Washington and Lee Journal of Civil Rights and Social Justice

Volume 7 | Issue 1 Article 14

Spring 4-1-2001

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FACTS

Linda M. Pereira worked for the Massachusetts Department of Social Services (DSS) for over twelve years with an "unblemished record."[1] However, Pereira's employment was terminated by DSS in 1996 as a result of a racist "joke" that Pereira told at a political dinner. At the time of her discharge, she was a "protective investigator" for the southeast region of Massachusetts, where approximately thirteen percent of DSS's clients are African-American.[2] As a protective investigator, Pereira reviewed, screened, and investigated allegations of child abuse and neglect. In the course of her investigations, she had frequent contact with DSS clients, members of the community, and other social service agencies.[3] Her investigations required her to "gain access to the homes of affected families."[4]

Pereira also served on the Fall River City Council from 1991 to 1995.[5] On February 5, 1996, Pereira attended and spoke at a dinner for the outgoing City Council members.[6] Although the city clerk sponsored the dinner and many city officials and community leaders of Fall River attended the political event, members of the general public were not invited.[7] At the event, Pereira made a racially insensitive comment, which the parties later characterized as a "joke."[8] Pereira said, "Why do black people have sex on their minds? Because they have pubic hair on their heads."[9]

The day after the dinner, the press reported Pereira's statement and there was extensive publicity about the incident.[10] DSS's area director in Fall River received several complaints from clients and members of the community expressing their outrage at Pereira's statement.[11] According to testimony, at least two DSS employees had difficulties conducting investigations as a result of Pereira's statement.[12] One client refused to allow a DSS employee into her house stating that because Pereira was an employee of DSS, "DSS must be

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1. Pereira v. Commissioner of Soc. Servs., 733 N.E.2d 112, 115 (Mass. 2000).
2. Pereira, 733 NE2d at 115 n.7.
3. 733 NE2d at 115.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 116.
8. *Id.* at 116 n. 9.
9. *Id.*
10. *Id.* at 116.
11. *Id.*
12. *Id.* at 116 n.13.

racist," and therefore, she could no longer trust DSS to make objective decisions about her case.[13]

Two days after the incident, Pereira was placed on administrative leave with pay.[14] DSS conducted an internal investigation, and on April 10, 1996, the Commissioner of Social Services (commissioner) sent a letter to Pereira notifying her that her employment with DSS would be terminated immediately.[15] The commissioner indicated that Pereira was being terminated because of the "joke" she made at the City Council dinner.[16] The letter also stated that Pereira's comment was "insulting" and expressed "views which are contrary to one of the fundamental principles under which the Department of Social Services operates: that all people who come into contact with the Department will be treated with respect, dignity and fairness."[17] In addition, the letter indicated that Pereira's comment impaired DSS's ability to carry out its mandate because the comment had undermined public confidence in the agency and interfered with the abilities of other DSS employees to perform their jobs.[18]

In September 1996, Pereira brought suit against DSS and the commissioner, in both the commissioner's official capacity and as an individual.[19] Pereira alleged that she had been terminated from her employment with DSS in violation of her First Amendment rights under the United States Constitution[20] and in violation of her civil rights under 42 U.S.C. § 1983.[21] She also alleged several state law and common law claims.[22] Pereira sought declaratory and injunctive relief against DSS and monetary damages from the commissioner individually.[23] After hearing cross motions for summary judgment, the Superior Court of Suffolk County granted summary judgment for Pereira on her civil rights claim against the commissioner in her individual capacity and ordered a trial to ascertain damages.[24] The judge also granted Pereira injunctive relief against DSS and ordered it to reinstate her *nunc pro tunc* with back pay.[25] He also found that Pereira's common law

13. *Id.*
14. *Id.* at 116.
15. *Id.* at 116 n.11.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 114.
20. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").
21. 42 U.S.C. § 1983. (2000); *Pereira*, 733 N.E.2d at 114.
22. 733 N.E.2d at 114.
23. *Id.*
24. *Id.*
25. *Id.*

claims raised issues of material fact that had to be resolved at trial and that her state law claims were untimely filed, and thus barred.[26] DSS and the commissioner appealed the judgment and were granted a stay, pending the appeal of the order to reinstate Pereira, the trial on damages against the commissioner under 42 U.S.C. § 1983, and the trial on liability and damages for Pereira's common law claims.[27] The appeals were consolidated in the Appeals Court and were transferred to the Supreme Judicial Court of Massachusetts on its own motion.[28] On this appeal, only Pereira's federal claims under the First Amendment of the United States Constitution and 42 U.S.C. § 1983 were at issue.[29]

HOLDING

The Supreme Judicial Court of Massachusetts reversed the decision of the Superior Court granting summary judgment for Pereira.[30] The court held that Pereira's "joke" was not speech on a matter of public concern, and thus was not protected speech under the First Amendment.[31] In addition, the court found that the commissioner's decision to terminate Pereira's employment was justified and, therefore, did not violate Pereira's civil rights under 42 U.S.C § 1983.[32]

ANALYSIS

In reversing the decision of the Superior Court, the Supreme Judicial Court of Massachusetts applied a two-prong test, first established in *Pickering v. Board of Education*[33] and reiterated in *Connick v. Myers*,[34] to determine whether the "joke" made by Pereira was speech protected by the First Amendment and whether DSS violated her civil rights by terminating her employment.[35] Under the first prong of the two-part test, the court must determine whether the public employee's speech is about a matter of public

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26. *Id.* at 114, 115.
27. *Id.* at 115.
28. *Id.*
29. *Id.* at 114 n.2.
30. *Id.* at 114.
31. *Id.* at 119.
32. *Id.* at 122.
33. Pickering v. Board. of Educ., 391 U.S. 563 (1968) (establishing two-part test for determining whether employee's free speech rights have been violated).
34. Connick v. Myers, 461 U.S. 138 (1983) (applying and reiterating *Pickering* analysis in free speech employment context).
35. *Pereira*, 733 N.E.2d at 116.

concern.[36] Under the second prong, the court must examine and balance the competing interests of the public employee and the government employer.[37] Although the speech in both *Pickering* and *Connick* could be characterized as work-related, neither case stipulated that the two-part test only applied to a public employee's work-related speech.[38] In both cases, the court noted that its role was to examine the employee's speech and balance the interests of the employee and the government.[39]

In applying the first part of the *Pickering* analysis, the court looked at "the content, form, and context of [Pereira's] given statement" to ascertain whether the speech related to any matter of political, social, or other concern to the community.[40] The court noted that the primary goal of the First Amendment is to protect "the public marketplace [of] ideas and opinions."[41] The court discussed several Supreme Court cases and found that Pereira's "joke" had "little in common" with speech the Supreme Court had determined to be of "public concern."[42] Matters of public concern pertain to issues that are central to the idea of self-government and are vital in educating and informing the public through "free and open debate."[43]

The court noted that Pereira's "off-the-cuff remark" was not central to any political or social concern within the community, and that Pereira herself admitted that she did not mean to disseminate any message by telling her "joke."[44] Thus, the court concluded that Pereira's "joke" was not protected speech because it was not on a matter of public concern.[45] Pereira argued that the "public concern" prong of the *Pickering* test should not apply because her speech was unrelated to her employment and was expressed outside the work environment.[46] Therefore, she argued that her speech should be afforded the same level of protection as speech expressed by a member of the general public.[47] However, the court distinguished the cases Pereira relied on and

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36. 733 NE2d at 117.

37. *Id.*

38. *See Pickering*, 391 U.S. at 568-70, 573-75; *Connick*, 461 U.S. at 143, 145, 147.

39. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142.

40. *Pereira*, 733 N.E.2d at 117 (quoting Connick v. Myers, 461 U.S. at 147-48).

41. *Id.* at 118 (quoting Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994)).

42. *Id.* (citing Perry v. Sinderman, 408 U.S. 593, 595 (1972); Mt. Healthy City Sch Bd. v. Doyle, 429 U.S. 274, 284 (1977); Givham v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979)).

43. *Id.* at 118, 119 (quoting Pickering v. Board of Educ., 391 U.S. 563, 571-572 (1968)). *See also* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (stating that matters of public concern deal with "essence of self-government").

44. *Pereira*, 733 N.E.2d at 119. *See also* Tindle v. Caudell, 56 F.3d 966, 970 (8th Cir. 1995) (holding that amusing guests at a private party without intent to disseminate message is not considered speech on matter of public concern).

45. 733 N.E.2d at 119.

46. *Id.* at 119 n.17.

47. *Id.* at 119 n.17. *See also* Connick v. Myers, 461 U.S. 138, 157 (1983) (Brennan, J., dissenting) (stating that when public employees speak away from workplace and speak about matters unrelated to their

emphasized that none of the cases she cited disavowed the "public concern" prong of the *Pickering* test.[48]

After concluding that Pereira's speech was not on a matter of public concern, the court nevertheless proceeded to examine Pereira's claim under the second prong of the *Pickering* test.[49] The court noted that precedent was not settled on the issue of whether a court should analyze speech under the balancing prong when it has already determined that the speech at issue is not on a matter of public concern.[50] The court was persuaded by the argument that it should consider the balancing prong of the *Pickering* analysis even when a public employee's speech did not pass prong one because the balancing prong provides an added safeguard to ensure that restraints on an employee's First Amendment rights are justified.[51] The court noted that although a public employer may have a right to restrict a public employee's speech in many situations,[52] a public employee's speech is still entitled to some constitutional protection.[53] A public employee cannot be discharged from public employment "on a basis that infringes that employee's constitutionally protected interest in freedom of speech."[54] The court cited *Rankin v. McPherson*[55] in support of the view that courts should proceed to the balancing test even when the employee's speech occurred outside the work environment.[56]

The second prong of the *Pickering* test balances the interests of the employee in expressing herself freely with the interests of the government employer in maintaining the integrity and effectiveness of its services.[57] Any harm to the employee's interest in free expression that could result from the employee's speech must not be used to outweigh the employee's interest in

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work, their First Amendment rights are equal to those of general public).

48. *Pereira*, 733 N.E.2d at 119, 120 (relying on Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994) (holding that novel written by state employee, which might contain confidential information, was protected speech); Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) (finding public concern prong impossible to apply to employee's nonverbal expression, but balancing prong was applicable); Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986) (holding that *Pickering* test was applicable even to speech unrelated to workplace).

49. 733 N.E.2d at 119, 120.

50. *Id.* (citing United States v. National Treasury Employees Union, 513 U.S. 454, 465, 480 (1995) (O'Connor, J., concurring in part and dissenting in part); Connick v. Myers, 461 U.S. 138, 154 (1983)).

51. *Id.* at 120.

52. *Id.* at 117.

53. *Id.* at 117 n.14.

54. *Id.* at 117 (quoting Rankin v. McPherson, 483 U.S. 378, 383 (1987)).

55. *Rankin*, 483 U.S. 378 (applying *Pickering* two-part analysis to speech expressed outside workplace).

56. *Pereira*, 733 N.E.2d at 120 n.18 (citing United States v. National Treasury Employees Union, 513 U.S. 454, 466 n.10 (1995)). *See also* Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that "our [the court's] responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

57. 733 N.E.2d at 120.

free expression.[58] Even if the court finds that the employee's interest outweighs the government's interest, the employee must still show that the protected speech was a "motivating factor" in her termination.[59] In this case, DSS admitted that Pereira was terminated as a direct result of her speech.[60]

The court viewed Pereira's interest in telling her "joke" as "relatively insubstantial" because her motive was not to contribute to an ongoing public discourse or to take a position on an issue.[61] The only motive asserted by Pereira was that she was responding to a "grossly sexist and vulgar joke" from another guest.[62] After assessing Pereira's relatively insubstantial interest, the court examined DSS's interest in preventing offensive speech by its investigators.[63] The court noted that although the government must justify its intrusion on an employee's interests, a wider degree of deference to the government employer's decision is permitted where "close working relationships" with the community are necessary for the government to accomplish its goals.[64] The court explained that even though DSS might not have been able to justify Pereira's termination on the grounds that it was an immediate workplace disruption, the "joke" had a clearly negative impact on DSS and interfered with DSS's ability to perform its duties.[65]

The court noted that Pereira's comment undermined public confidence in DSS as a fair and respectful agency. [66] It concluded that this negative public view of DSS interfered with DSS's ability to carry out its mission.[67] The court emphasized that DSS investigators must be perceived as fair and unbiased in order to perform their duties, which involve intrusive investigations into people's personal lives.[68] The court deferred to the commissioner's judgment that an investigator must behave in a way that instills confidence in her ability "to treat families of diverse racial and ethnic backgrounds with respect, dignity, and fairness."[69]

The court cited several cases in support of the factors it used in evaluating the government's interests.[70] These factors include whether the speech impairs

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58. *Id.* at 117 (citing Waters v. Churchill, 511 U.S. 661, 668 n.15 (1994)).
59. *Id.* at 117 n.15 (citing O'Connor v. Steeves, 994 F.2d 905, 913 (1st Cir. 1993)).
60. *Id.*
61. *Id.* at 121.
62. *Id.*
63. *Id.*
64. *Id.* at 122 (citing Connick v. Myers, 461 U.S. 138, 151-52 (1983)).
65. *Id.* at 121 (citing United States v. National Treasury Employees Union, 513 U.S. 454, 483 (1995) (O'Connor, J., concurring in part and dissenting in part)).
66. *Id.* at 121-22.
67. *Id.*
68. *Id.*
69. *Id.* at 122.
70. *See* Connick v. Myers, 461 U.S. 138, 151, 152 (1983); Rankin v. McPherson, 483 U.S. 378, 390 (1987); United States v. National Treasury Employees Union, 513 U.S. 454, 494 (1995) (Rehnquist, C.J.,

the ability of the department to perform its functions, the character of those functions, and the degree of deference given to employment decisions made by government officials.[71]

The court asserted that Pereira had a responsibility to DSS to exhibit better judgment and should have known that her comment could undermine public confidence in the agency.[72] Thus, the court found that DSS had a legitimate and substantial interest in maintaining public confidence in its ability to perform its mandated duties.[73] The court concluded that DSS's interest in being perceived as an unbiased agency outweighed Pereira's relatively insubstantial interest in making a racially insensitive comment, which was not on a matter of public concern and which had foreseeable negative effects on DSS's reputation and effectiveness.[74]

The court did not address the second issue on appeal, which was whether the commissioner was entitled to a qualified immunity defense.[75] The court had already concluded that Pereira's rights were not violated, and therefore, the defense was unnecessary because Pereira had no claim under 42 U.S.C. § 1983.[76]

CONCLUSION

A public employee who makes an offensive comment in a situation that directly and negatively impacts an agency's ability to perform its mandate is not always entitled to First Amendment protection if the speech does not meet the two-prong *Pickering* test. The court stated that under the First Amendment, protection against adverse personnel decisions extends only to speech on matters of public concern.[77] The government employer has wide discretion in restricting an employee's speech if it undermines the agency's reputation as an unbiased and fair organization. Such a rule places much discretion in the hands of a public employer. However, the burden is on the government to show that its interest in regulating the speech and terminating employment is greater than the employee's interest in expressing herself.

This is an important case for situations in which the employee's speech is not work related, but may be censored because of its demonstrable impact on

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dissenting); Waters v. Churchill, 511 U.S. 661, 673 (1994); Tindle v. Caudell, 56 F.3d 966, 972 (8th Cir. 1995).

71. *Pereira*, 733 N.E.2d at 121, 122.
72. 733 NE2d at 121, 122.
73. *Id.*
74. *Id.* at 122.
75. *Id.*
76. *Id.*
77. *Id.* at 119.

the government agency. A government employee's speech is not as protected as it might be if the employee were simply a member of the general working public. According to the holding in this case, a government employer can restrict speech which is not related to the workplace simply because the employee works for the government. Government employees seem to have a greater duty to guard what they say than members of the general public do. A fine line exists between protecting the government's interest in maintaining its integrity and unduly restricting public employee's speech. In this case, the insubstantial interest and foreseeable consequences of Pereira's actions were outweighed by the stronger interests the government had in performing its duties.

Because this appeal dealt with a federal question, it sets precedent for both Massachusetts and other jurisdictions that deal with a similar question. The court uses precedent from many different jurisdictions in its opinion, which illustrates how each case deciding a First Amendment issue can affect the larger body of First Amendment jurisprudence.

The opinion also supports the proposition that courts should look at both prongs of the *Pickering* test in their entirety even when the first prong is not satisfied. The second prong acts as a safeguard to an employee's free speech rights to ensure that the employer's curtailment of speech is justified even when the speech is not on a matter of public concern.

This decision also demonstrates the wide degree of deference that courts offer to government judgment. In addition, the case reiterates the importance for an appellate court to make an independent examination of the record in First Amendment issues because of the importance of free speech rights in the United States. The nation was built on a concept that citizens should be free to express themselves even if they hold unpopular viewpoints. This fundamental right of free speech is one that must be protected and guarded against unreasonable abridgement. Thus, courts must always make careful and thorough examinations of the record when First Amendment rights are at issue.

It is unclear what effect this case may have on free expression. On one hand, the reasoning in this case could provide incentives for government employees to behave with the utmost control and judgment in not saying offensive and "racist" comments. On the other hand, this case might have a "chilling" effect on speech and thereby mitigate the importance of the safety valve/outlet role of free speech.

This case is illustrative of the struggle going on within our country between the freedom to express offensive, hurtful speech and the desire to promote and encourage civil, respectful speech. Because justifications for curtailing free speech are narrow and tied to very specific situations, the court

must look at each case's individual facts to ascertain whose interests are more substantial. In this case, the court has chosen to favor the community's interest in respecting diversity and maintaining public confidence in the government over an individual's right to express distasteful comments that lend little to the public discourse and have foreseeably negative consequences.

Summary and Analysis Prepared by:
Pranita A. Raghavan