Private Expression is Subject to Constitutional Protection

In *Givhan v. Western Line Consolidated School District,*[1] the U.S. Supreme Court held that a public employee does not forfeit his first amendment protection against governmental abridgement of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly.[2]

Plaintiff, Bessie Givhan, was a black junior high school English teacher who was not rehired by the School District for the 1971-72 academic year. At the time of her termination, the School District was the subject of a desegregation order. Givhan intervened, seeking reinstatement on the grounds that the nonrenewal of her contract violated the rule laid down in *Singleton v. Jackson Municipal Separate School District*[3] and infringed on her right of free speech secured by the First and Fourteenth Amendments. To show that its decision was justified, the School District introduced evidence of, among other things,[4] a series of private encounters between Givhan and the school principal, James Leach, in which Givhan allegedly made "petty and unreasonable demands" in a manner described by Leach as insulting, hostile, loud and arrogant.[5]

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1. ___ U.S. ___, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

2. 99 S.Ct. at 695-97, 58 L.Ed.2d at 623-25.

3. 419 F.2d 1211 (5th Cir. 1979), *rev'd and remanded sub nom.*, Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970). *Singleton* required that desegregating school districts apply objective and reasonable nondiscriminatory standards in effecting staff reductions.

4. In a letter to Givhan, the District Superintendent gave the following reasons for failure to renew her contract: "(1) [A] flat refusal to administer standardized National tests to the pupils in your charge; (2) an announced intention not to cooperate with the administration of the Glen Allen Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allen Attendance Center demonstrated throughout the school year." *Quoted at* 99 S.Ct. at 694 n.1, 58 L.Ed.2d at 622 n.1. In addition, the School District advanced several other justifications for its decision including: (1) that Givhan "downgraded" the papers of white students; (2) that she was among a number of teachers who walked out of and attempted to disrupt a meeting about desegregation in the fall of 1969; (3) that she had threatened not to return to work when the school reopened on a unitary basis in February, 1970; and (4) that she had protected a student during a weapons shakedown in March, 1970, by concealing a student's knife until completion of the search. The evidence on the first three points was inconclusive and rejected by the trial court. Givhan admitted the fourth but the district judge rejected it as a justification for not rehiring her. 99 S.Ct. at 695 n.2, 58 L.Ed.2d at 622 n.2 (citation omitted).

5. There was substantial testimony about the alleged "demands" made upon the principal by Givhan. This testimony showed that relatively early in Leach's tenure as principal, Givhan gave him a list of what he termed "demands" and she termed "requests." These requests all reflected Givhan's concern as to the impressions on black students of the respec-

Finding that Givhan's demands were neither "petty" nor "unreasonable" since they involved employment policies at the school which she conceived to be racially discriminatory, the district court held that the dismissal violated her first amendment rights and ordered her reinstatement.[6] The court concluded that "the primary reason for the School District's failure to renew [petitioner's] contract was her criticism of the policies and practices of the School District. . . ."[7]

The Court of Appeals for the Fifth Circuit reversed, concluding that because Givhan had privately expressed her complaints and opinions to the principal, her communications were not protected under the First Amendment.[8] The court derived support for this contention from implications that "private expression by a public employee is not protected,"[9] which it felt were contained in four leading Supreme Court cases in the area of teacher's first amendment rights: *Pickering v. Board of Education,*[10] *Perry v. Sindermann,*[11] *Mt. Healthy City School District v. Doyle,*[12] and *City of Madison, Joint School District v. Wisconsin Employment Relations Commission.*[13]

On appeal by Givhan, the U.S. Supreme Court held that "we are unable to agree that private expression of one's views is beyond constitutional protection . . . ."[14] It therefore reversed the court of appeals' judgment and remanded the case for consideration of the parties' claims "freed from this erroneous view of the First Amendment."[15]

In considering Givhan's claims that her first amendment rights had been violated by the nonrenewal of her contract, the Fifth Circuit noted that it had been cited to no cases precisely on point with the situation in which a public employee privately voices complaints and expresses opinions to his immediate superior.[16] This statement could have been made in most juris-

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tive roles of whites and blacks in the school environment. These requests included: (1) that black people be placed in the cafeteria to take up tickets (jobs considered "choice" by Givhan); (2) that the administrative staff be better integrated; and, (3) that black Neighborhood Youth Group workers be assigned semiclerical office tasks instead of only janitorial-type work. Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1313 (5th Cir. 1977), *rev'd sub nom.*, Givhan v. Western Line Consol. School Dist. ___ U.S. ___, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). (The court of appeals' opinion will be referred to hereafter in the text as *Givhan.*)

6. Ayers v. Western Line Consolidated School District, [No. GC 66-1-S (N.D. Miss. July 2, 1975) (interlocutory order granting re-instatement)].

7. *Id.*

8. 555 F.2d at 1318.

9. *Id.*

10. 391 U.S. 563 (1968).

11. 408 U.S. 593 (1972).

12. 429 U.S. 274 (1977).

13. 429 U.S. 167 (1976).

14. 99 S.Ct. at 695, 58 L.Ed.2d at 623.

15. *Id.*

16. 555 F.2d at 1316.

dictions. Indeed, it appears that prior to the Fifth Circuit's consideration of this issue in *Givhan,* only the Third Circuit had addressed this question in a manner that could reasonably be considered direct. In *Roseman v. Indiana University of Pennsylvania,*[17] the Third Circuit held, as did the Fifth Circuit two years later in *Givhan,* that the "essentially private" communications involved in the case were not constitutionally protected.[18]

Other than *Givhan* and *Roseman,* the issue of whether private communications are to be accorded first amendment protection has been dealt with only indirectly or collaterally,[19] or has been substantially avoided. Courts have accomplished this evasion by either concentrating on the alleged potential or resulting disruption of the employer-employee relationship[20] or by disposing of such a case purely on the basis of the content of the expression itself, thereby rendering the setting of the communication largely immaterial.[21]

In *Givhan,* the Fifth Circuit Court of Appeals concluded that the only question it could consider in determining whether to reverse the district court was whether Givhan's expressions were constitutionally protected.[22] The court noted that this determination entailed striking "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."[23] This is essentially the balancing test mandated by the U.S. Supreme Court in *Pickering* to determine whether a teacher's first amend-

17. 520 F.2d 1364 (3d Cir. 1975), *cert. denied,* 424 U.S. 921 (1976).

18. In *Roseman,* a nontenured associate professor's contract was not renewed. Roseman filed suit against the school claiming that she had been discharged because of comments she had made to the college dean and faculty committee in which she alleged that the acting chairman of her department had suppressed one Faust's application for the permanent chairmanship. Roseman alleged that these communications were constitutionally protected and therefore her dismissal violated her first amendment rights. The court of appeals held that these communications were not protected since they were essentially private communications in which only members of the department and the dean had an interest and that such communications had a potentially disruptive impact on the functioning of the department. *Id.* at 1367-69.

19. *See, e.g.,* Bradford v. Tarrant County Junior College Dist., 492 F.2d 133 (5th Cir. 1974), in which it was held that private speech was not damaging to reputation and therefore gave rise to no liberty or property interest on which to base a due process demand for a hearing.

20. *See, e.g.,* Watts v. Board of Curators, Univ. of Mo., 495 F.2d 384 (8th Cir. 1974); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

21. *See* Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied,* 411 U.S. 972 (1973); Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977). In both of these cases it was held that since the communications did not involve matters of public concern, thereby distinguishing them from *Pickering,* they were not constitutionally protected.

22. 555 F.2d at 1316.

23. *Id.* (citations omitted).

ment rights are to be accorded protection.[24] The court of appeals never reached this balancing test, however, holding that it must first determine, on the facts of this case, whether Givhan had "a [f]irst [a]mendment interest as a *citizen* in making complaints to the principal."[25] In other words, the court decided that the *Pickering* balancing test was to be applied only where it is found that, under the facts of the case, an expression subject to constitutional protection is involved. It was on this basis that the court of appeals disposed of the case by inferring from *Pickering, Perry, Mt. Healthy,* and *Madison* that private speech is not subject to constitutional protection, thereby rendering the *Pickering* balancing test irrelevant to the decision.

In *Pickering,* a public school teacher had written a letter to the editor of a local newspaper criticizing the way in which the board of education and the superintendent of schools had handled past proposals to raise new revenue for the schools. Upon her subsequent dismissal, the teacher filed suit. The Supreme Court held that in the absence of proof of false statements knowingly or recklessly made by the teacher, the exercise of his right to speak on issues of public importance could not furnish the basis for his dismissal.[26] The Court then mandated the type of balancing test referred to by the court of appeals in *Givhan.* In that opinion, the Fifth Circuit placed special emphasis on Justice Marshall's conclusion in *Pickering* that on the facts of that case "the interest of the school administration in limiting teachers' opportunities to contribute to *public debate* is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[27] The court of appeals in *Givhan* then discussed *Perry,* in which a teacher alleged that he had not been rehired because of his public criticism of the college's board of regents.[28] Again, the Fifth Circuit Court of Appeals emphasized specific language in *Perry* in which the Supreme Court referred to Sindermann's statements and criticism as *public.*[29] *Mt. Healthy* involved an incident in which a teacher telephoned a disc jockey at a local radio station and conveyed the substance of a memorandum relating to teacher dress and appearance which had been circulated by the school principal. Here, the court of appeals placed emphasis on the language of the district court, accepted by the Supreme Court, which referred to Doyle's action in making the memorandum *public.*[30] The court in *Givhan* concluded that "[t]he

24. *See* discussion of *Pickering infra.*

25. *Id.*

26. 391 U.S. at 574.

27. 555 F.2d at 1317, *quoting* 391 U.S. at 573 (emphasis added).

28. The public criticism involved in *Perry* was in the form of a newspaper advertisement, highly critical of the school's Board of Regents, which appeared over Sindermann's name, and testimony by Sindermann before committees of the Texas Legislature. 408 U.S. at 594-95.

29. 555 F.2d at 1317, *quoting* 408 U.S. at 598.

30. *Id.* at 1318, *quoting* 429 U.S. at 284.

strong implication of these cases is that private expression by a public employee is not constitutionally protected."[31] The court of appeals then cited *Madison*[32] to illustrate that recent cases added support to this dichotomy. As it had done in its discussion of *Pickering, Perry,* and *Mt. Healthy,* the court concentrated on specific language in *Madison* in which the protected communication involved was referred to by the Supreme Court as *public.*[33] In essence, the court of appeals stated that since the aforementioned cases each involved protection of public expression, which was specifically noted as such by its respective court, an implication arose that had such expression been private, the same protection would not have been afforded. The court then noted, almost as an afterthought, that no one has a right to press even good ideas upon an unwilling recipient, thereby adopting a "captive audience" rationale.[34]

The Supreme Court, in an opinion by Justice Rehnquist, reversed the court of appeals, stating that "[t]his court's decisions in *Pickering, Perry* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly."[35] The Court went on to state, in effect, that the fact that each of these cases involved public expression by the employee-teacher was not critical to the decision but was merely a coincidental fact.[36] The Court then discussed *Pickering,* observing that the Fifth Circuit's opinion in *Givhan* could be read to turn on its view that the teacher-principal relationship involved in *Givhan* was significantly different from the employment relationship involved in *Pickering,* in that under the Pickering facts there was little potential for an adverse affect on the working relationship between the teacher and the object of his criticism.[37] But the Court dismissed this as a

31. *Id.* The court mentioned that this implication could also be found in its prior decisions involving teacher dismissal and freedom of speech. 555 F.2d at 1318 n.15 (cases cited).

32. The issue in *Madison* was whether a state could constitutionally require that an elected board of education prohibit teachers, other than union representatives, from speaking at an open meeting, at which public participation is permitted, if such speech is addressed to the subject of pending collective bargaining negotiations. The Supreme Court answered in the negative. 429 U.S. at 167.

33. The court specifically mentioned the Supreme Court's statement in *Madison* that "[r]egardless of the extent to which true contract negotiations between a public body and its employees may be regulated . . . the participation in *public discussion* of public business cannot be confined to one category of interested individuals." 555 F.2d at 1318, *quoting* 429 U.S. at 175. The court also cited the concurrence of Justice Brennan as support for its position.

34. 555 F.2d at 1319. The court cited *Rowan v. United States Post Office Dep't,* 397 U.S. 728 (1970) and *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), in support of this position.

35. 99 S.Ct. at 695-96, 58 L.Ed.2d at 623.

36. *Id.* at 696, 58 L.Ed.2d at 623.

37. The Court in *Pickering* indicated that its decision upholding the teacher's first amend-

determinative factor stating that "we do not feel confident that the [c]ourt of [a]ppeals' decision would have been placed on that ground notwithstanding its view that the First Amendment does not require the same sort of *Pickering* balancing for the private expression of a public employee as it does for public expression."[38] Turning to *Perry* and *Mt. Healthy*, the Court reiterated its contention that the fact that these cases involved public expression by the employee was not critical to its decision in those cases.[39] The Court then disposed of the court of appeals' "captive audience" rationale by stating that "[h]aving opened his office door to petitioner, the principal was hardly in a position to argue that he was the '*unwilling* recipient' of her views."[40] Finally, the Court noted that subsequent to the trial of this case and while its appeal was pending to the Fifth Circuit Court of Appeals, the Supreme Court had decided *Mt. Healthy*, which called for a determination as to whether the teacher involved would have been rehired notwithstanding his protected expression.[41] Consequently, the respondent's "same decision anyway" claim, rejected by the court of appeals,[42] called for a factual determination that could not, on the record, be resolved by that court since it was not presented to the district court. Thus, the court of appeals' judgement was vacated and the case remanded to the district court to make an appropriate finding on this issue.[43] Also, in reference to the "same decision anyway" claim was the concurring opinion of Justice Stevens, which expressed the view that the district court should have the opportunity to decide whether any further proceedings were necessary on the issue of whether the School District would have rehired the teacher had she not engaged in conduct protected by the First Amendment.[44]

The Supreme Court's decision in *Givhan* is significant for its extension of the cloak of the First Amendment to cover private as well as public expression. The decision is also significant for the direct approach taken by the Supreme Court in answering the question of whether private speech

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ment rights had been significantly influenced by the fact that "[T]he statements [were] in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." 99 S.Ct. at 696 n.3, 58 L. Ed.2d at 624 n.3, *quoting* 391 U.S. at 569-70.

38. 99 S.Ct. at 696, 58 L.Ed.2d at 624.

39. *Id.*

40. *Id.* 58 L.Ed.2d at 624-25. (emphasis in original).

41. In *Mt. Healthy*, the Supreme Court held that "once the employee has shown that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him, the employer is entitled to show 'by a preponderance of the evidence' that it would have reached the same decision as to reemployment, even in the absence of the protected conduct." *Id.* at 697, 58 L.Ed.2d at 625, *quoting* 429 U.S. at 287.

42. 555 F.2d at 1314-15.

43. 99 S.Ct. at 697, 58 L.Ed.2d at 625-26.

44. *Id.* at 697-98, 58 L.Ed.2d at 626.

is protected. This is a substantial achievement in light of the previous treatment this issue has received in the courts, as illustrated by the Fifth Circuit Court of Appeals in *Givhan* which framed its decision by drawing implications from largely irrelevant factual situations. But while the Supreme Court's decision in *Givhan* may seem clear on its face, its application will likely be far from simple. This difficulty exists because the holding has at least one major question unanswered. The limitation involves the reasonably certain assumption that *Givhan* does not stand for the proposition that all private expression is protected by the first amendment, even as applied to the teacher-principal relationship. Rather, what *Givhan* seems to stand for is the proposition that one does *not forfeit* first amendment protection *merely* because he expresses himself in a private setting. In other words, the Court seems to be saying merely that private speech is *subject* to first amendment protection.[45] Consequently, when this type of speech arises, in an educational setting for example, it will still be subject to the *Pickering* balancing test along with the *Mount Healthy* "same decision anyway" argument to determine whether protection will actually be afforded under the fact situation involved.

The major question left unanswered by the Court is to what type of relationship the holding will apply. For example, it may apply only to education-employment relationships, or it might be applicable to all public employment relationships (as the language of the decision would seem to indicate), to non-public employment, or to extra-employment relationships. Presumably, the courts will be called on to answer some or all of these questions in the future.

Nevertheless, notwithstanding these limitations and unanswered questions, with its decision in *Givhan,* the Supreme Court has taken a substantial step in the expansion of the individual's first amendment rights.

KENNETH S. BARR

45. This is precisely contrary to the Fifth Circuit's holding which was, essentially, that private speech is *not subject* to first amendment protection. 555 F.2d at 1316-18.