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 STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

This is a free country. Every American has the *right* to express an opinion on issues of public significance. In the private sector, of course, the exercise of that right may entail unpleasant consequences. Absent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds. The First Amendment, however, demands that the Government respect its employees' freedom to express their opinions on issues of public importance. As long as that expression is not unduly disruptive, it simply may not provide the basis for discipline or termination. The critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee.

Applying these standards to the case before us is quite straightforward. Everyone agrees that respondent Cheryl Churchill was fired because of what she said in a conversation with co-workers during a dinner break. Given the posture in which this case comes to us, we must assume that Churchill's statements were fully protected by the First Amendment.[1] Nevertheless, the plurality

[1]On review of the Court of Appeals' reversal of a summary judgment for petitioners, we naturally accept as true the version of Churchill's statements described in her

concludes that a dismissal for speech is valid as a matter of law as long as the public employer reasonably believed that the employee's speech was unprotected. See *ante*, at 13–16. This conclusion is erroneous because it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exhalted rights, including contractual and statutory rights applicable in the private sector.

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testimony and that of two supporting witnesses. See 977 F. 2d 1114, 1118–1126 (CA7 1992). According to Churchill, Thomas Koch and Jean Welty, the dinner-break conversation concerned the merits of hospital policy, and Churchill did not direct any "personal criticism" against her supervisors. See *id.*, at 1118–1119, 1122. According to two other witnesses, Melanie Perkins-Graham and Mary Lou Ballew, Churchill's speech was filled with "unkind and inappropriate . . . things," "negativism," and personal comment about petitioner Cynthia Waters and the hospital administration. *Id.*, at 1118–1119.

If, for example, a hospital employee had a contract providing that she could retain her job for a year if she followed the employer's rules and did competent work, that employee could not be fired because her supervisor reasonably but mistakenly believed she had been late to work or given a patient the wrong medicine. Ordinarily, when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion.[2] Our legal system generally delegates the determination of facts upon which important rights depend to neutral factfinders, notwithstanding the attendant risks of error and overdeterrence.

Federal constitutional rights merit at least the normal degree of protection. Doubts concerning the ability of juries to find the truth, an ability for which we usually have high regard, should be resolved in favor of, not against, the protection of First Amendment rights. See, *e.g.*, *New York Times Co.* v.

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[2]In *NLRB* v. *Burnup & Sims*, 379 U. S. 21 (1965), two employee labor organizers were fired based upon a report that they had threatened to dynamite the employer's plant if a coming representation election was unsuccessful. The National Labor Relations Board found that the employees had never made the threatening statements. Although we recognized that the employer had acted in good faith, this Court held that the discharge "plainly violated" the organizers' right under §8 of the National Labor Relations Act. *Id.*, at 22. "Union activity," we observed, "often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *Id.*, at 23. The plurality does not explain why First Amendment rights should receive any lesser protection than the statutory right at issue in *Burnup & Sims*.

Sullivan, 376 U. S. 254, 279–280 (1964). Unfortunately, the plurality underestimates the importance of freedom of speech for the more than 18 million civilian employees of this country's Federal, State, and local Governments,[3] and subordinates that freedom to an abstract interest in bureaucratic efficiency. The need for governmental efficiency that so concerns the plurality is amply protected by the substantive limits on public employees' rights of expression. See generally *Connick* v. *Myers*, 461 U. S. 138 (1983); *Pickering* v. *Board of Ed. of Township High School Dist.*, 391 U. S. 563 (1968). Efficiency does not demand an *additional* layer of deference to employers' "reasonable" factual errors. Today's ruling will surely deter speech that would be fully protected under *Pickering* and *Connick*.

The plurality correctly points out that we have never decided whether the governing version of the facts in public employment free speech cases is "what the government employer thought was said, or . . . what the trier of fact ultimately determines to have been said." *Ante*, at 1.[4] To me it is clear that the latter

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[3]See U. S. Dept. of Commerce, Statistical Abstract of the United States, Table No. 500, p. 318 (113 ed. 1993) (figure from 1991).

[4]JUSTICE SCALIA would recharacterize employees' right to free speech as a more modest protection against "retaliatory" discharges, a protection that would not extend to those terminated for speech that was fully protected but incorrectly reported. The only support he cites for this restrictive theory is that three of our prior public employment speech opinions have used the word "retaliation." See *ante*, at 7 (citing *Connick* v. *Meyers*, 461 U. S. 138, 149 (1983); *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972); *Pickering* v. *Board of Education*, 391 U. S. 563, 572 (1968)). Our use of that word in the cases JUSTICE SCALIA cites, however, does not resolve the present question, since none of those decisions involved any

must be controlling. The First Amendment assures public employees that they may express their views on issues of public concern without fear of discipline or termination as long as they do so in an appropriate manner and at an appropriate time and place. A violation occurs when a public employee is fired for uttering speech on a matter of public concern that is not unduly disruptive of the operations of the relevant agency. The violation does not vanish merely because the firing was based upon a reasonable mistake about what the employee said.[5]

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factual dispute over the content of employee speech. More importantly, other passages from two of those opinions support the view that the *causal* connection between the employee's speech and her discharge is all the "retaliation" that must be shown. See *Perry*, 408 U. S., at 598 (nonrenewal of a teacher's conduct "may not be predicated on his exercise of First and Fourteenth Amendment rights"); *ibid*. ("[A] teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment."); *Pickering*, 391 U. S., at 574 ("In sum, . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."). Precedent certainly does not command JUSTICE SCALIA's approach, and nothing in the First Amendment recommends a rule that makes ignorance or mistake a complete defense for a discharge based on fully protected speech. JUSTICE O'CONNOR appropriately rejects that 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.

[5]The reasonableness of the public employer's mistake

A First Amendment claimant need not allege bad faith; the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives, but whether the employee's freedom of speech has been "abridged."

The risk that a jury may ultimately view the facts differently from even a conscientious employer, is not, as the plurality would have it, a needless fetter on public employers' ability to discharge their duties. It is the normal means by which our legal system protects legal rights and encourages those in authority to act with care. Here, for example, attention to "conclusions a jury would later draw," *ante*, at 13, about the content of Churchill's speech might have caused petitioners to talk to Churchill about what she said before deciding to fire her. There is nothing unfair or onerous about putting the risk of error on an employer in these circumstances.[6]

Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and

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would, of course, bear on whether that employer should be liable for damages. See *Butz* v. *Economou*, 438 U. S. 478, 507 (1978) ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law"). It is wrong, however, to constrict the substantive reach of a public employee's right of free speech in response to such remedial considerations. See *ante*, at 14 (government employers who use reasonable procedures should be free to act "without fear [of] *liability*") (emphasis added).

[6]Because there is no dispute that Churchill was fired for the content of her speech, this case does not involve the problem of determining whether the public employee would have been terminated anyway for reasons unrelated to speech. See *Mount Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977).

individual opinion, such disagreements are both inevitable and desirable. When those who work together disagree, reports of speech are often skewed, and supervisors are apt to misconstrue even accurate reports. The plurality, observing that managers "can spend only so much of their time on any one employment decision," *ante*, at 17, adopts a rule that invites discipline, rather than further discussion, when such disputes arise. That rule is unwise, for deliberation within the government, like deliberation about it, is an essential part of our "profound national commitment" to the freedom of speech. Cf. *New York Times*, 376 U. S., at 270. A proper regard for that principle requires that, before firing a public employee for her speech, management get its facts straight.

I would affirm the judgment of the Court of Appeals.