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# Constitutional Law - First Amendment: Protection of Expression in a Private Context - Givhan v. Western Line Consolidated School District

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CONSTITUTIONAL LAW—FIRST AMENDMENT: PROTECTION OF EXPRESSION IN A PRIVATE CONTEXT—*Givhan v. Western Line Consolidated School District*, 99 S. Ct. 693 (1979).

Early in 1979 the United States Supreme Court rendered a decision which, like many first amendment cases, is more far-reaching than would appear at first reading. The case, *Givhan v. Western Line Consolidated School District*,[1] held that expressions of a public employee which are made in a private context are protected by the first amendment. The significance of the case, however, lies more in the negative; that is, in what it prevents rather than what it pronounces. This comment will examine *Givhan* in light of the existing body of law on which it impacts.

## THE PUBLIC EMPLOYEE AND FREE SPEECH IN A PUBLIC FORUM

The public employee was, until relatively recently, no better off than his private employee counterpart in relation to his constitutional rights. Courts had held that a state could terminate a public employee at will, in the same way a private employee may be terminated.[2] That view was expressed as early as 1892 by Mr. Justice Holmes in his famous statement that, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his contract."[3] That statement constitutes the foundation of the old right-privilege distinction, which has held on until relatively recently. Although eroded to some extent,[4] the practice of conditioning public employment on the surrender of constitutional rights was not clearly rejected by the Supreme Court until 1967 in

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[1] 99 S. Ct. 693 (1979).

[2] *See generally* Note, *The First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L.R. 1404 (1967). *But see* Holloway, *Fired Employees Challenging Terminable-at-Will Doctrine*, The Nat. Law J., Feb. 19, 1979, at 22, col. 1 (indicates that private employees are also making inroads into the terminable-at-will doctrine).

[3] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (1892).

[4] *See generally* Garrison v. Louisiana, 379 U.S. 64 (1964) and Wood v. Georgia, 370 U.S. 375 (1962) (extending first amendment privileges to public employees speaking publicly on matters of public concern); Shelton v. Tucker, 364 U.S. 479 (1960) and Wieman v. Updegraff, 344 U.S. 183 (1952) (striking down loyalty oaths). *See also* Note, *The Non-Partisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365 (1977) [hereinafter cited as *Non-Partisan Freedom of Expression*]; Note, *The First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968).

*Keyishian v. Board of Regents.*[5] The right-privilege distinction, however, lived on. In Illinois, a public school teacher, Pickering, sent a letter to a local newspaper criticizing the revenue raising practices of the school board. He was dismissed when the school board determined that publication of the letter had lead to disruption in the operation and administration of the school. The school board found that the statements were false, but considered no evidence on the question of disruption. Instead the board based its decision on the old right-privilege distinction. The Illinois Supreme Court affirmed the dismissal.[6] On appeal the United States Supreme Court re-affirmed *Keyishian* and established what has become known as the *Pickering*[7] balancing test to determine when dismissal of a public employee for speech-related behavior may be justified. The Court reasoned that while it could not generally be said that the state had a significantly greater interest in regulating the speech of its employees than it does in regulating the speech of the public in general, the state does have an interest in the efficiency of the public service it performs. Therefore, the Court held that "[t]he 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."[8]

Mr. Justice Marshall, who wrote the opinion, said that one factor to consider when applying the balancing test is the relationship between the employee-speaker and the supervisor criticized. If there is no close working relationship between the two, then actual disruption due to a resultant discipline or loyalty problem is not as likely to arise as when a more intimate relationship is required.[9] The Court held that another factor to consider was whether Pickering's statement was clearly concerning an issue of public interest.[10] While part of his statement was false, it was not shown that the false statement was carelessly made nor any actual disruption occurred as a result.[11] The

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[5]385 U.S. 589 (1967). Care should be taken, however, not to over generalize the concept of unconstitutional conditions, as they have been called, *Non-Partisan Freedom of Expression, supra* note 4, at 367 n. 7; remembering that constitutional rights are not absolute, United States v. O'Brien, 391 U.S. 367 (1968), Gitlow v. New York, 268 U.S. 652 (1925); and that the first amendment rights of public employees remain subject to regulation, e.g.: The Hatch Act which established restrictions on the political activities of public employees, 5 U.S.C. §§ 1501-1508 (1966).

[6]Pickering v. Board of Education, 36 Ill. 2d 568, 225 N.E.2d 1 (1967).

[7]Pickering v. Board of Education, 391 U.S. 563 (1968).

[8]*Id.* at 568.

[9]*Id.* at 570.

[10]*Id.*

[11]*Id.* at 573. The Court applied New York Times v. Sullivan, 376 U.S. 254 (1964) *But see* 391 U.S. at 574, n. 6, where the Court declined to decide the issue of whether the first amendment would protect statements that were knowingly or recklessly false and also had harmful effects.

Court, therefore, ruled that under the circumstances Pickering had just as much right to speak out as any member of the general public.[12]

In 1972 another United States Supreme Court case made a major statement concerning the free speech rights of public employees, particularly teachers. *Perry v. Sindermann*[13] involved Sindermann, a teacher at a Texas state junior college which had no tenure system. He had been a teacher in the state college system for ten years, employed for four years at the junior college. He became involved in public disagreements with the board of regents and on one occasion his name was printed in conjunction with a newspaper advertisement which was highly critical of the board. At the end of the year in which the advertisement had been published, the board voted not to renew his contract, but provided him with neither the reason for his termination nor an opportunity for a hearing. When he brought suit, the district court granted a summary judgment in favor of the school, holding that because Sindermann had no tenure, he had no cause of action. The court of appeals reversed and remanded,[14] saying that despite his non-tenured status, the non-renewal of his contract "would violate the Fourteenth Amendment if it in fact was based on his protected free speech," and "the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if [he] could show that he had an 'expectancy' of reemployment."[15]

The United States Supreme Court affirmed the court of appeals decision, but disagreed that a "mere subjective 'expectancy' " would be protected by due process.[16] In view of its decision in *Board of Regents v. Roth*,[17] the Court held that while Sindermann was not required to be tenured in order to demonstrate a "property interest" in his job, he did have to prove and should be given an opportunity to prove, an "actual expectancy" which could arise by implication.[18]

*Mt. Healthy City School District Board of Education v. Doyle*[19]

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[12] *Id.* at 574-75.

[13] 408 U.S. 593 (1972).

[14] Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).

[15] Perry v. Sindermann, 408 U.S. 593, 596 (1972).

[16] *Id.* at 603.

[17] 408 U.S. 564 (1972).

The Supreme Court considered the *Roth* case along with *Perry* and rendered judgments on both cases the same day. *Perry* summed up *Roth* as holding "that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract." Perry v. Sindermann, 408 U.S. at 599.

[18] 408 U.S. 603. In view of the fact that Sindermann had been employed with the state college system for so long and because evidence was presented which showed the possibility of a *de facto* tenure program, the Supreme Court felt that this was a genuine issue of fact, Perry v. Sindermann, 408 U.S. at 599-600.

[19] 429 U.S. 274 (1977) (unanimous decision).

rounds out the trilogy of cases establishing the guidelines for permissible dismissal of public employees for constitutionally protected behavior. Doyle, an untenured teacher at a public school, had previously been involved in several incidents at the school, but the last incident, a phone call to a local radio station in which he conveyed the substance of a memorandum from the principal concerning a dress code for teachers, was the only one to involve his first amendment rights. A month after the phone call, the principal recommended that Doyle's contract not be renewed. Doyle requested a statement of reasons for his termination and the reply cited, "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships,"[20] followed by references to the phone call and another incident in which he had allegedly made an obscene gesture toward two female students. The district court[21] held that the phone call clearly came under the protection of the first amendment, and as it had played a "substantial part" in the decision not to rehire even in the face of other permissible grounds, Doyle should be reinstated with back pay.[22] The court of appeals affirmed.[23]

The Supreme Court in *Mt. Healthy* cited *Pickering* and *Perry*, but went one step further saying:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, 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. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[24]

The Court found this to be particularly true in Doyle's situation as a decision to rehire him would have awarded him tenure. The Court then established a two-part causation test which has become known as the "same decision anyway" test, wherein the burden is first placed on the employee to show that he engaged in constitutionally protected conduct and such conduct was a substantial factor in the decision not to rehire. Then the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[25]

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[20] *Id.* at 282.

[21] No opinion reported.

[22] 429 U.S. at 283.

[23] Doyle v. Mt. Healthy City School Dist. Board of Education, 529 F.2d 524 (6th Cir. 1975).

[24] 429 U.S. at 285-86.

[25] *Id.* at 287.

## *GIVHAN* AND THE PRIVATE EXPRESSION

While *Pickering*, *Perry*, and *Mt. Healthy* establish the basic tests for determining when a public employee may be subject to sanctions for speech related behavior, each case arose out of factual situations in which the speech occurred in a public forum. In that respect, *Givhan* differed.

Bessie Givhan was an untenured, black junior high school teacher employed by the Western Line Consolidated School District, a rural district encompassing most of Washington County and some of Issaquena County, Mississippi. She was not rehired for the 1971-72 school year. In dismissing her, the school principal acknowledged that she was a competent teacher, but complained primarily of her "insulting and hostile attitude" and her "petty and unreasonable demands."[26] Givhan sued[27] arguing, among other things, that her free-speech rights had been violated.

In attempting to justify her dismissal, the school board introduced, among other evidence,[28] details from "private" conversations between Givhan and the school principal in which her allegedly "petty and unreasonable demands"[29] had been made. The district court found that Givhan's demands were neither petty nor unreasonable as

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[26]Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1312 (5th Cir. 1977).

[27]Western Line had been placed under a desegregation order, Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 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 (5th Cir. 1970). The order required, *inter alia*, that the school district develop and use objective and reasonable nondiscriminatory standards when dismissing or demoting staff. Givhan was eventually allowed to intervene in the desegregation order, but only after she had attempted a direct suit. Initially she and two others filed suit in the District Court of the Northern District of Mississippi on their own and on behalf of three classes of dischargees of Western Line. The district court dismissed the class action and one of the individual cases with prejudice, and allowed Givhan and one other individual to intervene. On appeal to the Fifth Circuit, the cases were treated separately; then on appeal to the Supreme Court, only the Givhan case was considered. 99 S. Ct. at 695; 555 F.2d at 1311.

[28]School officials also sought to establish these other bases for their decision not to rehire her:

> (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.

555 F.2d at 1313 n. 7.

The Fifth Circuit held that because the evidence on the first three points was inconclusive, the district judge did not clearly err in rejecting or ignoring it, and the court said though Givhan admitted the fourth incident, the principal had not relied on it in recommending that she not be rehired. *Id.*

[29]*See* note 22 and accompanying textual material, *supra*.

they all involved employment practices and policies of the school which Givhan believed were discriminatory. The district court said her contract was not renewed primarily because of her criticism of school policies and practices and therefore her dismissal violated her first amendment rights.[30]

The Court of Appeals for the Fifth Circuit did not find the district court decision clearly erroneous, but reversed anyway, holding that because her expressions were made in private conversations with her principal, they were not protected by the first amendment.[31]

The Fifth Circuit based its decision on four grounds: 1) *Pickering*, *Perry*, and *Mt. Healthy* implied that expressions made in a private context were not protected by the first amendment; 2) there was no contrary authority; 3) to protect such private expressions would place public employers in the position of being a "captive audience," and there is no constitutional right to "press even good 'ideas' on an unwilling recipient";[32] and 4) the school board failed to successfully make a *Mt. Healthy* "same decision anyway" defense.[33]

In unanimously[34] reversing and remanding the Fifth Circuit decision, the Supreme Court stated its position clearly; "The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our 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."[35]

The Court held that even though the decisions in *Pickering*, *Perry*, and *Mt. Healthy* "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."[36] Therefore, the rules established by those cases are to be applied to private as well as public expressions.

The Fifth Circuit's determination that there was no contrary authority was simple error, and was possibly due to the fact that the issue of public versus private speech was not briefed by the parties prior to the Fifth Circuit's decision.[37] The fact is that the Supreme

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[30]555 F.2d at 1311 (referring to the district court's unreported decision).

[31]555 F.2d at 1319-20.

[32]*Id.* at 1319.

[33]*Id.* at 1314-19.

[34]Justice Stevens concurred, but did not agree with the Court's handling of the *Mt. Healthy* issue, arguing that as the district court concluded that Givhan's speech was the primary reason for her termination, the Fifth Circuit could have regarded that determination as foreclosing the *Mt. Healthy* defense. Justice Stevens agreed, however, that the district court should have an opportunity to hear further evidence on that subject. but that the court should also be free not to do so if it feels an adequate record has already been made. 99 S. Ct. at 697-98 (Stevens, J., concurring).

[35]99 S. Ct. at 696-97.

[36]*Id.* at 696.

[37]Petition for Rehearing and Suggestion for Rehearing en banc on Behalf of Appellee Bessie B. Givhan at 5 n. 4, Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977).

Court itself had previously spoken to the issue in dicta,[38] and several circuits had found private speech to be within first amendment protection.[39]

In disposing of the Fifth Circuit's "captive audience" rationale, the Supreme Court held simply that because the principal had opened his office door to Givhan, he was hardly in a position to argue that he was the unwilling recipient of her views.[40]

The problem that arose in regard to the *Mt. Healthy* defense was due to the fact that that decision was not handed down until after the district court decision in *Givhan*, therefore, such a defense could not be anticipated. In a note,[41] the Supreme Court also suggested that such a defense could possibly prove successful under the facts of *Givhan*.

Upon a first consideration it seems surprising that the Supreme Court had never heard a case in which such a basic issue as first amendment protection for the public employee's private speech was involved. However, it must be remembered that it has not been many years since the demise of the right-privilege distinction, thus judicial interpretation of public employee rights is still in its infancy.

Other factors may also have contributed to the absence of a decision on the issue; for example, the difficulty in determining when an expression is public. Consider the case of *Jannetta v. Cole*,[42] where a fireman circulated a petition, and after acquiring twenty-four signatures, presented it to the city manager and to the fire chief. In a footnote,[43] the Court of Appeals for the Fourth Circuit determined that speech in a private context was involved since the petition was presented to the fireman's employer. The court seemed to overlook the fact that the petition had been read and signed by twenty-four other persons.

An additional problem in this area may occur if a public employee is involved in more than one incident before the decision to terminate is made. The court would have to determine which incident was the proximate cause of the termination. Prior to *Mt. Healthy*, this was a very real problem. It is obvious that an expression made in a public context is more apt to stimulate conflict than an expression made

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[38] *See* Norwell v. City of Cincinnati, 414 U.S. 14 (1973) in which the Supreme Court held that nonprovocative expressions to a police officer are protected. *See also* Abood v. Detroit Board of Education, 431 U.S. 209 (1977): "[E]very public employee is largely free to express his views, in public or private, orally or in writing." *Id.* at 230.

[39] *See generally* Ring v. Schlesinger, 502 F.2d 479 (D.C. Cir. 1974); Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973); Simard v. Board of Education, 473 F.2d 988 (2d Cir. 1972); Hostrop v. Board of Jr. College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972).

[40] 99 S. Ct. at 696.

[41] *Id.* at 697 n. 5.

[42] 493 F.2d 1334 (4th Cir. 1974).

[43] *Id.* at 1337 n. 4.

privately. Further, if other speech-related incidents are involved, the importance of the privately-made expression is more likely to be diminished when considered in relation to the other incidents in making a decision whether to terminate. Indeed, in their brief to the Supreme Court, respondents argued that the first amendment should not have been an issue in *Givhan*, as many other non-speech related incidents in which she had been involved demonstrated her lack of loyalty.[44]

The Fifth Circuit's ruling in *Givhan*, that private expressions are excluded from first amendment consideration because they have not specifically been protected, is contrary to the basic theories of first amendment interpretation.

In 1952 the Supreme Court declared that each method of expression presents "its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule."[45] Furthermore, the Bill of Rights has been declared to have "penumbras"[46] wherein "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[47] Possibly the most potent statement for inclusion of private expressions in first amendment protection came from James Madison who drafted the first amendment. In responding to Thomas Tucker's proposal that the amendment should include language specifically securing the right of the people to instruct their representatives, Madison said:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government, the people may therefore publicly address their representatives, *may privately advise them* [emphasis added], or declare their sentiments by petition to the whole body, in all these ways they may communicate their will.[48]

It therefore appears more likely that any form of expression is to be considered protected by the first amendment unless specifically declared otherwise.

Likewise, the idea that the *Pickering* Court did not intend to include privately expressed speech, is contrary to the entire *Pickering* principle—that of avoidance of disruption. A reasonable person seeking to avoid disruption would express his complaint privately rather than publicly. Even if the *Pickering* Court didn't specifically speak

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[44]Brief of Respondents at 13-20, Givhan v. Western Line Consol. School Dist., 99 S. Ct. 693 (1979).

[45]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

[46]*Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965).

[47]*Id.* at 486 (Goldberg, J., concurring).

[48]Brief for Petitioner at 14, Givhan v. Western Line Consol. School Dist., 99 S. Ct. 693 (1979) (quoting 1 ANNALS OF CONG. 766 (Gales & Seaton eds. 1789)).

directly to this point, it did plant a clue in a footnote,[49] when it reserved judgment on the question of whether a teacher could be required to take his grievance through private channels before going public. Certainly the court would not have even considered such a requirement without first presuming that the manner of communication was protected by the first amendment. Not only do the authorities agree that private expressions are protected by the first amendment, but in their brief to the Supreme Court in *Givhan*, respondents joined with the petitioner on this point only, arguing that the Fifth Circuit decision was in error.[50]

When the Fifth Circuit applied the captive audience concept in *Givhan* it treated the idea as if it were an isolated one. Captive audience is, however, a term used in the right to privacy area.

While the caselaw has dealt with several areas of privacy,[51] the majority of cases concern privacy in the home,[52] or the inability to escape the intrusion of one's privacy if not in the home.[53] The privacy concept is therefore very limited as the Supreme Court has said:

> The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.[54]

The term captive audience appeared in the case of *Rowan v. United States Post Office Department*,[55] which pointed out "[t]hat we are often 'captives' outside the . . . home,"[56] indicating that captivity

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[49]Pickering v. Board of Education, 391 U.S. 563, 572 n. 4 (1968).

[50]Brief of Respondents at 3.

[51]*See generally* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. City of Chicago, 394 U.S. 111 (1969) (residential picketing); Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (unwanted telephone calls and mail); Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) (public address systems and sound trucks); Breard v. City of Alexandria, 341 U.S. 622 (1951); Marsh v. Alabama, 326 U.S. 501 (1946) (door to door solicitation); Packer Corp. v. Utah, 285 U.S. 105 (1932); Perlmutter v. Greene, 140 Misc. 42, 249 N.Y.S. 495 (1931), *rev'd* 259 N.Y. 327, 182 N.E. 5 (1932) (billboards). *See also* Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?* 67 NW. U. L. REV. 153 (1972).

[52]*See generally* Cohen v. California, 403 U.S. 15, 21 (1971); Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970).

[53]Haiman, *supra* note 51, at 194.

[54]Cohen v. California, 403 U.S. 15, 21 (1971).

Note also that expressions to persons in their home are private expressions. To this author's knowledge, it has never been argued that these expressions were not protected because they were private; they have been subject to regulations, however, because of the right to privacy involved.

[55]397 U.S. 728 (1970).

[56]*Id.* at 738.

cannot always be avoided. But was Givhan's principal a captive audience? The Supreme Court held that because he opened his office door to her, he could not complain that he was unwilling to listen to her views[57] indicating that he might have had a right not to open his door at that particular time. The Supreme Court has also indicated that the first amendment does not command "that people who want to [voice their] views have a constitutional right to do so whenever and wherever they please."[58] It follows that a public employer may have a means of escaping from unwanted opinions, or at least putting them off for a time, through the establishment of reasonable time, place and manner regulations.[59]

Time, place and manner takes on another and greater significance when dealing with private expressions. In a footnote to *Givhan*, the Court pointed out that when an expression made in a public context is involved, the content of the expression is focused upon to determine the disruptive effect. Whereas in dealing with expressions in a private context, the Court said that not only the content, but also the time, place and manner of the expression may lead to disruption of institutional efficiency.[60] Therefore, the time, place and manner of private expressions may be considered in a *Pickering* balance. To a degree, this puts the burden on the employee to use common sense and his best judgment to avoid disruption.

The word "private" in this analysis can be considered in two distinct ways—private context, which has been the issue up to this point, and private content. Whether a statement is made in a public or a private context has to do with to whom the statement is made. But whether the content of an expression is public or private has to do with the subject matter of the expression—whether or not it concerns a matter of public interest. From a combination of content and context, four possible factual situations evolve:

1. Public context—public content
2. Public context—private content
3. Private context—public content
4. Private context—private content[61]

The first three of these categories are at least, since *Givhan*, clearly protected by the first amendment. Whether private content—private context expressions are protected remains in doubt.

In some cases dealing with teacher dismissals wherein the speech

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[57]*See* note 35, *supra*.

[58]Adderley v. Florida, 385 U.S. 39, 48 (1966).

[59]*See generally* Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972); Cox v. New Hampshire, 312 U.S. 569, 576 (1941); Abbott v. Thetford, 534 F.2d 1101 (1976) (reversing Abbott v. Thetford, 529 F.2d 695 (1976) and adopting dissenting opinion of Gewin, J. 529 F.2d at 706, regarding time, place, and manner generally).

[60]99 S. Ct at 696 n. 4

[61]*Non-Partisan Freedom of Expression*, *supra* note 4, at 389-90 n. 99.

involved was of a private content—private context nature, the courts have upheld the dismissals finding that such expressions carry little weight and require different consideration when applying the *Pickering* balancing test.[62] There are, however, a growing number of cases holding that the first amendment is not always limited to issues of public concern when statements are made in a private context.[63]

Unfortunately, *Givhan* dealt with private content—public context expressions, and therefore the Court had no reason to discuss private content—private context expressions. It is evident that the law concerning the rights of public employees is not yet standardized. One of the problems is the number of variables to consider. Perhaps that is why the *Pickering* Court demanded a case by case analysis[64] and, for the most part, established only general guidelines instead of clear cut tests.

## *PICKERING* DISRUPTION STANDARDS

The requirement of disruption in *Pickering*, however, is framed stronger than a general guideline, and is more akin to the clear and present danger test used in general free speech cases.[65] Generally, an "actual impairment" of a government interest is required.[66] Likewise, the disruption must be the result of more than the mere expression of controversial ideas.[67] If strong standards like these were not required, an intolerable chilling effect could result.[68]

When attempting to determine the degree of actual disruption, courts have had to consider a number of variables. The following discussion deals generally with only a few of these factors. As this particular area of the law has a high degree of subjective impact, the reader should bear in mind the enormity of the task the court faces when presented with even a few of these variables.

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[62]Schmidt v. Fremont County School District No. 25, 558 F.2d 982 (10th Cir. 1977); Roseman v. Indiana Univ. of Pennsylvania, at Indiana, 520 F.2d 1364 (3d Cir. 1975).

[63]*See, e.g.*, Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974); Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977).

[64]391 U.S. at 569 (1968).

[65]Note, *First Amendment Rights and Teacher Dismissal: A Survey*; 4 OHIO NORTH. L. REV. 392, 401 (1977) [hereinafter cited as *First Amendment Rights*].

[66]*Non-Partisan Freedom of Expression*, *supra* note 4, at 380-82. The cases that demonstrate actual disruption most clearly are symbolic speech cases. The case of Smith v. United States, 502 F.2d 512 (5th Cir. 1974), involved a V.A. psychologist whose dismissal was upheld as he would not refrain from wearing a peace pin while testing veterans. Another case, Phillips v. Adult Probation Dept., 491 F.2d 951 (9th Cir. 1974) involved a probation officer who was fired because he displayed a poster in his office which favorably depicted fugitives. It is obvious that the symbolic speech of these two employees would severely interfere with their job performance.

[67]Downs v. Conway School Dist., 328 F. Supp. 338, 349 (E.D. Ark. 1971).

[68]Because the *Pickering* balance is not a clear cut objective test, it may itself cause a chilling effect, because it might be difficult for an employee to guess at the decision a court would make. In such a situation, the employee may simply choose to remain silent. *See Non-Partisan Freedom of Expression*, *supra* note 4 at 367, 370 n. 25.

The effect of the expression on employer-employee relations is one factor. One of the guidelines offered by *Pickering* in determining disruption is whether "[t]he statements are in no way directed towards any person with whom [the employee] would normally be in contact in the course of his daily work as a teacher,"[69] which could lead to an impairment of the working relationship. If the working relationship is impaired, then disciplinary or loyalty problems could possibly result.

Disciplinary problems are probably the most common ground for discharge of a public employee,[70] but they usually arise as a real problem in speech cases only when there is a close working relationship. For example, an employee of the Nebraska Department of Roads was discharged when he said at a private meeting of engineers, that the state engineer and director of the roads department were not qualified. The district court held that his statement was not insubordination, which is beyond first amendment protection, and because there was no close working relationship involved, ordered his reinstatement.[71]

An employee's good faith criticisms standing alone will likely find first amendment protection. If, however, abusive language or a personal attack is involved, the balance may possibly fall in favor of dismissal, as the employer-employee relationship could be severely damaged.[72] On the other hand, a caveat is in order, as care should be taken to determine if the dismissal is due only to oversensitivity on the employer's part.[73] As so aptly stated by a noted authority: "[W]e must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosion of the first amendment."[74] Yet if a close working relationship is significantly impaired, the fact that the employer is overly sensitive may, in practical terms, mean little.[75] In the final analysis, the determination will probably depend largely on the closeness of the relationship.

Repeated criticisms, on the other hand, if taken to the point of harassment, may be considered to be conduct, and the speech involved

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[69]391 U.S. at 569-70.

[70]*See Non-Partisan Freedom of Expression*, *supra* note 4, at 386.

[71]Nebraska Dept. of Roads Emp. Ass'n. v. Dept. of Roads, 364 F. Supp. 251, 255-56 (D. Neb. 1978).

[72]*First Amendment Rights*, *supra* note 65, at 404-05.

[73]*See, e.g.*, Roberts v. Lake Central School Corp., 317 F. Supp. 63, 65 (N.D. Ind. 1970) where the court found that a conflict was merely the result of the employer's oversensitivity.

[74]Haiman, *supra* note 51, at 199.

[75]*See, e.g.*, Rampey v. Allen, 501 F.2d 1090, 1110 (10th Cir. 1974) (en banc), *cert. denied* 420 U.S. 90 (1975); Note, 1975 UTAH L. REV. 234 (1975), where a teacher was fired because he could not relate nor agree with the school president, the court held that such a reason was not a permissible ground for firing him—but the decision was limited to factual situations in which there is no close working relationship.

will be assigned a secondary position. In this regard, the Court of Appeals for the Ninth Circuit held in 1975 that while the first amendment protects controversial ideas, it will not protect them if they are forced upon others through harassment.[76]

The considerations may be altogether different, however, when dealing with sensitive or high level positions, as courts have been inclined to strictly enforce loyalty in those situations. It is noteworthy in regards to this comment, that when disloyalty is speech-related, it generally surfaces via public comment.[77] In fact, the *Pickering* Court pointed out in a note, that even totally correct public statements could possibly provide permissable grounds for dismissal in certain types of public employment where the need for confidentiality is especially great.[78]

It is likewise possible that an expression made either publicly or privately, could call into question an employee's fitness to perform his job. *Pickering* mentioned this possibility and suggested that while such expressions could be evidence of an employer's competence, the statements could not be the sole basis for his dismissal.[79] Expressions made both publicly and privately have nonetheless been used as independent grounds for dismissal under the fitness argument.[80]

Basically, whether the speech involved is made in a public or private context appears to be just another consideration. Like the above mentioned variables, it is simply another piece of the factual situation that must be weighed when employing *Pickering* and *Mt. Healthy*. What *Givhan* adds is that a public employee may not be subject to sanction simply because he expresses himself privately when he would not be subject to sanction for the same statement made publicly. The weight to be given any single variable will usually depend on the circumstances.

It is in the area of "blowing the whistle" that a real difference between public and private context speech is noticed. Blowing the whistle occurs when a government employee reports his superior or

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[76]Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 807 (9th Cir. 1975), where a teacher repeatedly and privately tried to convince a pregnant student to have an abortion.

[77]*Non-Partisan Freedom of Expression*, *supra* note 4, at 387-90.

[78]391 U.S. at 570 n. 3.

[79]*Id.* at 573 n. 5.

[80]*See* Megill v. Board of Regents, 541 F.2d 1073, 1085 (5th Cir. 1976) in which the court upheld denial of tenure to a teacher on the grounds that when he made false statements and could have ascertained the truth, he demonstrated lack of character. Lefcourt v. Legal Aid Society, 445 F.2d 1150, 1153 (2d Cir. 1971) in which a legal aid attorney privately made statements to the effect that because guilt was assumed when a client pleaded guilty, the legal society should always take cases to trial. The court held that the society could conclude from the statement that the attorney was unwilling to implement society policies.

another public employee for wrongdoing. One authority[81] suggests that *Swaaley v. United States*,[82] which held that, "[a] petition, . . ., that has never left a Department, need do no harm," combined with the holding in *Pickering*, indicates that statements suggesting wrongdoing, even if false and defamatory, will be protected by the first amendment if made privately and without intentional or reckless disregard for the truth.[83] *Givhan* clearly adds support to this position, as does other caselaw. In *Sprague v. Fitzpatrick*[84] the Court of Appeals for the Third Circuit upheld the dismissal of an assistant district attorney who publicly called into question the integrity of the district attorney on the grounds that the statement was disruptive according to the *Pickering* test. But in *Ring v. Schlesinger*,[85] a teacher in a school for Navy dependents was discharged when she sent a letter charging her principal with incompetency to four persons in the chain of command. When she appealed from a summary judgment, the Court of Appeals for the District of Columbia reversed holding that as she had sent the letter to only four persons, and no apparent harm was shown, the case was not subject to summary judgment.[86]

## CONCLUSION

The United States government employs more than eighteen percent of the United States work force[87] and the areas of private employment where state action has been found to exist are ever increasing.[88] The *Givhan* decision, thus, is potentially far reaching. But more significant is the *Pickering* view, that the "threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."[89] It is not unlikely, therefore, that if the *Givhan* Court had held differently, a considerable chilling effect would have resulted. Such a decision would have forced the public employee to decide whether to remain silent or to go public in order for his speech to be protected. That many such employees, if not the vast majority of them, would choose to remain silent does not seem unlikely in a society like ours where many persons actively avoid publicity.

Givhan's attorneys speculated as to what might happen in the

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[81] Lindauer, *Government Employees Disclosure of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975).

[82] 376 F.2d 857, 863 (Ct. Cl. 1967).

[83] *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

[84] 412 F. Supp. 910, 914-15 (E.D. Pa. 1976), *aff'd* 546 F.2d 560 (3d Cir. 1976), *cert. denied* 431 U.S. 937 (1977).

[85] 502 F.2d 479 (D.C. Cir. 1974).

[86] *Id.* at 490.

[87] *See Non-Partisan Freedom of Expression*, *supra* note 4, at 365 n. 1.

[88] *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions for Private Activity*, 74 COLUM. L. REV. 656 (1974).

[89] 391 U.S. at 574.

event of an unfavorable ruling. They said, "the First Amendment would not prevent a municipal government from revoking a citizen's library privileges or trash collection services because he complained to an official reasonably perceived by the citizen to be the appropriate recipient of his complaint."[90]

We need not muse over the frightening possibilities, as the *Givhan* decision was favorable. The decision was successful in closing up a potentially serious loophole in this area of the law. What it proposes in the way of a substantial addition to the law is, however, minimal. The decision adds only another factor to consider among the great many previously discussed. It is possible that *Givhan* appears to be a landmark case because it shocks the conscience to think that such a profound and basic issue has been overlooked for so long.

Upon reflection and consideration of the entire area of law upon which *Givhan* impacts, the progress is apparent. The law has moved with great strides from the time, not so long ago, when the public employee sacrificed his constitutional rights for the privilege of serving the people.

*Susan Fowler Brown*

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[90]Brief for Petitioner at 17, Givhan v. Western Line Consol. School Dist., 99 S. Ct. 693 (1979).