# SUPREME COURT OF THE UNITED STATES

No. 92–1450

CYNTHIA WATERS, ET AL., PETITIONERS *v.* CHERYL R. CHURCHILL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[May 31, 1994]

JUSTICE SOUTER, concurring.

I join JUSTICE O'CONNOR's plurality opinion stating that, under the Free Speech Clause, a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance on that report, even if it turns out that the employee's actual remarks were constitutionally protected. I add these words to emphasize that, in order to avoid liability, the public employer must not only reasonably investigate the third-party report, but must also actually believe it. Under the plurality's opinion, an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in disruptive or otherwise unprotected speech does not inoculate the employer against constitutional liability. A public employer violates the Free Speech Clause, that is, by invoking a third-party report to penalize an employee when the employer, despite the report and the reasonable investigation into it, believes or genuinely suspects that the employee's speech was protected in its entirety or in that part on which the employer purports to rely in taking disciplinary action; or if the employer invokes the

third-party report merely as a pretext to shield disciplinary action taken because of protected speech the employer believes or genuinely suspects that the employee uttered at another time.

First Amendment limitations on public employers, as the plurality explains, must reflect a balance of the public employer's interest in accomplishing its mission and the public employee's interest in speaking on matters of public concern. See *ante*, at 5–12. Where an employer penalizes an employee on the basis of a third-party report of speech that the employer should have suspected, based on the content of the report and the employer's familiarity with the employee and the workplace, to have been constitutionally protected, this balance must reflect the facts that employees' speech on matters of public concern will often (as we said of employees' union activities) "engende[r] strong emotions and giv[e] rise to active rumors," and, critically, that "the example of employees who are discharged on false charges would or might have a deterrent effect on other employees." *NLRB* v. *Burnup & Sims, Inc.*, 379 U. S. 21, 23 (1964); see also *Rankin* v. *McPherson*, 483 U. S. 378, 384 (1987) ("`[T]he threat of dismissal from public employment is . . . a potent means of inhibiting
speech'") (quoting *Pickering* v. *Board of Ed. of Township High School Dist.*, 391 U. S. 563, 574 (1968)). As the plurality's opinion frankly recognizes, permitting public employers to punish employees in reliance on third-party reports "involve[s] some risk of erroneously punishing protected speech." *Ante*, at 14.

This is a risk that the public employer's interests justify tolerating, as the plurality's opinion explains, but only when the public employer's conduct was reasonable, see *ante*, at 14–16, and only when the employer "really did believe" the third-party report, *ante*, at 17; see also *ante*, at 18 (an employer need

not investigate further "`if the belief an employer forms supporting its adverse personnel action is "reasonable"'") (citation omitted); *ante*, at 15 (courts must "look to the facts as the employer reasonably found them to be") (emphasis omitted).[1] A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression, whether the employer affirmatively disbelieved the third-party report or merely doubted its accuracy. Imposing liability on such an employer respects the "longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." *Connick* v. *Myers*, 461 U. S. 138, 154 (1983).

Accordingly, even though petitioners conducted an objectively reasonable investigation into Ballew's report about respondent Churchill's conversation with Perkins-Graham, I believe that petitioners' dismissal of Churchill would have violated the Free Speech Clause if after the investigation they doubted the accuracy of the report and fired Churchill for speech, or for a portion of her speech, that they genuinely suspected was nondisruptive (assuming that the speech was actually on a matter of public concern). Though under the plurality's opinion the presentation of such an argument is open to Churchill on remand, Churchill would not, of course, have to rely on it if she

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[1]In addition, and also because of the risk of chilling protected expression, the public employer must believe that the discipline chosen is an appropriate, and not excessive, response to the employee's speech as reported. I do not understand respondents in this case to raise any claim that the discharge was pretextual in this respect.

can establish that, despite the reasonable investigation, petitioners believed that Churchill said nothing disruptive in her conversation with Perkins-Graham; that they believed that Churchill made some nondisruptive remarks to Perkins-Graham and fired her because of those remarks; or that they fired her because of nondisruptive comments about cross-training they knew she made earlier (again, assuming in each case that the speech at issue was on a matter of public concern).

Though JUSTICE O'CONNOR's opinion speaks for just four Members of the Court, the reasonableness test it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext), see *ante*, at 17–19 (plurality opinion); *post*, at 1–8 (SCALIA, J., concurring in the judgment); and a majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause, see *ante*, at 14–16 (plurality opinion); *post*, at 1–5 (STEVENS, J., dissenting); see also *post*, at 4, n. 4 (STEVENS, J., dissenting) ("JUSTICE O'CONNOR appropriately rejects [JUSTICE SCALIA's] position, at least for those instances in which the employer unreasonably believes an incorrect report concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with JUSTICE O'CONNOR that discipline in such circumstances violates the First Amendment"). Accordingly, the plurality opinion may be taken to state the holding of the Court. See *Marks* v. *United States*, 430 U. S. 188, 193–194 (1977) (discussing *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966)).