

1 of 8 DOCUMENTS

GIVHAN v. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.

No. 77-1051

SUPREME COURT OF THE UNITED STATES

439 U.S. 410; 99 S. Ct. 693; 58 L. Ed. 2d 619; 1979 U.S. LEXIS 209; 18 Fair Empl. Prac. Cas. (BNA) 1424; 18 Empl. Prac. Dec. (CCH) P8750

**November 7, 1978, Argued
January 9, 1979, Decided**

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 555 F.2d 1309, vacated in part and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: After petitioner teacher was dismissed from her employment, she filed a complaint seeking reinstatement on the grounds that nonrenewal violated a 5th Circuit rule and infringed her right of free speech. The district court held that the termination had violated the First Amendment and ordered her reinstated. The Fifth Circuit Court of Appeals reversed because she had privately expressed her complaints. The teacher appealed.

OVERVIEW: The teacher contended that nonrenewal of her contract violated her right of free speech. Respondent school district contended that its decision was justified based on private encounters between the teacher and school principal in which the teacher made unreasonable demands and was hostile. The district court held that the termination had violated the First Amendment because the primary reason for the school district's failure to renew her contract was her criticism of the policies and practices of the school district. The court of appeals held that because the teacher had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment. The court reversed the judgment. The court held that private expression of one's views was not beyond constitutional protection. The cases relied on by the Court of Appeals did not support the conclusion that a public employee forfeited his protection against governmental abridgement of freedom of speech if he decided to express his views privately rather than publicly.

OUTCOME: The court vacated the judgment of the court of appeals reversing the district court's order to reinstate the teacher.

CORE TERMS: teacher's, school district's, public employee, protected conduct, reinstatement, termination, encounters, privately, rehire, decision to terminate, superintendent, desegregation, unwilling, recipient, publicly, school principal, freedom of speech, government employee's, working relationship, abridgment, hostile, rehired, petty', school year, inter alia, right of free speech, introduced evidence, unreasonable demands, constitutional right, good' ideas

LexisNexis(R) Headnotes

439 U.S. 410, *; 99 S. Ct. 693, **;
58 L. Ed. 2d 619, ***; 1979 U.S. LEXIS 209

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Public Employees
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom***

[HN1] Noting that the free speech rights of public employees are not absolute, the Supreme Court has held that in determining whether a government employee's speech is constitutionally protected, the interests of the employee, as a citizen, in commenting upon matters of public concern must be balanced against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Under the circumstances of the case, the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Public Employees
Education Law > Faculty & Staff > Freedom of Speech > General Overview***

[HN2] Although the First Amendment's protection of government employees extends to private as well as public expression, striking the Pickering balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they in any way either impeded the teacher's proper performance of his daily duties in the classroom or interfered with the regular operation of the schools generally. Private expression, however, may in some situations bring additional factors to 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.

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Public Employees
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom***

[HN3] The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor the United States Supreme Court's decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Public Employees

[HN4] Once a public employee has shown that his constitutionally protected conduct played a substantial role in the employer's decision not to rehire him, the employer is entitled to show by a preponderance of the evidence that it would have reached the same decision as to the employee's re-employment even in the absence of the protected conduct.

SUMMARY: Following her dismissal from employment by a school district, a teacher, seeking reinstatement, intervened in a desegregation action against the school district in the United States District Court for the Northern District of Mississippi. Among other things, the teacher contended that the dismissal infringed her right of free speech secured by the First and Fourteenth Amendments. As justification for its action, the school district introduced evidence of a series of private encounters between the teacher and the school principal during which the teacher allegedly made "petty and unreasonable demands" in a manner described by the principal as "insulting," "hostile," "loud," and "arrogant." The District Court concluded that the main reason for the teacher's dismissal was her criticism of the school district's policies, which she believed to be racially discriminatory. Accordingly, the District Court held that the dismissal violated the teacher's First Amendment rights, and ordered her reinstatement. The United States Court of Appeals for the Fifth Circuit reversed, concluding that because the teacher had spoken privately with the principal, her expression was not protected by the First Amendment, and furthermore, that there was no constitutional right to "press even 'good' ideas on an unwilling recipient" (555 F2d 1309).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Rehnquist, J., expressing the unanimous view of the court, it was held that the teacher's criticism was subject to the protection of the First Amendment, since (1) such private expression of views is not beyond constitutional protection, and (2) the "captive audience" theory was inapplicable in view of the principal's having opened his office door to the teacher.

Stevens, J., concurring, expressed the view that the District Court should have the opportunity to decide whether any further proceedings were necessary on the issue whether the school district would have rehired the teacher in any event had she not engaged in constitutionally protected conduct.

LAWYERS' EDITION HEADNOTES:

*****LEdHN1**

LAW §935.5

First Amendment protection -- public employee -- private speech --

Headnote:[1A][1B]

A public school teacher's criticism of certain policies and practices of the school district in which she is employed, which criticism is communicated privately to a school principal, is subject to the protection of the First Amendment, since (1) such private expression of views is not beyond constitutional protection, and (2) the "captive audience" theory that there is no constitutional right to "press even 'good' ideas on an unwilling recipient" is inapplicable in view of the principal's having opened his office door to the teacher.

*****LEdHN2**

LAW §935.5

First Amendment protection -- public employee -- private speech --

Headnote:[2]

A public employee does not forfeit his First Amendment protection against governmental abridgement of freedom of speech merely because he decides to express his views privately rather than publicly.

*****LEdHN3**

LAW §925.3

public employee -- free speech -- balancing of interests --

Headnote:[3A][3B]

With regard to the rule that in determining whether a government employee's speech, critical of the government, is constitutionally protected, the interests of the employee as a citizen, in commenting upon matters of public concern, must be balanced against the interests of the state as an employer in promoting the efficiency of the public services it performs through its employees, striking such a balance in each context may involve different considerations even though the First Amendment's protection of government employees extends to private as well as public expression; for example, when a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they in any way impede the proper performance of his daily duties in the classroom or interfere with the regular operation of the schools generally, but private expression may in some situations bring additional factors to the calculus, so that 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.

*****LEdHN4**

ERROR §1337

Federal Court of Appeals -- consideration of issue not presented below --

Headnote:[4]

On review of a Federal District Court's decision that since certain critical statements made privately to a school principal by a public school teacher were constitutionally protected, her subsequent dismissal by the school district violated the First Amendment, a Federal Court of Appeals may not decide whether the decision to terminate the teacher would have been made even if her encounter with the principal had never occurred, the issue having been raised in the Court of Appeals by the school district as a result of an intervening decision of the United States Supreme Court, where such factual determination was not presented to the District Court, whose decision was rendered prior to the intervening decision.

SYLLABUS

After petitioner was dismissed from her employment as a teacher, she intervened in a desegregation action against respondent School District, seeking reinstatement on the ground, *inter alia*, that her dismissal infringed her right of free speech under the First and Fourteenth Amendments. In an effort to justify the dismissal, the School District introduced evidence of, *inter alia*, a series of private encounters between petitioner and the school principal in which petitioner allegedly made "petty and unreasonable demands" in a manner variously described by the principal as "insulting," "hostile," "loud," and "arrogant." Concluding that the primary reason for the dismissal was petitioner's criticism of the School District's practices and policies, which she conceived to be racially discriminatory, the District Court held that the dismissal violated petitioner's First Amendment rights and ordered her reinstatement. The Court of Appeals reversed, holding that under *Pickering v. Board of Education*, 391 U.S. 563; *Perry v. Sindermann*, 408 U.S. 593; and *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, petitioner's complaints and opinions were not protected by the First Amendment because they were expressed privately to the principal, and because there is no constitutional right to "press even 'good' ideas on an unwilling recipient." *Held*: A public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. Pp. 413-417.

(a) *Pickering*, *Perry*, and *Mt. Healthy* do not support the Court of Appeals' conclusion that private expression is unprotected by the First Amendment. The fact that each of those cases involved public expression by the employee was not critical to the decision. Pp. 414-415.

(b) Nor is the Court of Appeals' view supported by the "captive audience" rationale, since the principal, having opened his office door to petitioner, was hardly in a position to argue that he was the "*unwilling* recipient" of her views. P. 415.

(c) Respondents' *Mt. Healthy* claim, rejected by the Court of Appeals, that the decision to terminate petitioner would have been made even if her encounters with the principal had never occurred called for a factual determination that could not, on the record, be resolved by that court, since it was not presented to the District Court, *Mt. Healthy* having been decided after the trial in this case. Pp. 416-417.

COUNSEL: David Rubin argued the cause for petitioner. With him on the briefs were Stephen J. Pollak, Richard M. Sharp, and Fred L. Banks.

J. Robertshaw argued the cause and filed a brief for respondents. *

* Briefs of amici curiae urging reversal were filed by David M. Rabban and William Van Alstyne for the American Association of University Professors, and by William A. Dobrovir and Andra N. Oakes for the Fund for Constitutional Government and the Government Accountability Project.

JUDGES: REHNQUIST, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, post, p. 417.

OPINION BY: REHNQUIST

OPINION

[*411] [***622] [**694] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Bessie Givhan was dismissed from her employment as a junior high English teacher at the end of the 1970-1971 school year.¹ At the time of petitioner's termination, respondent Western Line Consolidated School District was the subject of a desegregation order entered by the United States District Court for the Northern District of Mississippi. Petitioner filed a complaint in intervention in the desegregation action, seeking reinstatement on the dual grounds that [*412] nonrenewal of her contract violated the rule laid down by the Court of Appeals for the Fifth Circuit in [**695] *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (1969), rev'd and remanded *sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970), on remand, 425 F.2d 1211 (1970), and infringed her right of free speech secured by the First and Fourteenth Amendments of the United States Constitution. In an effort to show that its decision was justified, respondent School District introduced evidence of, among other things, 2 a series of [***623] private encounters between petitioner and the school principal in which petitioner allegedly made "petty and unreasonable demands" in a manner variously described by the principal as "insulting," "hostile," "loud," and "arrogant." After a two-day bench trial, the District Court held that petitioner's termination had violated the First Amendment. Finding that petitioner had made "demands" on but two occasions and that those demands [*413] "were neither 'petty' nor 'unreasonable,' insomuch as all the complaints in question involved employment policies and practices at [the] school which [petitioner] conceived to be racially discriminatory in purpose or effect," the District Court concluded that "the primary reason for the school district's failure to renew [petitioner's] contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach." App. to Pet. for Cert. 35a. Accordingly, the District Court held that the dismissal violated petitioner's First Amendment rights, as enunciated in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), and ordered her reinstatement.

¹ In a letter to petitioner, dated July 28, 1971, District Superintendent C. L. Morris gave the following reasons for the decision not to renew her contract:

"(1) [A] flat refusal to administer standardized national tests to the pupils in your charge; (2) an announced intention not to co-operate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year."

² In addition to the reasons set out in the District Superintendent's termination letter to petitioner, n. 1, *supra*, the School District advanced several other justifications for its decision not to rehire petitioner. The Court of Appeals dealt with these allegations in a footnote:

"Appellants also sought to establish these other bases for the decision not to rehire: (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 a 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 [the principal] relied on it in making his recommendation." *Ayers v. Western Line Consol. School Dist.*, 555 F.2d 1309, 1313 n. 7 (CA5 1977).

[***LEdHR1A] [1A]The Court of Appeals for the Fifth Circuit reversed. *Ayers v. Western Line Consol. School Dist*

439 U.S. 410, *413; 99 S. Ct. 693, **695;
58 L. Ed. 2d 619, ***LEdHR1A; 1979 U.S. LEXIS 209

., 555 F.2d 1309 (1977). Although it found the District Court's findings not clearly erroneous, the Court of Appeals concluded that because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment. Support for this proposition was thought to be derived from *Pickering*, *supra*, *Perry*, *supra*, and *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), which were found to contain "[the strong implication . . . that private expression by a public employee is not constitutionally protected." 555 F.2d, at 1318. The Court of Appeals also concluded that there is no constitutional right to "press even 'good' ideas on an unwilling recipient," saying that to afford public employees the right to such private expression "would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions." *Id.*, at 1319. We are unable to agree that private expression of one's views is beyond constitutional protection, and therefore reverse the Court of Appeals' judgment and remand the case so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment.

[*414] [***LEdHR2] [2]This Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion [*696] that a public employee forfeits his protection against governmental abridgment 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.

[***LEdHR3A] [3A]In *Pickering* a teacher was [***624] discharged for publicly criticizing, in a letter published in a local newspaper, the school board's handling of prior bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. [HN1] Noting that the free speech rights of public employees are not absolute, the Court held that in determining whether a government employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon matters of public concern" must be balanced against "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S., at 568. The Court concluded that under the circumstances of that case "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*, at 573. Here the opinion of the Court of Appeals may be read to turn in part on its view that the working relationship between principal and teacher is significantly different from the relationship between the parties in *Pickering*,³ as is evidenced by [*415] its reference to its own opinion in *Abbott v. Thetford*, 534 F.2d 1101 (1976) (en banc), cert. denied, 430 U.S. 954 (1977). But we do not feel confident that the Court of Appeals' decision would have been placed on that ground notwithstanding its view that the First Amendment does not require the same sort of *Pickering* balancing for the private expression of a public employee as it does for public expression.⁴

³ The *Pickering* Court's decision upholding a teacher's First Amendment claim was influenced by the fact that the teacher's public statements had not adversely affected his working relationship with the objects of his criticism:

"The statements [were] in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S., at 569-570.

⁴

[***LEdHR3B] [3B] [HN2] Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.*, at 572-573. Private expression, however, may in some situations bring additional factors to 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

439 U.S. 410, *415; 99 S. Ct. 693, **696;
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employee's message but also by the manner, time, and place in which it is delivered.

[***LEdHR1B] [1B]*Perry* and *Mt. Healthy* arose out of similar disputes between teachers and their public employers. As we have noted, however, the fact that each of these cases involved public expression by the employee was not critical to the decision. Nor is the Court of Appeals' view supported by the "captive audience" rationale. [***625] Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the "unwilling recipient" of her views.

[HN3] The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to [***697] the public employee who arranges to communicate privately with his employer rather [*416] than to spread his views before the public. We decline to adopt such a view of the First Amendment.

[***LEdHR4] [4]While this case was pending on appeal to the Court of Appeals, *Mt. Healthy City Bd. of Ed. v. Doyle, supra*, was decided. In that case this Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial" part in the employer's decision to terminate. Such a rule would require reinstatement of employees that the public employer would have dismissed even if the constitutionally protected conduct had not occurred and, consequently, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S., at 285. Thus, the Court held that [HN4] once the employee has shown that his constitutionally protected conduct played a "substantial" role in the employer's decision not to rehire him, the employer is entitled to show "by a preponderance of the evidence that it would have reached the same decision as to [the employee's] re-employment even in the absence of the protected conduct." *Id.*, at 287.

The Court of Appeals in the instant case rejected respondents' *Mt. Healthy* claim that the decision to terminate petitioner would have been made even if her encounters with the principal had never occurred:

"The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. . . . Therefore [respondents] failed to make a successful 'same decision anyway' defense." 555 F.2d, at 1315.

[*417] Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her "demands." Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented to this Court. And while the District Court found that petitioner's "criticism" was the "primary" reason for the School District's failure to rehire her, it did not find that she would have been rehired *but* for her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which [***626] could not, on this record, be resolved by the Court of Appeals.⁵

⁵ We cannot agree with the Court of Appeals that the record in this case does not admit of the argument that petitioner would have been terminated regardless of her "demands." Even absent consideration of petitioner's private encounters with the principal, a decision to terminate based on the reasons detailed at nn. 1 and 2, *supra*, would hardly strike us as surprising. Additionally, in his letter to petitioner setting forth the reasons for her termination, District Superintendent Morris makes no mention of petitioner's "demands" and "criticism." See n. 1, *supra*.

439 U.S. 410, *417; 99 S. Ct. 693, **697;
58 L. Ed. 2d 619, ***626; 1979 U.S. LEXIS 209

Accordingly, the judgment of the Court of Appeals is vacated insofar as it relates to petitioner, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

CONCUR BY: STEVENS

CONCUR

MR. JUSTICE STEVENS, concurring.

Because this Court's opinion in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, had not been announced when the District Court decided this case, it did not expressly find that respondents would have rehired petitioner if she had not engaged in constitutionally protected conduct. The District Court did find, however, that petitioner's [**698] protected conduct was the "primary" reason for respondents' decision. * The [*418] Court of Appeals regarded that finding as foreclosing respondents' *Mt. Healthy* claim. In essence, the Court of Appeals concluded that the District Court would have made an appropriate finding on the issue if it had had access to our *Mt. Healthy* opinion.

* App. to Pet. for Cert. 35a. See also *id.*, at 36a, where the District Court stated that petitioner's protected activity was "almost entirely" responsible for her termination.

My understanding of the District Court's finding is the same as the Court of Appeals'. Nevertheless, I agree that the District Court should have the opportunity to decide whether there is any need for further proceedings on the issue. If that court regards the present record as adequate to enable it to supplement its original findings without taking additional evidence, it is free to do so. On that understanding, I join the Court's opinion.

REFERENCES

16 Am Jur 2d, Constitutional Law 341, 348

22 Am Jur Proof of Facts 563, Dismissal of Teachers for Cause

USCS, Constitution, 1st Amendment

US L Ed Digest, Constitutional Law 935.5

ALR Digests, Constitutional Law 791

L Ed Index to Annos, Freedom of Speech, Press, Religion, and Assembly; Schools

ALR Quick Index, Freedom of Speech and Press; Schoolteachers

Federal Quick Index, Freedom of Speech and Press; Schools and School Districts

Annotation References:

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.