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Casenotes: Constitutional Law — First Amendment — Dismissal of State Employee for Distributing Questionnaire Upheld Where Speech Tangentially Affected Public Concern and Questionnaire Had Potential to Disrupt Office, Undermine Supervisory Authority, and Destroy Close Working Relationships. Connick v. Meyers, 103 S. Ct. 1984 (1983)

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CONSTITUTIONAL LAW — FIRST AMENDMENT — DISMISSAL OF STATE EMPLOYEE FOR DISTRIBUTING QUESTIONNAIRE UPHELD WHERE SPEECH TANGENTIALLY AFFECTED PUBLIC CONCERN AND QUESTIONNAIRE HAD POTENTIAL TO DISRUPT OFFICE, UNDERMINE SUPERVISORY AUTHORITY, AND DESTROY CLOSE WORKING RELATIONSHIPS. *Connick v. Myers,* 103 S. Ct. 1684 (1983).

An assistant district attorney in New Orleans opposed her pending transfer to another section of the criminal court and informed her supervisor that the transfer policy was unsound. In an attempt to demonstrate that her views were shared by others in the office she prepared a fourteen-item questionnaire[1] concerning the transfer policy and distributed it to her co-workers during lunch and office hours. The district attorney subsequently dismissed her since he viewed her reaction to the transfer as open defiance of office policy and as a disruption of office routine. She filed suit in the United States District Court for Eastern Louisiana under 42 U.S.C. § 1983[2] alleging that her first amendment right of free speech had been violated.[3] The district court held that the questionnaire and its distribution were protected speech.[4] The United

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1. The questionnaire read as follows:
   Please take the few minutes it will require to fill this out. You can freely express your opinion WITH ANONYMITY GUARANTEED.
   ****
   1. How long have you been in the Office?
   2. Were you moved as a result of the recent transfers?
   3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted?
   4. Do you think as a matter of policy, they should have been?
   5. From your experience, do you feel office procedure regarding transfers has been fair?
   6. Do you believe there is a rumor mill active in the Office?
   7. If so, how do you think it effects [sic] overall working performance of A.D.A. [Assistant District Attorney] personnel?
   8. If so, how do you think it effects [sic] office morale?
   9. Do you generally first learn of office changes and developments through rumor?
   10. Do you have confidence in and would you rely on the word of:
       Bridget Bane
       Fred Harper
       Lindsay Larson
       Joe Meyer
       Dennis Waldron
   11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
   12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
   13. How would you rate office morale?
   14. Please feel free to express any comments or feelings you have.

   THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

   Connick v. Myers, 103 S. Ct. 1684, 1694 (1983).
2. 42 U.S.C. § 1983 (1976).
3. Connick v. Myers, 103 S. Ct. 1684, 1686-87 (1983).
4. Connick v. Myers, 507 F. Supp. 752, 759 (E.D. La.), *aff'd,* 654 F.2d 719 (5th Cir.

States Court of Appeals for the Fifth Circuit affirmed.[5] The Supreme Court, in a close decision, reversed and held that the discharge of the employee did not violate the first amendment because the speech touched upon public concern in only the most limited sense and, in addition, the questionnaire had the potential to disrupt the office, undermine authority, and destroy close working relationships.[6]

Although freedom of speech has traditionally been given broad protection by courts, public employees have not always enjoyed first amendment protection. In the late 1800's public employers were allowed to suspend the constitutional rights of employees as a condition of employment. This policy, referred to as the right/privilege doctrine, was based on the premise that a person had no constitutional right to public employment. The citizen was free to choose between the exercise of his rights and the acceptance of the privilege of public employment that might restrict those rights.[7]

The right/privilege distinction remained intact for over seventy years. In 1967, however, the Court in *Keyishian v. Board of Regents*[8] rejected the premise "that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[9] Under this rationale the right/privilege distinction could no longer be used to justify restrictions on the rights of public employees. Thus, the *Keyishian* Court viewed a public em-

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1981), *rev'd,* 103 S. Ct. 1684 (1983). In cases involving dismissal of employees for speaking out the employee must show: (1) that his speech is protected; and (2) that his speech was the substantial or motivating factor in his dismissal. *Connick,* 507 F. Supp. at 756. Since the Supreme Court in *Connick* reversed the district court on the protected speech issue, this casenote is limited to an analysis of that issue. For a discussion of the employee's second burden, *see* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 284-87 (1977).

5. Connick v. Myers, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 103 S. Ct. 1684 (1983).
6. Connick v. Myers, 103 S. Ct. 1684, 1689-90 (1983) (5-4 decision). It is unclear whether the Court's holding extends to speech made outside the workplace. Although the Court's language is broad enough to encompass all public employee speech, *Connick* dealt with the in-house statements of a public employee.
7. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). In dismissing a policeman's first amendment claim, Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, stated "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517. This language became the foundation of the right/privilege doctrine that guided courts in employee first amendment claims for over 70 years. *See* Note, *The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?,* 37 GEO. WASH. L. REV. 409, 409-12 (1968).
8. 385 U.S. 589 (1967).
9. *Id.* at 605. In rejecting the right/privilege distinction, the *Keyishian* Court relied on the doctrine of unconstitutional conditions. *Id.* at 605-06; *see also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1445-46 (1968) ("Essentially, this doctrine declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.").

ployee's rights as equal to those of the general public.[10]

Within one year, however, the Court recognized that the state, in certain circumstances, could restrict first amendment rights. In *Pickering v. Board of Education,*[11] the Court recognized that the state had a special interest in providing efficient services to the public that might justify otherwise unconstitutional restrictions on employment.[12] The Court formulated a balancing test to determine if those restrictions were valid. Under this test, the state's interest in providing services to the public was weighed against the employee's interest in commenting on matters of public concern.[13] Central to the decision was the introduction of several factors that determine the strength of the competing interests. In striking the balance in favor of the public employee, the *Pickering* Court held that the interest in preserving the employee's speech was great because of the public nature of the forum and the public importance of the speech.[14] In addition, the employee's position was strengthened because his speech did not relate to his present employment position.[15] By contrast, the state's interest was weakened because the statement did not threaten close working relationships, cause friction among co-workers, undermine an immediate supervisor's discipline, or call into question the employee's fitness to perform his

10. *See Keyishian,* 385 U.S. at 605-06; *see also* Note, *Judicial Protection of Teachers' Speech: The Aftermath of* Pickering, 59 IOWA L. REV. 1256, 1260-61 (1974) (the unconstitutional conditions doctrine placed the state in the unrealistic position of being able to restrict employee speech only if the same restriction could be placed on the general public).
11. 391 U.S. 563 (1968).
12. *Id.* at 568. The scope of employee first amendment rights is narrower under the *Pickering* balancing test than under a strict application of the doctrine of unconstitutional conditions. First amendment protection under the *Pickering* Court's approach is determined by a balancing of interests rather than a test to determine if the restriction could constitutionally be placed on the general public. *See* Connick v. Myers, 103 S. Ct. 1684, 1695 (1983) (Brennan, J., dissenting).
13. *Id.* The *Pickering* Court did not clarify the respective burdens for each party under the balancing test. Despite this ambiguity, lower federal courts that have applied the balancing test have required the employee first to show that he was fired because of his expression. The burden then shifts to the government to show some actual interference with its interest. These courts then balance the extent of impairment to the government's interest against the employee's interest in speaking on matters of public concern. *See* Note, *The Nonpartisan Freedom of Expression of Public Employees,* 76 MICH. L. REV. 365, 369-70 (1977); *see, e.g.,* Janetta v. Cole, 493 F.2d 1334, 1337 (4th Cir. 1975); Pennsylvania *ex rel.* Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500, 507-09 (E.D. Pa. 1973). The Court's opinion in *Connick* requires the public employee to show initially that his speech is on matters of public concern before any further balancing occurs. Connick v. Myers, 103 S. Ct. 1684, 1690 (1983).
14. *Pickering,* 391 U.S. at 568-74.
15. *Id.* In *Pickering* these factors supported the employee's contention that his speech was on matters of public concern. Pickering, a teacher, wrote a letter to a local newspaper criticizing a proposed increase in school expenditures. The Court noted that these expenditures were a matter of general public interest, the local newspaper was a public forum, and the expenditures were irrelevant to his classroom teaching. *Id.*

duties.[16]

After *Pickering,* the Court extended the balancing test to in-house communication between a public employee and his immediate supervisor.[17] The Court, however, explained that when private expression of the employee is at issue courts must also consider when, where, and how the employee confronted his supervisor.[18]

The *Pickering* Court's application of the balancing test left a number of issues unresolved. For example, it was unclear whether first amendment protection extended to public employee speech not involving matters of public concern.[19] The Court also failed to explain under what circumstances the individual factors in the balancing process would be given additional weight and what affect this weight would have on the burden of proof.[20] In *Connick,* the Court addressed these issues.

Connick can be divided into a two-part analysis of public employee speech.[21] The first part limits review of employee free speech claims to those involving matters of public concern. The second part focuses on the actual balancing process that occurs after the employee's speech is found to involve matters of public concern.

The *Connick* Court initially held that when a public employee does not speak as a citizen upon matters of public concern, but as an employee on matters of personal interest, federal courts cannot review the personnel decisions taken by the public employer in reaction to that speech.[22] The Court justified this limitation on the scope of public employee first amendment protection through an analysis of the history of

16. *Id.* These factors failed to show any interference with the state's interest because Pickering's letter did not mention fellow employees or immediate supervisors, and it did not concern his classroom performance.
17. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 410-14 (1979).
18. *Id.* at 415 n.4.
19. An inter-circuit conflict existed on the issue of whether employee speech not involving matters of public concern was protected. *Compare* Waters v. Chaffin, 684 F.2d 833, 838 (11th Cir. 1982) (public concern was not a threshold issue, but was merely a factor in the balancing test) *with* Chitwood v. Feaster, 468 F.2d 359, 360-61 (4th Cir. 1972) (as a preliminary issue, the content of the speech must be more than mere bickering or a running dispute). Other circuits, foreshadowing the decision in *Connick,* held that expression dealing with the internal operations of the employee's agency are unprotected because it did not involve public concern. *See* Schmidt v. Fremont County School Dist., 558 F.2d 982, 984-85 (10th Cir. 1977); Clark v. Holmes, 474 F.2d 928, 931-32 (7th Cir. 1972), *cert. denied,* 411 U.S. 972 (1973).
20. *Pickering,* 391 U.S. at 570 n.3 (Court recognized that one or more of the factors might acquire additional weight); *see* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979) (Court set out time, place, and manner factors but did not explain what affect they would have on the government's burden).
21. Under the first issue, courts must apply the *Pickering* balancing test if the employee speech addresses a matter of public concern. By contrast, if the employee speech does not address a matter of public concern, the speech is unreviewable by courts absent unusual circumstances.
22. Connick v. Myers, 103 S. Ct. 1684, 1689-90 (1983).

public employee first amendment rights. In examining pre- and post-*Pickering* cases applying the balancing test, the *Connick* Court noted that each case emphasized the social and political importance of the speech.[23] This led the Court to conclude that unless the employee's questionnaire could be characterized as constituting a matter of public concern, it would be unnecessary to review the government's disciplinary action.[24]

The Court justified the public concern requirement by stressing the government's need for wide latitude in employee decisions and the need to limit frivolous first amendment claims.[25] *Connick* recognized that employee speech on matters of public concern is protected under the first amendment but held that these claims would be reviewed only under the most unusual circumstances.[26]

Initially, the public concern requirement seems to be only a minimal intrusion on public employee rights. It is certainly reasonable to give wide latitude to the employer's need to maintain office discipline and avoid excessive litigation over personnel disputes. The problem, though, is that the Court requires a finding of public concern before the balancing of any interests. This requirement was not present in the Court's previous holdings on public concern. The *Pickering* decision recognized that employee speech might be restricted if it interfered with the efficient performance of governmental duties.[27] When interference occurred, the employee's free speech right would be balanced against the government's interest, and public concern was merely a factor in determining which interest would prevail.[28] The *Connick* decision reverses this process by placing the initial burden on the employee to prove public concern before the government must show any interference with its interest. In effect, the government is free to restrict employee free speech rights on issues that are not matters of public concern. This seems contrary to the principle that the government may not constitutionally restrict first amendment rights as a condition of employment.[29]

The Court's opinion also set forth the standard used to determine whether the employee's speech involves matters of public concern.

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23. *Id.* at 1688-90.
24. *Id.* at 1689.
25. *Id.* at 1690.
26. *Id.* The Court did not give examples of what circumstances would trigger review absent a showing of public concern. One unusual circumstance, however, might be the dismissal of an employee for social conversation made away from the work place. *See* Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) (police officer during conversation at local tavern referred to another officer in disparaging terms). If restrictions on this type of speech are not reviewable, courts cannot redress content restriction.
27. Connick v. Myers, 103 S. Ct. 1684, 1695 (1983) (Brennan J., dissenting); *see supra* notes 11-16.
28. Connick v. Myers, 103 S. Ct. 1684, 1690 (1983).
29. *See supra* note 7 and accompanying text.

Public concern is determined by the content, form, and context of the statement.[30] Although the Court made no attempt to define these factors, it appears that the content factor was used to evaluate the subject matter of the speech, the form factor was used to examine how the speech was delivered, and the context factor encompassed why and where the employee spoke.[31] Under this test only one of the employee's fourteen questions raised a public concern issue.[32] The Court then proceeded to explain why the remaining questions were not matters of public concern.

The *Connick* Court concluded that the purpose of the questionnaire was not to inform the public about government wrongdoing or inefficiency, but rather to continue the employment dispute over the transfer.[33] The employee's distribution of the questionnaire in-house with no subsequent release to the public further supports this conclusion.[34] Had the questionnaire been released to the public, its format would have conveyed only the employee's dissatisfaction.[35] Under these circumstances the content of the questions that related to office morale and discipline could be matters of public concern, but the context and form of the speech precluded this finding.[36]

The majority's content, form, and context standard narrows the scope of public concern in employee free speech cases. Speech that would have traditionally fallen within the ambit of public concern may be denied this protection on the basis of where, why, and how the employee spoke.[37] The Court apparently reasoned that the employee's choice of forum, motivation for speaking, and form of speech may prevent the public from benefiting from the content of the speech.[38] This rationale ignores the broad protection the first amendment has given speech that may inform the public about how it is governed.[39] The public concern inquiry should be made in light of the Court's long-standing commitment to free, unhindered debate on public issues. That where, why, and how the employee speaks might prevent the speech from becoming part of the public debate is irrelevant. As the dissent explained, the potential to add to the store of public knowledge should be sufficient.[40]

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30. Connick v. Myers, 103 S. Ct. 1684, 1690 (1983).
31. *See id.* at 1690-91. While subject matter is taken into consideration, it is not controlling. The form of the employee's speech was a questionnaire. The context focused on the motivation for the speech. Here that motivation consisted of an attempt to turn her employment dispute into a "cause célèbre." *Id.*
32. *Id.* at 1691.
33. *Id.* at 1690-91.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1697 n.2 (Brennan J., dissenting).
38. *Id.* at 1690-91.
39. *Id.* at 1698-99 nn.4-5 (Brennan J., dissenting).
40. *Id.* at 1696-99. Alternatively, Justice Brennan suggested that these factors may

The context factor of the public concern standard places the greatest burden on the employee who chooses to communicate in-house. It not only narrows the scope of public concern because of where and why the employee speaks, but it also chills the private expression of public employees. The subjective nature of the context factor creates a fear that a retaliatory firing will not be reviewable. This signals a retraction of the Court's previous view that free speech guarantees are not lost to public employees who choose to express their views in-house.[41]

The second part of the Court's analysis in *Connick* explains the application of the balancing process to the employee's questionnaire. One of the questions, which asked if co-workers felt pressure to work for political candidates, was a matter of public concern.[42] Since the question also contributed to the employee's discharge, the Court balanced the respective interests to determine if the firing infringed on the employee's first amendment rights. The Court held that the government's burden in justifying a particular discharge is a flexible one that

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severely limit employee in-house speech. Justice Brennan did not accept the majority's distinction that some speech is so inherently a matter of public concern (e.g., race discrimination) that where and why the employee speaks need not be balanced, but employee speech not inherently involving public concern must be subjected to the content, form, and context test. To appreciate the distinction between the approaches taken by the majority and dissent, it is important to note that the majority views public concern as a threshold issue. Thus, these factors could eliminate the need to proceed to the balancing test. The dissent's approach, however, views public concern simply as one factor in the balancing test. The dissent would not narrow the concept of public concern, but would emphasize the impact of where and why the employee speaks by closely analyzing the impact of the speech on the government's interest. This would be done by giving more weight to the public's interest in preserving employee discipline and harmony at the work place. *Id.* at 1699. The dissent, though, does not explain how this added weight to the government's interest would affect its burden of showing interference with the efficient operation of government services.

41. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979). The chilling effect that these factors have on employee speech is best illustrated by analyzing their impact on a 1967 federal district court case decided under the traditional content test. Pilkington v. Bevilaqua, 439 F. Supp. 465 (D.R.I. 1967). In *Pilkington,* the employee was a state hospital administrator at an inpatient mental health unit. The state adopted an expedited program to update records that forced a shift of personnel from patient care to clinical duties. As a result, both staff morale and patient care suffered. The administrator openly resisted the new policy and encouraged staff members to ignore clerical duties in favor of patient care. *Id.* at 468-72. The district court found the context of the employee's expression to be of public concern regardless of the forum. *Id.* at 474-77. The employee's first amendment claim is weakened when the form and content factors are added to the analysis. He was directly affected by the new policy as an employee and his opposition to the policy arose in the context of a dispute over its implementation. Therefore, under the *Connick* analysis, the employee may not have a cause of action even if he is fired for speaking on matters of public importance. The doubt created by the *Connick* test can only encourage employees to remain silent.

42. Connick v. Myers, 103 S. Ct. 1684, 1691 (1983); see *supra* note 32.

varies depending on the nature of the employee's speech.[43] If the public concern value of the speech is minimal then an employer's reasonable belief that the speech will disrupt the office is sufficient to justify the discharge.[44] The *Connick* Court therefore considered several factors to determine whether the employee's discharge was based on a reasonable belief that her speech could disrupt the office. Initially, the Court found that the content of one of her questions, which asked if employees had confidence in their supervisors, carried the clear potential for undermining office relations.[45] The Court then examined the time, place, and manner in which the questionnaire was distributed and concluded that the distribution of the questionnaire at the office supported the district attorney's fear that the office routine would be disrupted.[46] Finally, the context in which the dispute developed related to the employee's employment dispute and thus justified the district attorney's fear that close working relationships would be hindered.[47]

The Court held that under these circumstances the employee's speech was unprotected.[48] Her speech had little public concern value because it was analogous to an employee grievance. This limited first amendment interest did not require the government to show any actual disruption with its services. The supervisor's reasonable belief that the speech would disrupt the office, undermine his authority, and destroy close working relationships was sufficient to justify the employee's discharge.[49]

The Court's holding that some speech on matters of public concern is unprotected because the employer reasonably believed that it would disrupt government service is inconsistent with Supreme Court precedent. For example, in *Pickering* the Court found that the employee's speech did not interfere with the regular operation of the school.[50] Lower courts have interpreted this to require the government to show some actual interference with its interest before justifying any restriction on employee speech.[51] In *Tinker v. Des Moines Independent*

43. Connick v. Myers, 103 S. Ct. 1684, 1691-93 (1983).

44. *Id.* at 1692-93. Although the Court stated that a stronger showing might be necessary if the employee's speech more substantially involves matters of public concern, it did not indicate whether the government must show actual, substantial, or some other form of interference to meet its burden of justifying the discharge. *Id.*

45. *Id.* at 1691-92.

46. *Id.* at 1693.

47. *Id.* In effect, the content, context, and form factors are used twice in the balancing test: once to determine public concern and again in measuring whether the speech interfered with the government's interest. Although the Court substituted "manner" for "form," the terms appear to be synonomous. *See id.* at 1696 (Brennan J., dissenting).

48. *Id.* at 1693-94.

49. *Id.*

50. Pickering v. Board of Educ., 391 U.S. 563, 568-74 (1968).

51. *E.g.,* Tygrett v. Washington, 543 F.2d 840, 848-50 (D.C. Cir. 1974); James v. Board of Educ., 461 F.2d 566, 571 (2d Cir. 1972) (quoting Tinker v. Des Moines

Community School District,[52] the Court held that the government must show a material and substantial interference with the operation of the school.[53] In sum, these cases demonstrate that the government is required to show at least some actual harm to its interest.[54]

In support of its new reliance on a potential disruption standard the Court cited decisions that held that the government can place content and speaker restrictions on activities that are incompatible with the intended use of government property.[55] Under these circumstances a reasonable apprehension of disruption justifies a ban on speech. By extending this logic to public employee free speech cases, the Court implies that because the government could directly censor the general public's speech in these situations, it can also condition employment on similar restrictions. Although the Court's analogy is logically consistent with the rejection of the right/privilege distinction,[56] it fails to consider the public's interest in preserving the employee's speech, especially when public disclosure might negatively affect the working relationship between the employee and his immediate supervisor.[57] The Court has recognized the public employee's right to express his views directly to his immediate supervisor.[58] To remain viable the employee's in-house free speech right must include speech on controversial subjects, especially potentially disruptive speech that is critical of

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Indep. Community School Dist., 393 U.S. 503, 506 (1969)); *see* Note, *supra* note 13, at 380; Note, *supra* note 10, at 1280.

52. 393 U.S. 503 (1969).

53. *Id.* at 508-09.

54. *See* note 51 and accompanying text. *See also* Bidwell v. Hazelwood School Dept., 491 F.2d 490, 493-95 (8th Cir. 1974) ("In a situation of potential disruption there is no requirement that . . . authorities must wait for the blow to fall before taking remedial measures."); *see also* Note, *supra* note 13, at 380-81 nn.65-67 (most courts have read *Pickering* to require actual impairment); Note, *supra* note 10, at 1266-68 (discussing the circumstances that might justify use of a less than actual impairment standard).

55. Connick v. Myers, 103 S. Ct. 1684, 1692 n.12 (1983). The Court cited Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 103 S. Ct. 948 (1983), and Greer v. Spock, 424 U.S. 828 (1976). Both of these cases concerned the ability of the government to restrict access to public property that was not a public forum. The *Perry* Court allowed the exclusion of a rival union from access to employee mail boxes. In *Greer,* the Court upheld the denial of access of political candidates to Fort Dix, New Jersey.

56. *See supra* note 7 and accompanying text; *see also* Van Alystne, *supra* note 9 (further discussion of right/privilege distinction).

57. *See* Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977). *Sprague* involved an assistant district attorney who was fired for stating to a newspaper reporter that the district attorney had not told the truth about a recommendation of parole. The Third Circuit upheld the firing because the public statement caused an irreparable breach of confidence that destroyed close working relationships. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 563 (1972) (excellent discussion of the public's interest in preserving employee speech).

58. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979).

the agency.[59] Despite the majority's analogy between the general public's limited right to expression on government property that is not a public forum and employee free speech rights, precedent does not warrant a reduction of the government's burden in justifying an employee discharge.

The government's need to maintain close working relationships does not justify the adoption of a potential disruption standard. The adoption of this standard allows the employer's judgment to determine whether protection will be accorded to the employee's speech. When the employer's judgment controls, public employees will refrain from criticizing their supervisors and thereby deprive the public of a valuable source of information.[60] The detrimental effects of this deprivation cannot be mitigated by varying the government's burden according to the degree of public importance attached to the employee's speech. Because of their knowledge of internal policies, employees are in the best position to speak about policies directly affecting them. Since the context factor increases the likelihood that this type of speech will be characterized as an internal dispute, it also decreases the probability that the employee will speak out on issues upon which he is most informed.[61]

The *Connick* Court attempted to adjust the balancing process to the realities involved in administering government offices. The Court sought to exclude employee grievances from first amendment protection. In accomplishing its task, the Court adopted the context, form, and content factors to determine whether the employee's speech was motivated by an employment dispute or a legitimate desire to comment on matters of public concern. These issues, however, are not mutually exclusive. Employees often do not address matters that are of legitimate public concern until these matters directly affect them in the course of their employment. The use of the form and content factors to delineate between important public speech and employee grievances is much too subjective an inquiry on which to rest first amendment rights. The application of these factors in determining when speech is permissible, coupled with the Court's recognition that an employer's assessment of potential harm may justify terminating the employee, substantially erodes the Court's previous holding that free speech is not "lost to the public employee who arranges to communicate privately with his employer rather than spread his views before the public."[62]

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59. For example, a school principal may exclude outsiders from the school building because they would disrupt the school. That same authority, however, should not be used to justify the silencing of in-house criticism by employees.
60. Connick v. Myers, 103 S. Ct. 1684, 1701 (1983) (Brennan J., dissenting).
61. An exception would be a matter of inherent public concern, such as race discrimination. *Id.* at 1691 n.8.
62. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979).