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Supreme Court Revises Free Speech Test for Public Employees

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On May 31, 1994, the U.S. Supreme Court decided a case involving the First Amendment free speech rights of public employees, *Waters v. Churchill*.[1] This bulletin summarizes the Court's decision and offers some observations on its likely impact on North Carolina local government employers.

The Facts of the Case

Cheryl Churchill worked as a nurse in a public agency, McDonough District Hospital in Macomb, Illinois. On January 16, 1987, Churchill had a conversation with another nurse, Melanie Perkins-Graham, during a dinner break. All parties to this case agree that during the course of the conversation Churchill and Perkins-Graham discussed the latter's interest in transferring to the obstetrics department where Churchill worked. The parties disagree about the substance of that conversation, however, and therefore about whether the hospital was constitutionally permitted to fire Churchill for her statements.

According to two other nurses who overheard part of the dinner conversation, Churchill talked about how bad things were in her department in general and how bad her supervisor was in particular.

Churchill's version of the conversation is different. For several months, she had been concerned about the hospital's cross-training policy, under which nurses from one department could work in another area. She believed the policy threatened patient care because it was designed not to train nurses but to cover staff shortages, and she had complained about it to her supervisors. Churchill denied she spoke negatively about her supervisor, and claimed she actually encouraged Perkins-Graham to transfer to her department.

The two nurses reported Churchill to hospital management. Based on this report, and on an interview with Perkins-Graham, but without talking to Churchill, the managers decided to fire Churchill. She filed a grievance and met with the president of the hospital, who, after completing a review of Churchill's grievance, decided to uphold her dismissal. Churchill then sued the hospital, claiming that her firing violated her First Amendment free speech rights.

Lower Court Holdings

In 1991, the United States District Court for the Central District of Illinois held[2] that neither version of the dinner conversation constituted speech on a matter of public concern, and so was unprotected speech under the First Amendment. Further, the court ruled, even if the speech was on a matter of public concern, its potential for disruption outweighed Churchill's First Amendment rights. Therefore, the court held, management could fire Churchill for the conversation with impunity.

In 1992, the Seventh Circuit Court of Appeals reversed the district court opinion.[3] The court held that Churchill's speech was protected under the First Amendment, since it concerned the hospital's alleged violation of state nursing regulations and the quality and level of nursing care it provided its patients. The court also found that the speech was not disruptive. Finally, the court concluded that the inquiry must turn on what the speech actually was, not on what the employer thought it

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[1] No. 92-1450 (May 31, 1994).

[2] 731 F. Supp. 311 (C.D. Ill. 1991).

[3] 977 F.2d 1114 (1992).

was. If the employer chose to fire an employee without sufficient knowledge of her speech, because it had failed to conduct an adequate investigation into her conduct, then the employer ran the risk of liability.

The Plurality Opinion

Justice O'Connor wrote an opinion in which she was joined by three other members of the Court, Chief Justice Rehnquist, Justice Souter, and Justice Ginsburg. As discussed below, Justice Souter filed a concurring opinion, and Justice Scalia, joined by Justice Kennedy and Justice Thomas, filed an opinion concurring in the judgment. Justice Stevens filed a dissent, in which Justice Blackmun joined.

Justice O'Connor began her opinion by noting that the two-pronged test for determining whether speech by a public employee is protected by the First Amendment was established in *Connick v. Myers*.[4] The question presented by the *Churchill* case was whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said. Stated another way, should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?

The answer, the plurality held, is that the *Connick* test is applied to the speech as the government employer found it to be. However, an evaluation of the speech is to be made only after a reasonable investigation into the circumstances surrounding the employee's conduct has been made by the employer. In this way, the plurality opinion stated new law: it is important to ensure not only that substantive First Amendment standards are sound, but also that they are applied through reasonable procedures.

Elaborating on this approach, Justice O'Connor stated:

> We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available--if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.
>
> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedures, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision--discharge, suspension, reprimand, or whatever else--of the sort involved in the particular case.[5]

What constitutes a reasonable investigation into the circumstances surrounding an employee's conduct to decide whether the speech is protected and what action to take? There is no general test, Justice O'Connor answers. Rather, the question must be answered on a case-by-case basis, taking into consideration the cost of the procedure, the relative risk of punishing protected speech, and the erroneous exculpation of unprotected speech. In evaluating these factors, however, the key is the government employer's interest in achieving its goals as effectively and efficiently as possible.

Applying this standard to the *Churchill* case, Justice O'Connor concluded that if the employer believed the version of events related by the two nurses who overheard Churchill's conversation, the employer would win. Hospital management's investigation was entirely reasonable. After getting the initial report from one of the employees who overheard the conversation, the managers interviewed Perkins-Graham (Churchill's dinner partner) to confirm the report. In response to Churchill's grievance (filed after she was fired), the hospital president met with Churchill directly to hear her side of the story, and interviewed her supervisor again. Concluded Justice O'Connor: "Management can spend only so much of their time on any one employment decision. By the end of the termination process [the hospital director] had the

[4] 461 U.S. 138 (1983). The two pronged test requires a court to first determine whether the speech is on a matter of public concern, and, if so, to then determine whether the employee's First Amendment interest in speaking on the matter outweighs the government employer's interest in a workplace free from undue disruption.

[5] Slip Op. at 13.

word of two trusted employees, the endorsement of those employees' reliability by three hospital managers, and the benefit of a face-to-face meeting with the employee he fired."[6] This was a reasonable investigation, in Justice O'Connor's view.

Under the *Connick* standard, in the plurality's view, Churchill's speech was unprotected. Even if Churchill's criticism of cross-training was speech on a matter of public concern--which the Court need not decide--the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had, Justice O'Connor continued.

After all this, however, the Court held that the district court erred in granting summary judgment to the employer. Although the employer would have been justified in firing Churchill for her statements, there remained a question whether she was actually fired because of those statements or for her prior conduct. Churchill produced evidence that she had criticized the cross-training program in the past, and that management had exhibited sensitivity to the criticism. It is possible that the employer was motivated by retaliation for her earlier speech, the Court held, which may have been protected. The case was remanded to the district court for further proceedings.

Concurring Opinions

Justice Souter filed a concurring opinion in which he emphasized that the employer not only has a duty to reasonably investigate an employee's conduct, but also must actually believe it in order to avoid liability. Justice Souter stated that under the plurality opinion, "an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in disruptive or otherwise unprotected speech does not inoculate the employer against constitutional liability."[7] If the employer conducts an investigation which leads it to believe that the speech was protected and then disciplines the employee anyway, the employer may be liable for a constitutional violation. Similarly, if the employer uses the results of the investigation as a pretext to shield disciplinary action taken because of prior protected speech of the employee, the employer may likewise be found liable.

Justice Souter concluded by noting that although Justice O'Connor's opinion speaks for only four members of the Court, the "reasonableness test" for investigation it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held liable for a First Amendment violation, absent a showing of pretext. Further, he noted, a majority of the Court is of the opinion that an employer whose conduct fails the reasonableness test violates the First Amendment. Accordingly, he concludes, the plurality opinion may be taken to state the holding of the Court.

Justice Scalia, joined by Justice Kennedy and Justice Thomas, wrote a separate concurrence. Justice Scalia agreed with the plurality that disciplining an employee violates the employee's free speech rights if it is in retaliation for speaking on a matter of public concern. He disagreed with the plurality's decision to add the requirement that the employer conduct an investigation before taking action, adding: "This recognition of a broad new First Amendment right is in my view unprecedented, superfluous to the decision in the present case, unnecessary for protection of public employee speech on matters of public concern, and unpredictable in its application and consequences."[8]

The requirement that a public employer conduct an investigation into the speech conduct of the employee, who otherwise is an at-will employee, is inconsistent with the Court's decisions involving government employment decided under the Due Process Clause, Justice Scalia stated. At-will employees may be dismissed for any reason, except, under the plurality's opinion, if the reason relates to speech. Then, there is an obligation to conduct an investigation to assure that the speech is not protected by the First Amendment. He adds: "The creation of procedural First Amendment rights in this case is all the more remarkable because it is unnecessary to the disposition of the matter. After imposing a new duty upon government employers, Justice O'Connor's opinion concludes that it was satisfied anyway--i.e., that the investigation conducted by the hospital was entirely reasonable."[9] He concludes by lamenting that the effect of the *Churchill* decision will be to require the

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6 Slip Op. at 15.
7 Slip Op. at 17 (Souter, J., concurring).
8 Slip Op. at 19 (Scalia, J., concurring).
9 Slip Op. at 22 (Stevens, J., dissenting).

lower courts to spend decades trying to improvise the limits of this new procedure.

The Dissent

Justice Stevens, joined by Justice Blackmun, filed a dissent in the case, arguing that the plurality opinion provides less protection for a fundamental constitutional right (speech) than the law ordinarily provides for less important rights. There is inadequate protection against pretextual firing under the plurality's approach, because the obligation to conduct a reasonable investigation into the circumstances surrounding the employee's speech is not enough.

Implications of the Decision

Under this decision, public employers will be required to conduct a reasonable investigation into an employee's conduct to determine whether he or she engaged in protected speech. What affect will that have on those employers? It is hard to say, but it may be minimal. Public employers in North Carolina routinely conduct some investigation into the circumstances surrounding an employee's conduct, whether it involves speech or something else, before deciding to discipline or dismiss the employee.

But the *Churchill* decision is important in raising the need for an investigation to constitutional status. The investigation becomes a part of free speech jurisprudence as a procedural. In this way, First Amendment law will now parallel Fourteenth Amendment Due Process law, in that both now have a substantive and procedural component. Stated another way, it now appears an employee may bring a claim for denial of free speech procedural rights, separate and apart from the content of his speech, in much the same way that an employee may now challenge a dismissal as violative of his procedural right to a pre-dismissal hearing, separate and apart from the nature of his misconduct. His claim would hinge on the employer's alleged failure to conduct an investigation.

After the Supreme Court recognized procedural due process rights for employees in a 1985 decision,[10] it took years for the lower courts to fill in the gaps created by the Court's ruling. Local governments are now left in a similar position, with instructions from the court to conduct a "reasonable" investigation into an employee's speech but without guidance on how to do it. So what should you do? Consider having a manager who is not involved in the circumstances of the case review it to determine what actually was said and to assess the disruptive impact of the speech, if any. Certainly, consult your city or county attorney for assistance in determining whether the speech is protected. At a minimum, interview all the parties involved, including the employee, to gain as clear an understanding as possible as to what was actually said and the context in which the speech was made. Keep notes.

The other important implication of the *Churchill* ruling is that a public official's liability for damages may be lessened by the requirement that it conduct a reasonable investigation into the speech conduct. A public official would be in a good position to argue for qualified immunity if he or she has made a good-faith judgment, based on a reasonable investigation, that the employee's speech was not protected. Even if a court later determines that the speech was protected, the fact that the official acted only after an investigation may save him or her from having to pay damages.[11]

For North Carolina public employers, the *Churchill* case underscores the importance of recognizing the general contours of free speech rights of public employees and keeping them in mind when deciding to take disciplinary action. The substantive rights of employees are not expanded by the ruling, but their procedural rights certainly are. As the courts wrestle with the limits of these procedural rights, clearer guidance will emerge.

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[10] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42 (1985).

[11] In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."

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