Documents/NP%202009%20Hartigan,%20R%20and%20O%27Callaghan,%20P.pdf (last visited August 17, 2010).

[34] WILLIAM VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT (Duke University Press, 1984).

[35] *Id.* at 41-42.

[36] As Justice Frankfurter put it: "I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests,

.... Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body." *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 301 (1941).

[37] The late free speech scholar Edwin Baker postulated that gossip actually should merit the label "political speech" even more so than campaign speech. See, C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOCIAL PHILOSOPHY AND POLICY 2 (2004), at 262 ("...any proponent of protecting only or primarily political speech *should* have a hard time ruling out protection of gossip or other presentations of private information") [emphasis in original].

[38] Prior to the seminal *Pickering v. Bd of Education* decision 391 U.S. 563 (1968) the best known legal advice on this issue came from Justice Holmes in his opinion in *McAuliffe v. Mayor of New Bedford* 155 Mass. 216, 29 N.E. 512 (1892). The plaintiff lost his job as a policeman because he had solicited money for a political committee. Justice Holmes, sitting on the Massachusetts Supreme Judicial Court, held "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" 155 Mass. at 220, 29 N.E. at 517. For Justice Holmes the choice of employment simply trumped any assertion of free speech rights.

[39] 391 U.S. 563 (1968).

[40] *Pickering v. Board of Education*, 391 U.S. 563 at 574 (1968).

[41] *Pickering*, 391 U.S. 563 at 568.

[42] Both *Pickering*, 391 U.S. 563 (1968) and *Perry v. Sindermann*, 408 U.S. 593 (1972) involved teachers (both male). A nurse lost her job in *Waters v Churchill,* 511 U.S. 661 (1994), an assistant district attorney lost her job in *Connick v. Myers*, 461 U.S. 138 (1983), another assistant district attorney lost his job in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and a deputy constable lost her job in *Rankin v. McPherson*, 483 U.S. 378 (1987).

[43] *Connick v. Myers*, 461 U.S. 138 (1983), *Rankin v. McPherson*, 483 U.S. 378 (1987)

[44] *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977), *Rankin v. McPherson*, 483 U.S. 378 (1987)

[45] In *Garcetti v. Ceballos*, 547 U.S. 410 (2006) the Court ruled that the First Amendment allows employees to be disciplined for speech conducted in pursuance of their job duties.

[46] *Waters v. Churchill,* 511 U.S. 661 (1994)

[47] George Rutherglen, *Public Employee Speech in Remedial Perspective,* 24 J. L. & POLITICS 129 (2008), Cynthia Estlund, *Harmonizing Work and Citizenship: a Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, and Lawrence Rosenthal, *The Emerging First*

Amendment Law of Managerial Prerogative, 77 FORDHAM L. REV. 33 (2008).

[48] *Garcetti v. Ceballos,* 547 U.S. 410 at 422 (2006).

[49] "...Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation." *Waters v Churchill,* 511 U.S. 661 at 680 (1994).

[50] Keith Sachs, *Comment: Waters v. Churchill: Personal Grievance or Protected Speech, Only a Reasonable Investigation Can Tell,* 30 NEW ENG. L. REV. 779, at 812-818 (1996).

[51] "[T]o be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "`the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Waters v Churchill* 511 U.S. 661, 668 (1994) quoting *Connick* v. *Myers*, 461 U.S. 138 (1983).

[52] *Dillon v. Twin Peaks Academy*, 2008 U.S. Dist. LEXIS at *6. The Court "decline[d] the invitation to declare speech defined specifically in terms of its personal, unsubstantive nature as falling within that sphere of speech that an employer cannot constitutionally restrain, even if Dillon had been able to establish that she was, in fact, so restrained."

[53] *Pelletier v. City of Warwick* 2008 R.I. Super. LEXIS 4 (2008); *Bisbee v. Cuyohoga County Board of Elections* 2001 Ohio App. LEXIS 759 (2001).

[54] *Town issues statement on 'Hooksett Four*, *supra*, note 5.

[55] *Id.*

[56] *Waters v. Churchill* 511 U.S. 661, 677 (1994).

[57] Ayim, *supra*, note 9.

[58] *Id.* at 226.

[59] Noon & Delbridge, *supra*, note 20.

[60] Governor Spitzer's resignation in disgrace is factual; the preceding events are strictly hypothetical. See http://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html?_r=1&scp=2&sq=spitzer%20resignation&st=cse (last visited August 17, 2010).

[61] George Rutherglen, *supra*, note 50 at 167.

CREDIT RATING AGENCIES & FREE SPEECH

by

Alka Bramhandkar*
Marlene Barken**
Gwen Seaquist***

INTRODUCTION

The economic crisis that emerged in late 2007 continues to occupy an important place in many political and non-political discussions and can be traced to a number of players. The role many financial institutions, mortgage brokers, appraisers, and speculators played is well documented. Individual borrowers also contributed to this sub-prime lending crisis either knowingly or unwittingly through participation in the fraud committed by other parties. Several experts have put the blame squarely on the politicians who promoted home-ownership as the ultimate measure of success in American society and the government agencies (e.g. Fannie Mae) that were charged with assisting in the process of making these home ownership dreams come true.

*Professor of Finance & Int'l Business, Ithaca College
**Associate Professor of Legal Studies, Ithaca College
***Professor of Legal Studies, Ithaca College
The authors wish to thank Tyler Rauber, a senior at Ithaca College, and Joanne Barken, J.D., Brooklyn Law School, for their assistance in the research and preparation of this paper.