

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1251

TITLE HARRY CONNICK, INDIVIDUALLY AND IN HIS CAPACITY AS
DISTRICT ATTORNEY, ETC., Petitioner v. SHEILA MYERS

PLACE Washington, D. C.

DATE November 8, 1982

PAGES 1 thru 53



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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 HARRY CONNICK, INDIVIDUALLY AND :
4 IN HIS CAPACITY AS DISTRICT :
5 ATTORNEY, ETC., :
6 Petitioner, :
7 v. : No. 81-1251
8 SHEILA MYERS :
9 - - - - -x
10 Washington, D.C.
11 Monday, November 8, 1982
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:56 o'clock a.m.
15 APPEARANCES:
16 WILLIAM F. WESSEL, ESQ., New Orleans, Louisiana; on
17 behalf of the Petitioner.
18 GEORGE M. STRICKLER, JR., ESQ., New Orleans, Louisiana;
19 on behalf of the Respondent.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Connick against Myers.

4 Mr. Wessel, I think you may proceed when you
5 are ready.

6 ORAL ARGUMENT OF WILLIAM F. WESSEL, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. WESSEL: Mr. Chief Justice, and may it
9 please the Court, the case before you today is a case
10 involving a public employee who was dismissed from
11 service because of actions surrounding a job movement,
12 that is, moving an assistant district attorney from one
13 section of the court to another section of the court in
14 the Orleans Parish criminal justice system.

15 The action to transfer the assistant district
16 attorney was followed up by the assistant district
17 attorney circulating a questionnaire, which is in the
18 record, which pertained -- over 90 percent of the
19 questionnaire pertained to matters surrounding the
20 transfer, and one question pertained to a question about
21 the integrity or the confidence that other assistant
22 district attorneys may or may not have had in the
23 supervising trial assistant who took part in the
24 decision to have him transferred.

25 Another question in the questionnaire outside

1 of the questions that directly pertained to the transfer
2 was a question as to whether or not the other assistant
3 district attorneys felt pressured to engage in political
4 campaigns.

5 The central issue around this case falls on
6 Pickering, decided by this Court, and Pickering left us
7 no standards in a case where a public employee is
8 terminated for voicing concerns that he could voice or
9 would voice as a private citizen on matters of
10 legitimate public concern. The Court has not left the
11 circuits any standards by which to determine what is a
12 matter of legitimate public concern.

13 By reason of that, the circuits have gone
14 askew in determining what is a matter of public concern,
15 and in some instances have done the balancing required
16 by Pickering in order to determine what is a matter of
17 public concern. In Pickering, of course, we had a
18 non-employment setting about a matter pertaining to a
19 bond issue and how -- why the bond issue should or
20 should not be voted upon by the population. The teacher
21 there voiced his concern in the public media about the
22 bond issue.

23 In Givhan, decided by -- remanded by this
24 Court, we had an employee setting rather than a
25 non-employee setting, an employee setting about racially

1 discriminatory policies. That matter was remanded by
2 this Court to determine whether or not there was another
3 reason for the firing in that case.

4 In this particular case, we have an employee
5 setting again, rather than a public setting, but we have
6 a questionnaire pertaining to a private quarrel or petty
7 bickering of the employee pertaining to a transfer of
8 that assistant district attorney from one section of
9 court to another section of court.

10 The questionnaire throughout points out the
11 culmination of the events that took place prior to the
12 questionnaire being circulated, and it is important in
13 that regard to determine -- to look at the facts as they
14 were presented at the trial level.

15 The evening before the distribution of the
16 questionnaire, the assistant district attorney in this
17 case was told that she was going to be transferred to
18 another section of court and was given a written memo to
19 that effect. The written memo was returned by her to
20 the first assistant district attorney that evening with
21 a complaint on it, why didn't you tell me about it
22 before, and with an indication that her name was spelled
23 wrong.

24 The next morning, she had been visited by the
25 district attorney himself at approximately 8:00 or 8:30

1 in the morning, in the courtroom where she had her
2 office, with a personal request to acquiesce in the
3 decision to transfer her from one section of court to
4 the other.

5 The district attorney had come from home, had
6 not planned to work that day. He was home with a sick
7 wife at that time. And he made a personal request to
8 her. Thereafter, he returned to his office to pack his
9 briefcase to return home. He was informed by the first
10 assistant that the assistant district attorney, Ms.
11 Myers, had told him she would not accept the transfer
12 and would not move to the other section of court.

13 This was an intervening event that took place
14 between his personal request of Ms. Myers in her section
15 of court that morning. Later on that morning, at about
16 noon, the first assistant called the district attorney
17 and told him, Ms. Myers is circulating a questionnaire,
18 and she is creating a mini-insurrection, what do you
19 want me to do about it? Whereupon, Mr. Connick, the
20 district attorney, returned to the office and he
21 inquired of the questionnaire, was informed by the chief
22 of trials under whom Ms. Myers was to be transferred
23 that he had spoken to Ms. Myers and she told him she
24 wasn't going to accept the transfer, that she was going
25 to quit rather than accept the transfer.

1 The questionnaire was then circulated, and Mr.
2 Connick, of course, had returned to the office, and at
3 that point in time he informed her that she was fired.
4 Ms. Myers testified and Mr. Connick testified that she
5 was being fired for two reasons, for refusing to accept
6 the transfer and refusing -- for refusing to accept the
7 transfer and for having circulated the questionnaire
8 with a -- or a question in the questionnaire being
9 particularly offensive to the district attorney at the
10 time pertaining to the integrity of the six chiefs,
11 chief assistants who had participated in the decision to
12 transfer the individual.

13 QUESTION: Mr. Wessel, does the record show
14 what the structure of the district attorney's office was
15 with respect to the chain of authority below the
16 district attorney himself? You just said there were six
17 chiefs --

18 MR. WESSEL: Yes, Mr. Justice, there was
19 testimony that the chief -- two chiefs of trials, the
20 chief of screening, and the training officer as well as
21 the first assistant. The structure in descending order
22 was the first assistant, the chief of the screening
23 division, that is, the intake division, two chiefs of
24 trials, that is, the operational trial under which Ms.
25 Myers was operating at that particular time, and the

1 training officer.

2 QUESTION: So Ms. Myers served under one of
3 the two chiefs of trials?

4 MR. WESSEL: Yes, Mr. Justice. She was being
5 moved from one chief of trials to another chief of
6 trials.

7 QUESTION: And the line of authority went from
8 the chief of trials to the first assistant and then to
9 the district attorney?

10 MR. WESSEL: That is correct, Mr. Justice.

11 QUESTION: May I just clarified one thing?
12 You have reviewed the facts. Do you challenge any of
13 the findings of the district court as clearly
14 erroneous?

15 MR. WESSEL: Yes, Mr. Justice. There is
16 certainly challenge insofar -- in two respects, that the
17 -- insofar as the Mount Healthy but for inquiry, as to
18 the inquiry where there is a dual reason for the firing,
19 the court below did not address itself to the dual
20 reasons. The court below found the real reason, as he
21 said. The trial court said the real reason, but did not
22 inquire either in terms of balancing or in terms of the
23 but for test of Mount Healthy, as to the other reason,
24 the non-First Amendment reason, i.e., the setting in
25 which the questionnaire was distributed, the transfer of

1 the assistant from one section of court to the other.

2 The Pickering, as I earlier pointed out, the
3 Pickering situation was a one-reason firing, not a
4 two-reason firing. There was no other reason. There
5 was one reason there.

6 QUESTION: Well, isn't it fair -- didn't you
7 argue -- this was argued to the district judge, wasn't
8 it, that the transfer was the real reason?

9 MR. WESSEL: That is correct, Mr. Justice.

10 QUESTION: And when he did not enter such a
11 finding and only found one reason, the -- and he says it
12 in so many words, that she was fired because of the
13 questionnaire, isn't that a -- didn't he -- don't we
14 have to assume he rejected the second reason?

15 MR. WESSEL: Well, Mr. Justice, there are two
16 problems with that. Number One, he didn't address the
17 other reason. Number Two, he didn't inquire -- he did
18 not do the threshold inquiry of Pickering insofar as
19 whether this questionnaire was a matter of public
20 concern. The -- that is what --

21 QUESTION: Well, that goes to whether it's
22 protected by the First Amendment, and all the rest, but
23 as to -- his findings on motivation I thought were
24 rather clear, that he considered all the evidence
25 pertaining to the transfer and said that the real reason

1 was the questionnaire.

2 MR. WESSEL: I would say that is correct, Mr.
3 Justice, in that regard.

4 QUESTION: You are saying that that is a
5 clearly erroneous finding?

6 MR. WESSEL: Clearly erroneous for several
7 reasons. Number One, he didn't address the factual
8 underlying reasons. There was no -- He addressed the
9 motivation of the district attorney without addressing
10 the motivation of the employee who circulated the
11 questionnaire.

12 QUESTION: Well, Mr. Wessel, I have a little
13 trouble understanding your position in the light of your
14 responses to Justice Stevens' question. Is it your
15 complaint basically that he didn't address the question,
16 or that he decided it the wrong way?

17 MR. WESSEL: My complaint is that he -- by not
18 addressing it, he did decide it the wrong way, and of
19 course I recognize the decision of facts on the factual
20 underlying basis is not reviewable, but the ultimate
21 question as to the protected activity would be.

22 QUESTION: Well, supposing in a negligence
23 case one side is arguing that something happened on
24 Friday, and the other is arguing it happened on
25 Saturday, and there is a bench trial, and the judge

1 says, I find it happened on Saturday. Now, he says
2 nothing about it not having happened on Friday, but
3 certainly that would be a rejection of the claim that it
4 happened on Friday.

5 MR. WESSEL: That's correct. I would yield on
6 that point, that that was where the trial judge was
7 coming from at the time --

8 QUESTION: Suppose the trial --

9 MR. WESSEL: -- but it does not appear that
10 he did. Excuse me, Mr. Justice.

11 QUESTION: Suppose the trial judge said, I
12 have considered the other Pickering point and reject it,
13 period. Would that be all right?

14 MR. WESSEL: Well, I would think the other
15 reason for -- the other reason for the firing, yes.

16 QUESTION: If he said, I've considered them
17 and rejected them.

18 MR. WESSEL: Yes, Mr. Justice.

19 QUESTION: And you wouldn't be arguing that,
20 would you?

21 MR. WESSEL: I would not be arguing that
22 except --

23 QUESTION: So your argument is, he didn't say
24 that.

25 MR. WESSEL: My arguing, Mr. -- My argument,

1 Mr. Justice, is that you can't in this sort of situation
2 under Mount Healthy --

3 QUESTION: You mean, he has to say that -- why
4 he rejects it? Isn't that what you're really saying?

5 MR. WESSEL: Correct. That is part of it, Mr.
6 Justice, but the other thing is that in a dual firing,
7 dual reason firing situation, you can't abstract out of
8 the situation the First Amendment aspect of it, because
9 you then end up, as this Court said in Mount Healthy,
10 where the employee by reason of -- by reason of engaging
11 in a First Amendment activity after the real reason
12 becomes -- there's a windfall to the employee by
13 grabbing the microphone at the press conference, as was
14 done in Butler versus Hamilton, in the Tenth Circuit,
15 and as was done by the employee in this case, where you
16 go to the press to cover up your own inadequacies or the
17 true reasons for the firing.

18 So, in -- you don't have --

19 QUESTION: Mr. Wessel, the district judge
20 didn't -- He found the facts differently.

21 MR. WESSEL: He found --

22 QUESTION: He found that Connick told the
23 plaintiff she was being fired because of a refusal to
24 accept a transfer, so he was fully aware of that
25 contention, and then he later found the real reason was

1 the questionnaire. Now, you describe it as a dual
2 motive case, but he found it was a single motive case.

3 MR. WESSEL: That's correct, Mr. Justice. He
4 found that it was a single motive case, but under the --

5 QUESTION: You say that is clearly erroneous.

6 MR. WESSEL: And even under the single motive
7 -- but even under the single motive case, the question
8 has to be addressed as to whether the subject is a
9 matter of public concern. Now, that has been decided in
10 the various circuits by judicial hunch. It has been
11 decided in this case by judicial hunch. There are no
12 guidelines whatsoever to determine what are matters of
13 public concern when an employee, a public employee is
14 fired.

15 QUESTION: That's a separate inquiry, isn't
16 it, from --

17 MR. WESSEL: That's correct.

18 QUESTION: -- if you dealt with the motivation
19 question.

20 MR. WESSEL: That is correct, Mr. Justice, and
21 the first and primary point is that the -- he reached
22 the balancing or he reached the real reason, but without
23 addressing -- the trial court, I am talking about, did
24 not address the public importance of the message or the
25 test that should have been applied insofar as

1 determining whether it was a matter of public concern.
2 It was, in this case, and this is where the results
3 throughout the circuits differ.

4 In the Lindsey case arising out of Georgia
5 where a teacher was fired for faculty, administration
6 criticism in the form of a questionnaire, the Fifth
7 Circuit takes -- comes to the conclusion or dictates the
8 conclusion that that is a matter of public concern, but
9 in the Tenth -- or the Seventh Circuit, in the Clark
10 versus Holmes situation, you had pretty much the same
11 situation with a teacher, again, determining the course
12 content and the counseling and criticizing it, and the
13 Seventh Circuit says this is not a matter of public
14 concern.

15 So, the threshold question of Pickering is
16 very rarely answered except by some fiat of what is
17 public concern, because there are no standards
18 enunciated.

19 QUESTION: Is the initial question of whether
20 the speech here is constitutionally protected one of a
21 -- that is a mixed question of fact and law, or a purely
22 legal question, or what is it?

23 MR. WESSEL: Justice O'Connor, I believe that
24 it's a legal question, and it's the ultimate question as
25 to whether or not the expression is First Amendment

1 protected or whether it is really a private quarrel
2 between -- involving the employee as an employee. The
3 test that should be applied and which we are urging the
4 Court in determining the threshold question comes under
5 the Schmidt case and the Clark v. Holmes case, and that
6 is really -- the Court should determine, does the
7 expression reveal concerns of the individual solely as
8 an employee, or also as an interested citizen?

9 QUESTION: Don't you have to convince us --
10 you have to persuade us that the district judge's
11 findings generally were in -- clearly erroneous because
12 of your claim that she was dismissed for refusing to
13 accept a reassignment within the office?

14 MR. WESSEL: That is -- that is --

15 QUESTION: Isn't that the narrow issue?
16 Whether there were other issues or not, isn't that the
17 issue on which you stand or fall?

18 MR. WESSEL: Not necessarily, Mr. Chief
19 Justice, because not only could the determination or
20 should the determination have been made upon the whole
21 context of the transfer with the questionnaire, but even
22 in the absence of that, if the real reason was the
23 questionnaire, if the real reason was the questionnaire,
24 is the questionnaire and the circulation of the
25 questionnaire a protected activity? Is it protected

1 under Pickering? Is she voicing concern as a citizen on
2 matters of public concern? And the threshold question
3 therefore has -- there has to be some sort of guideline
4 as to what is a matter of public concern, and that has
5 not been answered by the Court, and that -- and that is
6 the question that I am addressing at this point. Is she
7 talking as an employee about matters concerning her
8 employment, or does the questionnaire address issues
9 that a citizen at large would be interested in in
10 returning the, say, the district attorney to office?

11 QUESTION: Do you contend that the district
12 attorney had an absolute unilateral right to assign her
13 to any part of the office he wanted?

14 MR. WESSEL: I think there is no question at
15 all about that, Mr. Chief Justice.

16 QUESTION: Well, isn't that the heart of this
17 case?

18 MR. WESSEL: That is correct, but the setting,
19 the setting has been ignored in the findings of the
20 trial court. The setting -- the setting of the transfer
21 has been ignored, and it centers and focuses on the
22 questionnaire. The findings by the trial court center
23 and focus on the questionnaire, but the setting is
24 important either under determining the content of the
25 questionnaire vis-a-vis what was going on in the office

1 at that time, that is, his absolute right to transfer
2 her, and secondly, on the balancing aspect, on his need
3 to have confidence and loyalty in his supervising
4 assistants, for example.

5 On that balancing aspect alone, there is a
6 need to look at the underlying aspects of what was going
7 on, because the integrity of those assistants who
8 partook in the decision to transfer was being questioned
9 by that one question in the questionnaire, and remember,
10 every question in the questionnaire except for the
11 question pertaining to the reaction as to participation
12 in political campaigns, every question pertained to her
13 gripes pertaining to the transfer, and that underlying
14 basis in fact was necessary in order to determine
15 whether the content was in fact matters of public
16 concern, and secondly, whether the balancing required by
17 Pickering, the interest in furnishing the services to
18 the public, was there.

19 We have no -- the public -- certainly the
20 public is not interested in which assistant district
21 attorney worked in Section A or Section I of the
22 criminal district court.

23 QUESTION: What do you say -- You talk about
24 dual motive. Supposing the questionnaire could be
25 characterized as sort of a hybrid. Most of the

1 questions are just internal office matters, but one or
2 two were matters of public concern. Would the
3 questionnaire be protected or unprotected?

4 MR. WESSEL: I think, Mr. Justice, at that
5 point the balance in Pickering should be broadened, but
6 where you had eleven out of thirteen, or eleven or
7 twelve out of thirteen questions that pertained solely
8 to the transfer policy, and one was thrown in as to
9 whether or not the assistants felt that they were
10 pressured into political campaigns.

11 The point is that Ms. Myers --

12 QUESTION: I am not sure I understand the
13 answer.

14 MR. WESSEL: Well --

15 QUESTION: You are saying the questionnaire is
16 not protected even though one of the questions might
17 have been protected?

18 MR. WESSEL: I think in the abstract, had the
19 transfer not been involved, then the questionnaire might
20 have been a protected activity, pertaining to one
21 question. But here you have one question out of
22 thirteen, and it is difficult to answer that. In this
23 context, I say no.

24 QUESTION: But your argument, I gather, is
25 that the entire questionnaire was unprotected, even

1 though it contained one question which, had it been
2 asked separately, would have been protected.

3 MR. WESSEL: That one question may have been.
4 Actually -- Actually, that itself has to do with the
5 operations of the office, whether or not the assistants
6 were asked to participate --

7 QUESTION: But would not that -- yes, it has
8 to do with operation of the office, but would you not
9 think it was a matter of public concern if the assistant
10 attorneys were being pressured to work in political
11 campaigns on behalf of their superiors?

12 MR. WESSEL: I do not believe the voters would
13 turn Mr. Connick out of office or vote him into
14 office --

15 QUESTION: Well, that is not the question.
16 That is not the question. The question is whether that
17 information would be a matter of public concern,
18 whichever way the answer comes out.

19 MR. WESSEL: I don't think so.

20 QUESTION: You don't think that the public
21 would want to know if the assistants in the office were
22 being pressured to work for political candidates?

23 MR. WESSEL: I don't think so, not in the
24 non-civil service context, and this is where we are.

25 QUESTION: Is it your position that in public

1 employment, that a questionnaire sent out to other
2 employees that addressed only the question of the
3 activities that the employees were being asked to engage
4 in that are political in nature would not be
5 constitutionally protected? That is your position?

6 MR. WESSEL: No. I would say that under those
7 sort of circumstances, where that was the sole question,
8 in that respect it would be protected, and it would be --

9 QUESTION: And if there were two questions --

10 MR. WESSEL: -- it would be a matter of public
11 concern.

12 QUESTION: And if there are two questions,
13 that one plus one that is not of public concern, that
14 the situation would change?

15 MR. WESSEL: Justice O'Connor, it would be
16 difficult to answer that in the abstract, and I would
17 probably have to yield on the point. These things just
18 don't happen in a vacuum in that regard, but on your
19 question as it is posed, I think I would probably have
20 to yield on the point.

21 QUESTION: Mr. Wessel, when you say that
22 something is a matter of public concern, that, I take
23 it, is not the end of your argument on the point,
24 because you say even if it is a matter of public
25 concern, there remains the Pickering balancing test to

1 be struck.

2 MR. WESSEL: That's correct. That's correct,
3 so that once the determination is made that the subject
4 matter was one in which the public or the employee has
5 an interest as a citizen to explain to the citizenry or
6 to his fellow employees, given the Givhan case, that the
7 inquiry does not stop at that point, and that the
8 balancing that is required by Pickering is under these
9 circumstances, this time, and this manner, and these
10 circumstances, was this -- this expression contained in
11 this questionnaire, is it offset by the perceptions of
12 the district attorney at the time, and whether his
13 perceptions were reasonable in terms of requiring
14 loyalty and confidence in his supervisors and whether or
15 not he was -- it was hindering his concept, if they are
16 based on reasonable grounds of his efficient delivery of
17 the public services, and this circulation was taking
18 place in a courthouse where all the assistant district
19 attorneys were working.

20 It was during the time of their work, for the
21 most part, except one in a luncheon room elsewhere, but
22 during the time of their work, going into the screening
23 division, where the intake division is -- or intake of
24 cases of over 13,000 a year are coming in, and in the
25 trial division, where there are two assistants assigned

1 from each section of court to perform the trials that
2 are going on and the motions that are being heard in
3 every one of those sections of court during that day.

4 QUESTION: Mr. Wessel?

5 MR. WESSEL: And -- excuse me, Mr. Justice.

6 QUESTION: Excuse me for interrupting.

7 Is there any evidence in this record that
8 suggests that Respondent was being punished in the
9 propose transfer for political activity or political
10 inactivity?

11 MR. WESSEL: None whatsoever, Mr. Justice.

12 QUESTION: None whatsoever.

13 QUESTION: Was not the transfer indicated
14 before the questionnaire was --

15 MR. WESSEL: The transfer was indicated on the
16 week before, culminating on a Friday. On the Monday
17 evening, in the presence of the district attorney and
18 the first assistant, she was told she was going to be
19 transferred. Later that evening, a memo was given to
20 her, a written memo, showing her new transfer. The memo
21 then was thrown back on the first assistant's desk and
22 the questionnaire was compiled in the early morning
23 hours of the next day, and circulated around 11:00 or
24 12:00 o'clock that day. The questionnaire came about as
25 a result of the decision to transfer, and the personal

1 request of the district attorney to ask her to accede to
2 that transfer that morning.

3 QUESTION: Are you saying that the
4 questionnaire was provoked or was a response to the
5 transfer?

6 MR. WESSEL: I think that the trial judge
7 definitely found that. The assistant district attorney
8 definitely testified to that, and she -- and that was
9 the sequence of events.

10 QUESTION: Well, is it your position that
11 there were two reasons for dismissing her, or one? That
12 is, was she dismissed because she refused to accept the
13 transfer, or because she circulated the questionnaire?

14 MR. WESSEL: Mr. Chief Justice, the district
15 attorney testified and the assistant testified that when
16 she was fired, she was told by the district attorney,
17 you are being fired for your refusal to accept the
18 transfer, and I resent the implications of Question
19 Number 10 or 11 in the questionnaire pertaining to the
20 integrity of the supervisors who partook in the
21 decision.

22 QUESTION: Mr. Wessel, was there anything in
23 the way of a rule or regulation or practice about the
24 circulation of questionnaires during working time?

25 MR. WESSEL: No, Mr. Justice.

1 QUESTION: And you didn't raise the question
2 in this trial?

3 MR. WESSEL: There was no regulation.

4 QUESTION: You didn't raise the question that
5 they didn't have the right to pass them out? It says
6 so. The opinion says so. It said, no -- for
7 confidentialties asserted in regard to the
8 distribution.

9 MR. WESSEL: The judge was talking, and we
10 were talking about whether or not Ms. Myers enjoyed a
11 direct personal confidential relationship to the
12 district attorney under the Pickering test. That is, I
13 believe, what the court was addressing itself to, and
14 what --

15 QUESTION: You didn't object to her handing
16 out the questionnaire per se?

17 MR. WESSEL: She had handed out numerous
18 memorandums before, Mr. Justice.

19 QUESTION: And had never been questioned about
20 it?

21 MR. WESSEL: And had never been questioned
22 before.

23 QUESTION: Mr. Wessel, your opponent makes a
24 good bit out of Texas Department against Burdine, a case
25 you did not cite.

1 MR. WESSEL: Yes, Mr. Justice.

2 QUESTION: Does that mean that you concede
3 that Burdine doesn't affect whatever the standards were
4 in the Mount Healthy case?

5 MR. WESSEL: We originally argued that in our
6 petition for cert, Mr. Justice. By mistake on my part,
7 it was left out -- a footnote was left out referring to
8 that case. We had indicated that in these sort of
9 instances, as in the case, I believe, in the Seventh
10 Circuit, in the county, had indicated that in a dual
11 firing or dual reason situation, that the burden of the
12 appointing authority should be no more than to explain
13 with reasonable grounds for the firing, and should be
14 not a shifting of burden as dictated by Mount Healthy.

15 QUESTION: Well, you had the privilege of
16 filing a reply brief and didn't --

17 MR. WESSEL: That's correct, Mr. Justice.

18 QUESTION: Did you raise the Burdine issue
19 before the Fifth Circuit?

20 MR. WESSEL: No, we did not, Mr. Justice.

21 QUESTION: Counsel, did you appeal from the
22 attorneys' fees issue to the Fifth Circuit?

23 MR. WESSEL: Yes. The appeal was -- the
24 initial judgment from the trial court was granting the
25 attorney fees, but the quantum was not decided at that

1 time by the trial court. The appeal to the Fifth
2 Circuit was based on the entire judgment. That is the
3 removal and the reinstatement issue, the back pay issue,
4 the quantum for the damages issue, and the question of
5 attorney fees. The amount had not been determined until
6 the case was pending before the Fifth Circuit, but it
7 was argued before the Fifth Circuit, and briefed before
8 the Fifth Circuit, the actual question of attorney fees.

9 QUESTION: But that was in a separate
10 judgment, wasn't it?

11 MR. WESSEL: The amount was in a separate
12 judgment, Mr. Justice.

13 QUESTION: From which no appeal was taken.

14 MR. WESSEL: The issue of -- No appeal was
15 taken as to the amount. No question as to the quantum
16 -- no appeal would have been taken or was taken from the
17 quantum. The issue of the fact of the attorney fees as
18 it was granted by the trial judge was appealed from, and
19 it was briefed to the Fifth Circuit. In other words, we
20 didn't object ultimately to the amount determined by the
21 trial court.

22 CHIEF JUSTICE BURGER: Mr. Strickler.

23 ORAL ARGUMENT OF GEORGE M. STRICKLER, JR., ESQ.,

24 ON BEHALF OF THE RESPONDENT

25 MR. STRICKLER: Mr. Chief Justice, and may it

1 please the Court, Judge Gordon, the trial judge in this
2 case, conducted a full evidentiary hearing in this
3 matter. He gave all parties concerned the maximum
4 opportunity to put on all the evidence they wished to
5 put on. On the basis of that record, he made the
6 following findings.

7 He found that Sheila Myers was discharged
8 because of her circulation of the questionnaire. He
9 found that Sheila Myers would not have been discharged
10 but for the circulation of the questionnaire. He found
11 that neither the content nor the time, place, or manner
12 of the circulation of the questionnaire in any way
13 disrupted her performance of her work as an assistant
14 district attorney or in any way disrupted the
15 performance of the -- or the effective operation of the
16 DA's office.

17 QUESTION: Do you agree with what your friend
18 suggested, that the transfer notice preceded the
19 questionnaire?

20 MR. STRICKLER: Yes, Your Honor, Chief
21 Justice. The -- Ms. Myers did receive informal notice
22 prior -- maybe two days prior to the circulation of the
23 questionnaire that she was to be transferred.

24 The findings of fact made by the district
25 court are not clearly erroneous. They are supported,

1 amply supported in the record of this case. They are,
2 of course, facts to which this Court has frequently held
3 that Rule 52(a) applies. Indeed, it seems to me that
4 they are also insulated from review by this Court's well
5 established two-court rule, because the Fifth Circuit
6 also heard the same argument that Mr. Wessel is making
7 today.

8 The -- Mr. Wessel says that the district court
9 never considered the reasons put forward by Mr. Connick
10 for the -- his -- the basis for the firing, that is, his
11 reasons that there had been a refusal to accept the
12 transfer. That is simply not true. The judge did --
13 Judge Gordon did consider that, and it is clear in his
14 opinion that he found that Sheila Myers had not refused
15 a transfer. He found that Mr. Connick did not believe
16 she had refused a transfer.

17 Indeed, when Mr. Connick came back to his
18 office after hearing about the questionnaire, he started
19 interviewing various assistant district attorneys who
20 had received the questionnaire, and he wasn't interested
21 in interviewing them as to whether Sheila Myers was
22 refusing to transfer. He was interested in the content
23 of the questionnaire.

24 In fact, he interviewed one district attorney
25 -- his name is Fred Curs, who was from Section I, that

1 is, the section of court to which Ms. Myers was to be
2 transferred, who had talked with Ms. Myers only that
3 morning about how they were going to split up the work
4 in Section I, but Mr. Connick wasn't interested in
5 that. He was interested on the questionnaire.

6 So, the district court's finding that not only
7 had there not been a refusal to accept the transfer, but
8 also that Mr. Connick didn't believe there had been a
9 refusal, is also well supported in the record. It is a
10 finding with regard to motivation which this Court in
11 Pullman Standard versus Swint last term found is a fact
12 to which Rule 52(a) applies.

13 Since the Petitioner cannot really do anything
14 with those facts, he urges this Court to hold as a
15 matter of law that the content of this questionnaire was
16 so totally devoid of value as to be per se unfit for
17 protection under the First Amendment. In effect, what
18 he is saying is that the district court erred in even
19 applying Pickering at all, because the questionnaire
20 falls within one of those narrow kinds of speech which
21 this Court has found is outside the scope of the First
22 Amendment to begin with.

23 QUESTION: I really don't think that's a fair
24 characterization of his argument. He says that it's
25 basically an internal matter that Pickering doesn't

1 apply to. I don't think he says it quite the way you
2 describe it.

3 MR. STRICKLER: Well, Your Honor, Justice
4 Stevens, the reason I'm saying that is because the
5 Petitioner seems to make -- base his whole argument on a
6 distinction between matters of "public concern" and
7 matters not of public concern, and I perceive his
8 argument to be that on a matter where an employee is
9 speaking internally, within the office, on a matter not
10 of public concern, that that is a matter outside of the
11 First Amendment protection, and that Pickering shouldn't
12 even have been applied there.

13 QUESTION: Insofar as it goes to running an
14 office, that the person in charge of the office has a
15 right to discharge someone for making disruptive
16 comments in the office that don't have any particular
17 public value. That's the thrust of his argument, I
18 think.

19 MR. STRICKLER: Well, if that's the thrust of
20 the argument, Your Honor, I certainly would not disagree
21 that the content of the questionnaire, whether it
22 affects a matter of great public concern or only a very
23 narrow internal matter, is a relevant circumstance to be
24 weighed in the Pickering analysis. This Court has said
25 in Givhan versus Western Line Consolidated School

1 District that where the speech is internal, not only the
2 content but the manner in which it is made, and the time
3 and place and so forth, all the factors be weighed, and
4 I certainly would concede that the content of the
5 questionnaire must be weighed in the Pickering balance.

6 The district judge in this case did that. He
7 found that this was a matter that was of public
8 concern. I think he was clearly right. Certainly the
9 district judge, the person that's on the local scene, is
10 the person best able to make --

11 QUESTION: Mr. Strickler?

12 MR. STRICKLER: Yes, sir.

13 QUESTION: What if the questionnaire had
14 contained only Question Number 10? Do you think the
15 district court would have found -- made exactly the same
16 findings in connection with what you are now referring
17 to?

18 MR. STRICKLER: Justice Rehnquist, I would
19 have no way to say what the district judge would have
20 done in that case, but I think clearly if the
21 questionnaire had only been directed to the confidence
22 in that he -- under these circumstances, he would have
23 found it protected, and the reason I say that is because
24 four of the five persons mentioned in Question 10, these
25 middle level supervisors, as the personnel testified,

1 they were all called as witnesses by the defendant, none
2 testified that in any way was their working relationship
3 with Ms. Myers in any way poisoned or interrupted or
4 would be interrupted in the future by this
5 questionnaire.

6 QUESTION: Did they testify that it wasn't?

7 MR. STRICKLER: They didn't testify that it
8 wasn't, Your Honor, but I think that's the -- they
9 weren't -- they weren't asked the question to the
10 defendant, and I think that's the clear implication from
11 their testimony, that it would not have been.

12 QUESTION: Well, if they weren't asked, I
13 would think the implication from their testimony was
14 simply that it wasn't asked. I don't think you can draw
15 a negative inference or one way or the other on that.

16 Would you defend the district court judgment
17 here if in fact -- on the basis you are defending it now
18 if in fact only this Question 10, do you have confidence
19 and would you rely on the word of, listing the six
20 supervisory people?

21 MR. STRICKLER: Absolutely, Your Honor.
22 Absolutely, and I think our argument is exactly the
23 same. Mr. Connick did not go to his -- these four
24 persons or five persons and ask them, do you feel your
25 integrity is being questioned, can you work in the

1 future with Sheila Myers. He didn't ask -- they were in
2 the room with him when he -- or some of them were in the
3 room when he fired Sheila Myers. He didn't even consult
4 with them. Joe Meyer --

5 QUESTION: Well, why should he have consulted
6 with them? If he felt that the ability of his own
7 senior staff to supervise people further down the line
8 was in jeopardy, I mean, that was a judgment, I would
9 think, for him to make. I don't think he has to go ask
10 the senior staff, do you feel your authority is
11 undermined.

12 MR. STRICKLER: Your Honor, in the Pickering
13 case itself where this branch of the law started, the
14 school superintendent and all the members of the school
15 board testified without contradiction that they thought
16 that letter written by the school teacher, Pickering,
17 was incredibly damaging to the future ability of the
18 school board to raise money, to get its bond selection
19 out, and so forth, and this Court said there wasn't a
20 shred of evidence of that.

21 You cannot, going back to Tinker versus Des
22 Moines School System, you cannot restrict the First
23 Amendment rights on an unsupported fear of --

24 QUESTION: Well, Chief Justice Taft long ago
25 said that judges should not be rejected as judges what they

1 know as people, and I think there is an element of that
2 in the case.

3 MR. STRICKLER: Your Honor, to the extent that
4 the -- I think that certainly the question -- Pickering
5 makes relevant the question of whether the -- or the
6 issue of whether the questionnaire would have disrupted
7 the harmonious working relationships with intermediate
8 staff and perhaps even with Mr. Connick himself.

9 There was no evidence in this case that that
10 -- that there was going to be any such disharmony, and
11 indeed the district court found that there wouldn't be.

12 QUESTION: Well, let me call your attention to
13 one comment of the district court in its opinion on the
14 relief granted, and that's on Page A-20, where he's
15 speaking of injunctive relief. The opening phrase is,
16 "Considering the acrimonious circumstances surrounding
17 plaintiff's departure from the district attorney's
18 office."

19 MR. STRICKLER: "And the adverse feeling
20 necessarily engendered by her resort to judicial
21 remedies."

22 QUESTION: Right. I take it there were two
23 sources of acrimony, one, her resort to judicial remedy,
24 and two, the circumstances surrounding her departure
25 from the district attorney's office.

1 MR. STRICKLER: I believe, Your Honor, that as
2 you said, you -- no one should ignore what is common
3 sense, and any time that there has been a discharge in
4 any kind of employment there are going to be some
5 acrimonious feelings about that, and when the employee,
6 the rejected employee files suit to enforce his or her
7 rights, there is going to be some ill feeling about
8 that.

9 The judge heard the testimony. He recognized
10 that fact. He was exercising his equitable discretion.
11 There is not a hint in this record that Judge Gordon
12 felt that he was compelled to grant reinstatement, but
13 he listened to all the evidence, and he found that even
14 though there might be some ill feelings arising out of
15 this litigation and the circumstances surrounding it,
16 that reinstatement was appropriate anyway.

17 He didn't -- But at the same time, he was
18 clearly -- he clearly weighed the Pickering balance, or
19 made the -- applied the Pickering balancing procedure,
20 and found that with regard to the content of the
21 questionnaire, it would not create such a disharmony in
22 the district attorney's office that it would make Ms.
23 Myers' ability to continue functioning there impossible
24 or inefficient.

25 Indeed -- and there was, of course, ample

1 reason for him to believe that. Mr. Connick certainly
2 didn't testify that he himself couldn't in any way put
3 his trust in Sheila Myers in the future. Joe Meyer, her
4 immediate supervisor, testified, and he said, I don't
5 look over the shoulder of anybody. If they come and
6 consult with me, they have -- on a matter, a particular
7 tactical matter, I will talk to them, but I don't go
8 around the courts looking over their shoulders, and
9 particularly in Sheila Myers' case, she was the most
10 senior attorney we had.

11 Of course, Joe Meyer was, even though he was
12 the immediate supervisor of Ms. Myers, he wasn't even
13 consulted before the discharge. He wasn't even called
14 in. And one would think that he would be the person
15 whose concern with regard to harmonious working
16 relationship would be the most -- would be the most
17 relevant.

18 QUESTION: Do you think it was just mere
19 accident that the questionnaire was circulated during
20 the same time -- during the same period of time that a
21 transfer was being talked about?

22 MR. STRICKLER: Justice White, it certainly
23 was not an accident.

24 QUESTION: What?

25 MR. STRICKLER: It certainly was not an

1 accident.

2 QUESTION: So it was her -- circulating the
3 questionnaire was in response to suggestions that she be
4 transferred?

5 MR. STRICKLER: I believe the record does
6 reflect and the district judge found that the transfers
7 and the manner in which the transfers were announced was
8 what started the ball rolling.

9 QUESTION: Oh, so it was the fact that she was
10 being -- she was going to be transferred. Was this her
11 way of combatting her transfer?

12 MR. STRICKLER: Absolutely -- absolutely not.

13 QUESTION: Well, why wasn't it then just an
14 accident that she --

15 MR. STRICKLER: I believe that the, Justice
16 White, the record shows that Ms. Myers was unhappy about
17 the transfer of herself, she was unhappy about the way
18 all the transfers were --

19 QUESTION: Including hers.

20 MR. STRICKLER: Including hers.

21 QUESTION: So then came, as a response, the
22 questionnaire.

23 MR. STRICKLER: Well, no, that's not quite
24 accurate. The first thing that came --

25 QUESTION: Well, that's what I want to know.

1 MR. STRICKLER: -- was a meeting with the
2 first assistant, Mr. Waldren, at which, according to
3 both Mr. Waldren's testimony and Ms. Myers', the
4 discussion started off about the transfers, but kind of
5 went on into -- and broadened in scope, about various
6 things that Ms. Myers had to say about the efficient
7 working of the DA's office. Mr. Waldern suggested, and
8 again this is what the court found, Mr. Waldren
9 suggested that Ms. Myers was speaking only on her own,
10 and that other people did not share her views. Ms.
11 Myers said, no, that's -- I think I do -- I am speaking
12 for other people, and my view is not unique, and she
13 said she would do some research on it, and what she did
14 then was prepare the questionnaire.

15 And I take issue with what Mr. Wessel said.
16 Mr. Wessel said the questionnaire is a -- it is just a
17 kind of a -- putting the questions, these internal and
18 petty gripes about her own transfer. I think if you --
19 the questionnaire, of course, is reprinted in the cert
20 petition, and it clearly shows that it has a broader
21 scope. It deals with general morale in the office, as
22 well as --

23 QUESTION: What was the purpose of the
24 questionnaire?

25 MR. STRICKLER: The purpose of the

1 questionnaire was to -- for Ms. Myers to be able to come
2 back with some material indicating that her views were
3 not unique.

4 QUESTION: Indicating?

5 MR. STRICKLER: Unique. And were not
6 different from many other assistant district
7 attorneys'.

8 QUESTION: On questions like politics?

9 MR. STRICKLER: On questions about whether,
10 for example --

11 QUESTION: On questions like politics, for
12 example?

13 MR. STRICKLER: The question of whether DA's
14 felt they had been pressured to work in political
15 campaigns, yes. Absolutely.

16 QUESTION: And as to whether they had faith in
17 the officers?

18 MR. STRICKLER: Yes. Yes.

19 QUESTION: And how can she use that?

20 MR. STRICKLER: Well, what she --

21 QUESTION: Other than to disrupt the office?

22 MR. STRICKLER: What she intended to do --

23 QUESTION: What did she do other than disrupt
24 the office?

25 MR. STRICKLER: What she intended to do,

1 Justice Marshal, was not to go to the press or go spread
2 around things to the outside world, but to present the
3 views, that is, the results to Mr. Waldren. Now, she
4 never got to do that because she got fired, but that was
5 her intent. The record makes -- she testified to that,
6 and it is certainly not contradicted, that that's what
7 she intended to do with the results.

8 Ms. Myers, as a matter of fact, Justice
9 Marshal, made every effort to keep this questionnaire
10 from getting out to persons other than those directly
11 concerned. She didn't -- She testified that she didn't
12 even put the questionnaire in the mailboxes of the DA's
13 for fear that someone else would see it.

14 QUESTION: How do we know that?

15 MR. STRICKLER: She testified to that, and it
16 is not contradicted. And I believe there is a finding
17 to that effect in the district court.

18 QUESTION: Is it also true she telephoned
19 people?

20 MR. STRICKLER: To find out whether they
21 were --

22 QUESTION: She telephoned people --

23 MR. STRICKLER: Yes.

24 QUESTION: -- about the questionnaire?

25 MR. STRICKLER: To find out whether they were

1 available.

2 QUESTION: And you have never heard of anybody
3 overhearing a telephone conversation?

4 MR. STRICKLER: I don't believe the record
5 reflects whether the -- I believe the record reflects
6 that she telephoned persons to find out whether they
7 were available, and then she went and gave the
8 questionnaire to them. The district attorneys who
9 testified who received the questionnaire said it took a
10 minute, two minutes to do.

11 QUESTION: Mr. Strickler --

12 QUESTION: One of the elements of relief here
13 was ordering her reinstatement, besides giving her some
14 damages.

15 MR. STRICKLER: Yes, sir.

16 QUESTION: Reinstated into what position?

17 MR. STRICKLER: She was --

18 QUESTION: Her old position or the new one?

19 MR. STRICKLER: The reinstatement just simply
20 said, as an assistant district attorney, and did not --

21 QUESTION: Well, does she accept the transfer
22 or not under this --

23 MR. STRICKLER: Oh, absolutely. Absolutely.
24 It was never --

25 QUESTION: The lower courts endorsed the

1 assignment.

2 MR. STRICKLER: It was never our contention
3 that Ms. Myers was entitled to reinstatement to a
4 particular section. No, sir.

5 QUESTION: Now, do you find any internal
6 inconsistency in the court's finding in which he said,
7 the defendant, the district attorney, neither acted with
8 malice nor reckless or wanton disregard for plaintiff's
9 civil rights? Do you find any inconsistency between
10 that finding and the other findings that he made?

11 MR. STRICKLER: No, sir. That finding is with
12 regard to our claim for punitive damage, and I believe
13 that a finding that a person has not acted recklessly or
14 with malice for purposes of punitive damages does not
15 mean the person hasn't acted knowing the consequences or
16 knowing what his actions will entail.

17 And certainly the district judge found that,
18 as a finding of facts, that Mr. Connick had acted
19 because of the questionnaire and would not have acted
20 but for the questionnaire. I don't believe there's
21 anything inconsistent in saying that, in saying that he
22 acted without malice.

23 QUESTION: Is that entirely consistent with
24 the fact that she was notified of her transfer before
25 the questionnaire was circulated?

1 MR. STRICKLER: She was notified of her
2 transfer, Your Honor, but the questionnaire was not a
3 part and parcel of any refusal to accept the transfer.

4 QUESTION: But she did refuse to accept the
5 transfer, didn't she?

6 MR. STRICKLER: She did not, Your Honor.
7 There is a finding -- the court found that she did not
8 accept -- refuse to accept the transfer. In fact, when
9 she talked to Mr. Waldren and Mr. Connick, she said, I
10 will consider it. Now, there were two witnesses who
11 testified, contrary to Ms. Myers' testimony, that she
12 had flatly refused to accept the transfer. The district
13 judge heard their testimony and didn't believe them.
14 There was ample reason not to believe them.

15 QUESTION: If a superior tells a subordinate,
16 gives a subordinate an order, and the subordinate says,
17 I will think about it, I will consider it, what do you
18 call that?

19 MR. STRICKLER: I don't call it an absolute,
20 flat refusal to accept an order. Indeed, the district
21 judge found on the morning that Ms. Myers was fired she
22 had a conversation with Mr. Connick, she told him that
23 she would consider it, consider accepting the transfer,
24 and at that point Mr. Connick thought that was a
25 satisfactory answer. He didn't -- He certainly didn't

1 fire her at that point or say, that's unsatisfactory, or
2 whatever. That was a finding of fact made by the
3 district judge.

4 I think that this -- the context in which this
5 has to be reviewed, Your Honor, is the fact that Mr.
6 Connick also testified that complaints about transfers,
7 internal complaints to him about transfers were very
8 common, and that while he didn't think they were
9 negotiable, at the same time he didn't -- indeed, put
10 very little weight on the fact that DA's frequently
11 complained about going one place or the other.

12 In fact, he testified that on occasion he had
13 allowed Ms. Myers on an earlier occasion to talk him out
14 of being transferred. So, the finding that Mr. Connick
15 thought it was acceptable that she said she was going to
16 consider it is certainly not only supported in the
17 record but it is understandable.

18 I think the important point, though, is the
19 district court found that Mr. Connick did not fire Ms.
20 Myers or discharge her because he believed she was
21 refusing the transfer. There was no refusal, and he
22 didn't believe there was a refusal. The district judge
23 found that he fired her because of the questionnaire,
24 and that leads us back again to whether the
25 questionnaire itself falls within protected speech.

1 This Court has frequently said that the way
2 one is to answer that is to apply the Pickering
3 balancing test. The district judge did that. He
4 applied it -- he took into account all the factors,
5 including the possibility of some disruption of the
6 working relationship, and he found that in fact the
7 speech was protected.

8 QUESTION: That's not purely a factual
9 question, though, is it?

10 MR. STRICKLER: No, it's not, Justice
11 O'Connor. I believe --

12 QUESTION: So we wouldn't apply a clearly
13 erroneous test.

14 MR. STRICKLER: I believe imbalance includes
15 findings of subsidiary fact, but I believe that
16 ultimately the --

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1 QUESTION: That's not a factual question,
2 though, is it?

3 MR. STRICKLER: No, it's not, Justice
4 O'Connor.

5 QUESTION: So you wouldn't apply a clearly
6 erroneous test.

7 MR. STRICKLER: I don't believe so. I believe
8 the Pickering balance includes findings of subsidiary
9 fact. But I believe that ultimately the weighing is --

10 QUESTION: So at best it's a mixed question.

11 MR. STRICKLER: A mixed question; I believe
12 that's an accurate characterization.

13 QUESTION: The court, after finding -- the
14 district judge, after finding that the Pickering
15 balancing had been properly applied and finding that it
16 was protected, went ahead and then applied the Mount
17 Healthy test, and he considered, of course, the reasons
18 that Mr. Connick had put forward. He did not disregard
19 those reasons, as Mr. Wessel argued. He considered
20 those reasons and found that in fact the questionnaire
21 was the real reason, the but-for reason, and --

22 QUESTION: Turning for a moment to the
23 question whether the First Amendment protects the
24 circulation of the questionnaire, do you think any of
25 the questions in the questionnaire, other than the one

1 about feeling political pressure, are matters of public
2 concern?

3 MR. STRICKLER: I believe they're all matters
4 of public concern. I believe they're all matters of
5 public concern because they all relate to the efficient
6 operation and the morale of an important governmental
7 agency. They're at least as important, it seems to me,
8 as the bond issue speech that was addressed by this
9 Court in Pickering, and they're more important, it seems
10 by any standard, than the dress code communication that
11 was at issue in Mount Healthy.

12 Mount Healthy involved a communication
13 regarding the content of an internal dress code in a
14 public school. Now, if that's a matter of public
15 concern, it seems to me the issues that are addressed in
16 this questionnaire are matters of public concern.

17 QUESTION: Of course, in Mount Healthy the
18 employee went public with the thing, as I recall.

19 MR. STRICKLER: That's correct.

20 QUESTION: It was on a Cincinnati radio
21 station. Doesn't that add a little different dimension
22 to the case than when it's purely internal?

23 MR. STRICKLER: Only in the respect that it
24 implicates another factor in the Pickering balance, Your
25 Honor. It certainly seems to me that some kind of

1 communications are more disruptive if they're made in
2 the public forum.

3 For example, if Ms. Myers had indeed broadcast
4 some questions about the competency of her supervisors
5 to the public at large, I think that that would be more
6 disruptive than what she, far more disruptive than what
7 she did. And I think a court must take that into
8 account.

9 So to the extent that it went to the public at
10 large, I think it is a factor to be weighed in the
11 Pickering balance, but I do not think that it is a --
12 that this Court has ever, and I certainly do not think
13 in Pickering this Court intended, to draw any kind of
14 bright line between matters of public concern and
15 matters of non-public concern and say matters of
16 non-public concern are without any protection
17 whatsoever. And I think this Court has said the exact
18 opposite on many occasions where it has said --

19 QUESTION: Would you say that on the question
20 of whether a particular statement was a matter of public
21 concern or not, it's totally indifferent whether the
22 statement was made publicly or privately?

23 MR. STRICKLER: It's not totally indifferent.

24 QUESTION: It's relevant to the question
25 whether there's disruption. The question of whether the

1 issue is a matter of public concern, I don't see why it
2 would make any difference.

3 MR. STRICKLER: It shouldn't make any
4 difference on that. It does make a difference, though,
5 as to the potential disruptive effect. I don't think
6 there's any doubt about that.

7 QUESTION: Mr. Strickler, was there any
8 discussion or had there been any discussion in the city
9 with respect to the morale of the district attorney's
10 office, any public discussion?

11 MR. STRICKLER: The record does not reflect
12 that, Your Honor.

13 QUESTION: Is it your suggestion, in light of
14 comments you made earlier in your argument, that this
15 sort of morale is really -- this sort of questionnaire
16 is really beneficial to office morale?

17 MR. STRICKLER: I believe this sort of
18 questionnaire can be indeed beneficial to the workings
19 of a government bureaucracy.

20 QUESTION: With question 10 in it, suggesting
21 that all of this individual's supervisors were people
22 who could not be trusted or whose word couldn't be
23 believed?

24 MR. STRICKLER: The question is, do you have
25 confidence in and would you rely on the word of, and

1 then the names. I don't believe that's a personal
2 attack.

3 QUESTION: You don't?

4 MR. STRICKLER: No, sir. But even if the
5 Court were to consider it that, it seems to me that this
6 Court has frequently said that public employees have
7 rights to communicate or to assemble and to organize
8 with regard to their work in the public sector. Without
9 being able to communicate ideas like, do you think your
10 supervisor is doing a good job or do you trust their
11 word, that right, that First Amendment right to
12 organize, is meaningless.

13 QUESTION: Talking about public and private,
14 do you know of any private organization that allows you
15 to circulate questionnaires while you're working?

16 MR. STRICKLER: I know of some private
17 organizations that do, Your Honor, but private
18 organizations are not bound by the Fourteenth
19 Amendment.

20 QUESTION: That's what I'm saying. But still,
21 they don't allow it, do they?

22 MR. STRICKLER: I think it depends on the
23 organization, Your Honor.

24 QUESTION: I bet you it does.

25 Don't you agree that at least for one day that

1 the Respondent in this case didn't do anything on behalf
2 of her job?

3 MR. STRICKLER: That is certainly not correct,
4 Your Honor.

5 QUESTION: Well, doesn't the record show and
6 the Judge's findings show that during that day she
7 passed out the questionnaire, she carried it around and
8 gave it to people, made sure she didn't let anybody see
9 it, she telephoned people, she had people come in?
10 Isn't that what the record shows, in one day?

11 MR. STRICKLER: Your Honor, the record does
12 show that, and the record shows --

13 QUESTION: What other time is left?

14 MR. STRICKLER: The record shows it was all
15 done on lunch hour.

16 QUESTION: Well, I'd like to see -- well, how
17 can -- do you have lunch all afternoon? The record says
18 during the afternoon she called people.

19 MR. STRICKLER: Your Honor, I'd be happy to
20 respond to your question. I see the red light is on.
21 But the record --

22 CHIEF JUSTICE BURGER: You can answer the
23 question.

24 MR. STRICKLER: The record shows that the
25 questionnaire was prepared before working hours and it

1 was distributed starting at 12:00 o'clock and --

2 QUESTION: 11:30.

3 MR. STRICKLER: Shortly before 12:00 o'clock.

4 And it was completed before 1:00 o'clock, the
5 distribution that there was, and that she was fired at
6 2:00 o'clock.

7 Thank you.

8 CHIEF JUSTICE BURGER: Very well.

9 Do you have anything further? You have one
10 minute remaining.

11 REBUTTAL ARGUMENT OF WILLIAM F. WESSEL, ESQ.

12 ON BEHALF OF PETITIONER

13 MR. WESSEL: Thank you, Mr. Chief Justice.

14 The bond issue in Pickering may have been
15 determinative of whether or not that board of education
16 was going to be reelected. The question of whether or
17 not Sheila Myers was moved from one section of the court
18 to the other or her complaints about that would never
19 under any imagination determine whether or not Mr.
20 Connick would be reelected. The public is not concerned
21 about who is furnishing and the efficiency of the
22 services in any particular section of the court.

23 They're interested in the man on top and
24 whether or not he's getting the job done in terms of
25 getting the cases decided and his policies pertaining to

1 plea bargaining and his policies pertaining to a speedy
2 trial. And that I think is the issue before the Court
3 relative to this questionnaire.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 (Whereupon, at 11:58 a.m., the case in the
7 above-entitled matter was submitted.)

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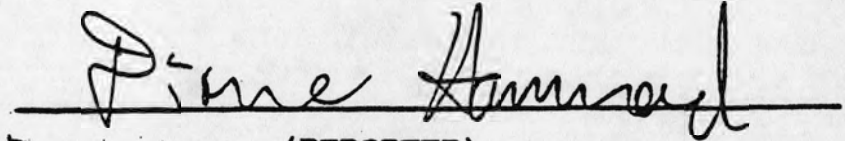
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

HARRY CONNICK, INDIVISUALLY AND IN HIS CAPACITY AS DISTRICT

ATTORNEY, ETC. v. SHEILA MYERS # 81-1251
and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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