ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CYNTHIA WATERS, ET AL., Petitioners v.

CHERYL R. CHURCHILL, ET AL.

CASE NO: 92-1450

PLACE: Washington, D.C.

DATE: Wednesday, December 1, 1993

PAGES: 1-55

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IN THE SUPREME COURT OF THE UNITED STATES

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CYNTHIA WATERS, ET AL., :

Petitioners :

v. : No. 92-1450

CHERYL R. CHURCHILL, ET AL. :

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Washington, D.C.

Wednesday, December 1, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

LAWRENCE A. MANSON, ESQ., Chicago, Illinois; on behalf of the Petitioners.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington D.C.; as amicus curiae, supporting the Petitioners.

JOHN H. BISBEE, ESQ., Macomb, Illinois; on behalf of the Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 92-1450, Cynthia Waters v. Cheryl Churchill.

Mr. Manson.

ORAL ARGUMENT OF LAWRENCE A. MANSON

ON BEHALF OF THE PETITIONERS

MR. MANSON: Mr. Chief Justice, and may it please the Court:

In this case, the court of appeals held that public officials risk substantial liability if they terminate employees based on believable reports of insubordinate remarks, substantiated by two other people, witnesses to the conversation in question, if other witnesses later come forward and convince a jury that the employee actually spoke on matters of concern to the public.

Although it -- although it expressly rejected Churchill's claim of a right to due process under the First Amendment, the court of appeals nevertheless held that an employer unaware of protected speech because of an inadequate investigation may be held liable for retaliatory -- retaliatory discharge, regardless of what the employer knew at the time of the termination, and even

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if its lack of knowledge was accidental.

This unpreceded holding conflicts with this Court's requirement that protected speech be a substantial or motivating factor in the termination decision for a constitutional violation to be found. There is no evidence in this case, none at all, that defendants ever were informed that Cheryl Churchill had discussed issues of public concern on January 16, 1987 with a cross-trainee in that department, Melanie Perkins-Graham. Thus the defendants could not have intended to retaliate against Churchill for her allegedly protected speech when they made the decision to terminate her employment.

QUESTION: Mr. Manson, do you mean no evidence on the record as it now stands? Assuming that you prevail on the question you're now arguing, it doesn't follow that you get summary judgment, do you? Because isn't -- wouldn't it be open to the plaintiff then to show that, indeed, the relevant offices did know that the --

MR. MANSON: Your Honor -- I'm sorry.

QUESTION: Yes.

MR. MANSON: Your Honor, we believe that under the Celotex case and the rules of rule 56(e) on summary judgment, that when the moving party moves for summary judgment and the burden of proof for a particular issue is on the nonmoving party, it is incumbent upon the nonmoving

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party to present evidence that would sustain a jury verdict in that party's favor.

And so what has happened here, we have moved for summary judgment. We have said that all the reports of protected speech that we -- I'm sorry, all the reports of speech we heard about that conversation on January 16 related to personal grievances, and that there is no evidence to the contrary.

In fact, Your Honor, in the district court respondent conceded and said that they had no doubt that the report submitted by Mary Lou Ballew, who was the employee that overheard the conversation, and Melanie Perkins-Graham, who was a cross-trainee to which Cheryl Churchill spoke that evening -- the respondent -- the respondent had no doubt that those reports to the first-level supervisor, Cindy Waters, and the director of nursing, Kathy Davis, could be construed in such a fashion, that is as unprotected speech. That citation is on page 29 of our brief.

QUESTION: Could be construed, but not had to be construed.

MR. MANSON: That is correct, Your Honor. But the burden on the respondent in this case is to bring -- is to present evidence to the court that could sustain a jury verdict in her favor. Pursuant to rule 56(e) and the

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Celotex case, there must be evidence.

QUESTION: Well, doesn't she have her own evidence of what she said, and wasn't there anyone else? Was it only those two people? And weren't there preceding events from which one might infer that that speech concerned -- was a matter -- on a matter of public concern?

MR. MANSON: Your Honor, with regard to the speech that night, yes, Cheryl Churchill does have her version of what she said. But our contention here is that for there to be a violation of the First Amendment, the defendants must be motivated by knowing of protected speech, and our argument here is that all the defendants knew about was comments of personal matters, grievances against the supervisor.

QUESTION: And you say there's no credibility issue at all involved in that, that it's open and shut, that all that the defendants knew about was that she was grousing?

MR. MANSON: That is correct, Your Honor. The person that overheard the speech has been deposed several times. She gave reports at the time. There are notes of those reports. And what we contend is the defendants cannot be motivated against public speech if they don't know about it, and all they knew about was unprotected

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speech.

Let me give you an example of what they were told. For -- first of all, the employee that overhead the speech said that Churchill had talked to the cross-trainee about the problems in the department to the point where the cross-trainee wasn't interested in working there anymore. This is sabotage of the employer's training efforts in an understaffed department to try and get additional people trained there.

The witness was then asked: "And what impelled you to make that report?" And Mary Lou Ballew, the employee that overheard the conversation, said: "I thought the OB Department was a good place to work and I hated to see people who wanted to work there being turned off by it." She then was asked: "Why did you think she needed to know that," meaning the supervisor to whom she reported the speech. And she said: "I thought it had a detrimental effect on the department. I thought it had foiled the attempt to get somebody in the department that could help with staffing."

That's what impelled this employee, who overheard the conversation, to go to her supervisors. Then we turn to the employee herself, the cross-trainee that was the subject of this speech. She said that the overall message was not a positive one as far as Cheryl

Churchill's relationship with her immediate supervisor, Cindy Waters. She said at her deposition that the general gist of the conversation was negative feelings between Cheryl Churchill and her immediate supervisor, Cindy Waters.

She said in the -- in the -- it's reflected in the notes of her conversation with Kathy Davis, the director of the nursing area, and Cindy Waters, the director of that unit, that she recognized that -- at the end of that conversation she said: "I know that the hospital cannot tolerate this kind of negative attitude."

So we had -- we had these reports from both the cross-trainee to which Cheryl Churchill spoke, and we had the report of the employee that overheard the conversation, an employee working in an understaffed department of the hospital who, perhaps because it's understaffed, has to take more on call or work weekends. And we had those reports and that is the only information that could possibly motivate the employer.

QUESTION: How did it come out later that those reports were inaccurate?

MR. MANSON: If the reports were inaccurate, Your Honor, we still believe that under the Connick case --

QUESTION: But how did it -- how did it -- what

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was the basis on which the employer learned more later?

MR. MANSON: The employer did not learn more later, Your Honor, until this lawsuit was filed. Cheryl Churchill was confronted when she was terminated, by Cindy Waters and Kathy Davis, with the fact that she was being terminated for general insubordination and for a conversation with a cross-trainee on the evening shift for 15 or 20 minutes. She did not respond at that time. When I asked --

QUESTION: Well, she -- she responded at the grievance hearing and she wasn't allowed to put in her evidence.

MR. MANSON: Your Honor, I do not believe that that is what the report of that conversation by Cheryl Churchill herself, in her own notes, reflects of that meeting. Mr. Hopper started that meeting off by saying, I would like to talk about three things. First of all, the warning you received in August for insubordinate action. Secondly, the evaluation that you received in January, where there were comments about her insubordination. And third, about the conversation with the cross-trainee.

Cheryl Churchill did not avail herself of that opportunity, but instead wanted to tell Hopper what was wrong with a nursing unit of the hospital. And so we contend again, Your Honor --

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QUESTION: Well, if she had been allowed to do that, isn't it likely that it would have come out that that was, in fact, part of the substance of the conversation that -- that was -- that is at issue here?

MR. MANSON: It is possible, Your Honor, that if, in effect, the defendants had forced her to give her version of the events, that might have happened.

QUESTION: Well, it's possible that if she had allowed to discuss the subject that she wanted to discuss, that it would have come out too, isn't it?

MR. MANSON: I suppose that it's possible, Your Honor. But we would -- we would submit that even in that event, the hospital could still lawfully have terminated this employee.

QUESTION: Well, is your theory that good faith is an absolute defense?

MR. MANSON: Your Honor, our theory is that in order for there to be a First Amendment violation, the employer's action must be motivated by protected speech. So it's not really good faith --

QUESTION: Suppose the employer has a rule that you have to have a permit before you hold a meeting in the cafeteria. And the employee holds a meeting in the cafeteria to talk about a matter of public concern and the employer fires the person because they didn't have a

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permit, but the employer's wrong, they did have a permit; what result?

MR. MANSON: I think if the -- first of all, Your Honor, I think that deals more clearly with the prior restraint rulings of this Court in terms of an overbroad rule and if the rule is appropriate.

QUESTION: No. Assume it's a valid time, place, and manner rule. You have to have a permit before you meet in the cafeteria; that's a valid rule. Let's at least assume it is.

MR. MANSON: We believe -- Your Honor, we would submit that whatever the result in that case -- and I'm not sure, but that the effect here is that under Mount Healthy the employer has to know that there -- and has to be acting on the basis of protected speech for there to be a violation of the First Amendment.

QUESTION: Well, under -- under my theory, the -- under my hypothetical, the employer acts under a mistaken assumption of fact. In fact, the employee was engaging in protected speech.

MR. MANSON: We would say to that, Your Honor, that that would not be a violation of the First Amendment.

QUESTION: I should think so. That has to be your answer, that that employer is guilty of a wrongful firing, and it would be a wrongful firing of somebody who

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wanted to have a meeting with a proper permit for a matter of public interest, just as it would be a wrongful firing of somebody who wanted to have a meeting on a different subject. But you have to take the position, it seems to me, that it's no First Amendment violation, it's just a wrongful dismissal.

MR. MANSON: That is correct, Your Honor.

QUESTION: Mr. Manson, you've spoken several times, as you did in your brief, about the need to prove that the -- in effect, the motivation of the employer was retaliation against protected speech.

Now, our cases have gone into motivation when the issue has been was the -- was the reason for the discharge something that was unprotected, as opposed to a response to that which was protected. But have we ever held that retaliation is, in fact -- an across-the-board retaliation for protected speech is, in fact, a requirement for liability?

MR. MANSON: I believe, Your Honor, that's what the Connick v. Myers case stands for. That speech in that -- in that case was not protected speech, and so it was deemed that it was not a violation of the First Amendment.

Another case, although it goes the other way, would be Rankin v. McPherson, where the employee was

clearly engaged in protected speech, talking about the CETA program, food stamps, Medicaid. And this was on the day that President Reagan was shot, and in the middle of that conversation the employee says if they go for again -- him again, I hope that they get him. Now, in that case the Court can agree or not agree as to whether that particular item of speech is protected or not, but I think that the --

QUESTION: But the issue in that case, as I understand you, as you have just phrased it, is whether, in fact, the impetus for the employer's action was the protected speech or the remarks about the success of the assassination attempt. But it doesn't follow from that -- when the contest in the case is between what was the cause, it doesn't follow from that that we have pronounced an across-the-board rule that retaliation against protected speech -- in other words, an intent test as opposed to an effects test is always going to be the test here. And I'm -- I'm not sure that we have a case that does hold that.

MR. MANSON: I believe, Your Honor, that that is the -- the holding of Mount Healthy and Connick. I believe it comes from the Arlington Heights --

QUESTION: Well, wasn't Mount -- wasn't Mount Healthy a dual motivation case?

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MR. MANSON: It was, Your Honor. Mount Healthy was the second prong. We're arguing the first prong here, and that is we don't even get to the but-for causes.

QUESTION: No, but my question is do we have cases that discuss the first prong as a requirement totally independent of the issue that arises with the second? And, I mean, for example, we've -- to counter it as recently as Simon & Schuster, we're talking about an effects test. We said we don't care what the motivation was here. It's the effect that we're concerned with. And it strikes me as odd that we would have an entirely different standard in the context that you're dealing with.

QUESTION: Mr. Manson, I understood you to say that what you're talking about is the mistake as to the content of the speech. If the employer was right about the content of the speech, that it didn't contain anything -- any matter of political concern, not -- are you talking about motive at all in that respect? You're talking about a mistake as to the words that were spoken.

MR. MANSON: We are not talking about a mistake as to the words that are spoken. What we are talking about here, Your Honor, is the --

QUESTION: Well, I thought you were. I thought that the -- that you were relying on statements that what

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was said was grousing, and what was said was not on a matter of public concern.

MR. MANSON: That is correct, Your Honor. That is what was reported to us --

QUESTION: Well that's different from taking the same speech and saying what was the motive for it, or what was the effect of it. We're looking at, as I understand it, two separate versions of what happened. One person said I heard grousing and the other person is saying I spoke about matters of public concern. I thought that's what was the nature of your case.

MR. MANSON: Yes, Your Honor, that's exactly right. And what we say is no matter what version of the speech Cheryl Churchill says, and even if that version were protected -- and we contend that she did admit talking about her evaluation, she did admit talking about her supervisor, she did -- but what we say is that even if you take her version, Cheryl Churchill cannot contest the fact that this -- these other reports were given to us and those are totally insubordinate, unprotected speech.

And the employer, knowing only of the unsubord -- insubordinate speech and having no reports, after talking to the employee that overheard it three times, after talking to the employee that received the speech, the employer can only act on the basis of what it

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knows. And it is unrefuted in this case that the only evidence the defendants had was the information that was given to them in these reports.

QUESTION: Is it perfectly clear that some of that information that they knew about had no relationship to matters of public concern? Like a statement that one of the nurses was ruining the hospital, and I forget, there are two or three things that arguably raise questions that might -- might have some public interest in.

MR. MANSON: We believe, Your Honor, that in the context of what the -- the information I read before about the impact that this speech made on the others.

QUESTION: Well, you described the impact by describing what one of the witnesses said was going to happen to personnel, but there's no evidence that that really happened.

MR. MANSON: I believe, Your Honor, that the disruption in this case was the employee that over -- that actually overheard the speech was upset about it. She is there to help train cross-trainees as well, and she sees her coemployee undermining not only efforts of the hospital, but her own efforts to get additional people in to help staff.

QUESTION: But there isn't any evidence that

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they had any staffing problems, was there?

MR. MANSON: Yes, Your Honor, that is not contested by either side here. There were significant staffing problems.

QUESTION: I see.

MR. MANSON: Your Honor, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Manson.

Mr. Seamon, we'll hear from you.

ORAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONERS

MR. SEAMON: Mr. Chief Justice, and may it please the Court:

The United States supports petitioners on both the First Amendment issue and the qualified immunity issue in this case. On the First Amendment issue, we think that the court of appeals was wrong when it held that it is irrelevant whether the petitioners knew, at the time of Nurse Churchill's discharge, that she had engaged in protected speech, i.e. speech on a matter of public concern.

That holding is wrong because under this Court's decision in Mount Healthy, an employee must show both that she engaged in protected speech and that she was fired

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because of the fact that she engaged in protected speech. If the hospital did not know that she had engaged in protected speech, it could not have been motivated by that fact.

QUESTION: Mount Healthy was a case in which the contest was a contest as between motivations, wasn't it?

MR. SEAMON: Yes, Mount Healthy was most accurately characterized as a mixed-motive case. And we think it's correct to say that the Court has never directly addressed the question presented here, whether motive is an across-the-board requirement in retaliatory discharge cases.

QUESTION: I don't understand that. Why would mixed motive make a difference if motive doesn't make a difference?

MR. SEAMON: Well -- and it's exactly in this respect that we think the court of appeals was wrong. We think that motive is highly relevant. In fact, that it's a necessary element.

QUESTION: Well, I don't -- then I don't understand why your response is -- Mount Healthy still, mixed motive or not, is right on point.

MR. SEAMON: I think --

QUESTION: That -- why would mixed motive make a difference if what your real motive is doesn't make a

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difference?

MR. SEAMON: Motive clearly is relevant, and Mount Healthy establishes that much.

QUESTION: Well, couldn't -- couldn't it make a difference if, in fact, there -- there would be a compete -- there was a competing justification, and the question is whether that justification was the operative one, as opposed to a justification of retaliation against protected speech.

MR. SEAMON: Yes. And that -- that was the focus of the court's concern in Mount Healthy, and that gave rise to the sort of two-part showing that has to be made and the affirmative defense that's available to the employer. But what --

QUESTION: I still -- I still don't understand -- I still don't understand that. It seems to me the inquiry in Mount Healthy was whether the motive for firing was the unlawful motive.

MR. SEAMON: That's right.

QUESTION: And the assertion was, well, there may have been mixed motives and -- but, still, doesn't it assume that you have to prove the bad motive?

MR. SEAMON: Yes. And I think -- I think that's exactly correct, to say that Mount Healthy -- the assumption in Mount Healthy is that motive is relevant

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and, in fact, that it's an element of the plaintiff's proof.

QUESTION: Yes, but the -- there was something independent of the speech. I can't remember what it was. But wasn't it true that the thought was even if the bad -- the protected speech had not been made, that she would have been fired anyway? Isn't that right, that was the defense?

MR. SEAMON: That's correct.

QUESTION: She did have a bad personnel record. Here there is no question about the fact that she was fired because she made a particular group of statements on a particular date, which they didn't realize were protected is the defense. But she was clearly fired because she made a particular speech which they say was protected.

MR. SEAMON: It may be more accurate to say that she was fired based on the reports of what she had said. And in that sense, the speech formed the basis.

QUESTION: Well, but the speech is the -- is -- was the basis for the discharge.

MR. SEAMON: That's correct.

QUESTION: And --

QUESTION: But isn't this case different from Mount Healthy in that the question is what was the speech?

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Now, whether the person was fired for what was the speech, or was fired for a different reason, is a different question from what was the speech? Here the employer thinks the speech is one thing when the employer acts, but it turns out to be something else. I thought that's what this case was, and that -- that such a case has not been seen.

MR. SEAMON: That is what this case is about. The employer made a mistake of fact about the content of the speech. And the question is --

QUESTION: And if the employer was right about what the speech was, there wouldn't be any First Amendment argument to make.

MR. SEAMON: That's right, if the --

QUESTION: It's only because the employer thought the words were one thing, when, in fact, it appears they may have been something quite different.

MR. SEAMON: Exactly. And that particular fact situation wasn't before the Court in Mount Healthy, but we believe that Justice Scalia's correct to characterize Mount Healthy as proceeding on the assumption that motive is not only relevant, but that it's a necessary element of the plaintiff's burden of proof.

QUESTION: I had a question that I think you could be very helpful with. If you had a situation like

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this in Federal employment, how would the employee put forward that claim?

MR. SEAMON: The situation in Federal employment is generally that whether the employee is a probationary employee or a nonprobationary employee, she would have the opportunity to get notice of the reason why she was being discharged, and in certain circumstances an opportunity to respond. The procedural safeguards are somewhat more attenuated for a probationary employee, but certainly for --

QUESTION: Take a nonprobationary employee. Apart from the administrative process, would there be any judicial review?

MR. SEAMON: Yes. The employee would first go to the agency and then to the Merit Systems Protection Board, and the decision of the Board would be reviewable in the Federal circuit. And, in fact, in Federal employment cases, retaliatory discharge claims come up frequently, and the Federal circuit rules on those.

QUESTION: Could you come directly to court, skip over that?

MR. SEAMON: We would argue no, that, in fact, the employee has a duty to exhaust his or her administrative remedies first. And those remedies provide for notice of the reason why you're being discharged, an

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opportunity to respond to those -- to those charges in writing, and then an opportunity for a hearing before the MSPB that is de novo.

QUESTION: Do any of these matters go through a collectively bargained arrangement?

MR. SEAMON: Yes. There is -- in some situations where the issue is covered by a collective bargaining agreement, there's an opportunity for arbitration. And, in fact, it may be that ultimately it's the arbitrator's decision that goes to the Federal circuit for review, rather than the Board's.

QUESTION: Mr. Seamon, your time is about to expire, and I did want to ask a question, please. The district court said that even if the -- part of the conversation was protected, there was another part that was inherently disruptive.

MR. SEAMON: That's correct.

QUESTION: By any version of the facts. And therefore the firing was justified on that basis. The court of appeals disagreed with that. Is there a sufficient factual basis to grant summary judgment one way or another on that?

MR. SEAMON: We think -- we think that summary judgment was appropriate, and that's because there was no dispute about what the employer -- what the hospital knew

and why it fired Nurse Churchill. Regardless of what the content of the speech was, as it heard the speech it was insubordinate conversation on a matter of personal concern, and it was motivated by its belief of those reports to fire her. And because we don't think that there is a genuine issue of disputed fact on that, that summary judgment was appropriate.

The district court did determine that there was a dispute about the content of the speech, but that -- that is no longer a dispute. The petitioners are conceding, for purposes of this decision, that she spoke on a matter of public concern, in other words on the cross-training policy.

QUESTION: Yes.

QUESTION: Is it not possible for speech to be insubordinate even though it deals with a subject of public concern? Must a hospital allow all of its personnel, in particular supervisory personnel, to go around and tell subordinate employees this is the worst hospital in the world? Must that be allowed?

MR. SEAMON: It certainly should not, in our view. In fact, especially if that kind of conversation was directed at patients coming into the hospital, we think it would have an enormous disruptive effect even if it was on a matter of public concern. And as we

understand Pickering, the Court can take that into account and say even if the speech was -- concerned a matter of public interest, nonetheless the discharge was still justified.

QUESTION: Is that a question -- mixed question of fact in law? What is the question, whether it's justified as inherently disruptive?

MR. SEAMON: I think that would probably be a mixed question. It would be a question of fact to the extent that it would implicate the -- what effect speech actually had on the workplace, and there may be disputes about exactly what the disruptive effect was. Ultimately, it would be a question of law.

I'd like to spend just a moment speaking about the question about whether an effects test of the sort that's been suggested in some of this Court's decisions should apply here. And we say no because of the distinct context in which this case has arisen.

The Court has made it clear since Pickering that when the Government acts as an employer, it has interests in regulating employee's speech that differs significantly from those that it possesses in connection with regulating the speech of the citizenry in general. And in the context, the Court made clear that in an employment at will situation like this one, the Government can discharge

an employee for any reason or no reason at all, as long as it is not motivated by a desire to retaliate against the employee for engaging in protected speech.

I thank the Court.

QUESTION: Thank you, Mr Seamon.

Mr. Bisbee, we'll hear from you.

ORAL ARGUMENT OF JOHN H. BISBEE

ON BEHALF OF THE RESPONDENTS

MR. BISBEE: Mr. Chief Justice, may it please the Court:

I'd like to say one thing by way of introduction, if I may, please. This case, more than any case decided since Pickering by this Court, presents public employee speech in a context in which I think -- although I've done no empirical study on the matter, in which I think public employee speech is most apt to take place.

That is speech during a break time or break period, dinner hour, or whatever, when employees in a public agency talk about the policies of the public employer, talk about the policies of the agency itself, talk about how the policies of the employer are conforming to or in furtherance of or sustaining the mission of whatever the agency may be.

So you have here a very vital public agency.

You have a public hospital, and you have a situation where for 6 months there's been a dispute ongoing between the professional nursing and medical staffs on a cross -- on a nurse staffing device known as cross-training. Disregarding the merits of cross --

QUESTION: Mr. Bisbee, I wish you would turn to the question presented, which is that the understanding of the employer at the time of the action. The employer's understanding, according to the question presented in the cert petition, was that the -- there was -- the speech that was involved was unprotected insubordinate speech.

So the question is at that time, the time of the firing, the employer believes that the words spoken were unprotected, insubordinate speech; doesn't find out until later the First Amendment protected cat -- that's the question presented. Who phrased that question?

MR. BISBEE: The petitioners raised that question, Your Honor.

QUESTION: And you don't --

MR. BISBEE: And that question is not supported by the record.

QUESTION: Isn't that what the question -- isn't that what the Seventh Circuit treated the question as being?

MR. BISBEE: No, it did not.

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QUESTION: Well, what question did the Seventh Circuit address?

MR. BISBEE: The Seventh Circuit basically addressed the question whether or not, on the facts of the case, summary judgment was warranted to the petitioners in light of what the record showed and in light of what was reasonably available to the hospital. And what was reasonably available to the hospital, Your Honor, is very explicit in this record.

QUESTION: The Seventh Circuit said it didn't matter that the employer didn't know that the words spoken were protected speech. Didn't the Seventh Circuit say that?

MR. BISBEE: Your Honor, the problem with the Seventh Circuit's opinion, to the extent that there is one, is that after doing a very careful analysis of the historical context into which this dispute arose, then made somewhat of a leap, without perhaps the appropriate link in the bridge, and then did say that it doesn't matter what the employer knew, so long as it knew it was dealing with speech.

QUESTION: More than said we held -- it said we hold that ignorance of the nature of the employee's speech is inadequate to insulate officials from the 1983 act.

MR. BISBEE: But, Your Honor, I think that

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unfairly characterizes what the court of appeals did in a 26 or so page opinion in which it painstakingly -- painstakingly detailed the beginning of this controversy, beginning with Dr. Koch in 1982 and the staffing problems that he, as the medical-clinical director of the OB Department, had with --

QUESTION: Mr. Bisbee, to further Justice Ginsburg, when they're summarizing at the end of their opinion, they say we further hold as immaterial whether the defendants knew the precise content of Churchill's conversation, for they knew or should have known. This is the language of the court of appeals itself.

MR. BISBEE: Your Honor, that is the language of the court of appeals. I don't think, however, you can extract that language from the opinion of the court of appeals. What I'm here defending is the judgment of the court of appeals. I think --

QUESTION: Well, but we -- we granted certiorari on a question presented, and you can assume that we want to -- we want to hear argument on that question.

MR. BISBEE: I do assume that, Your Honor, and I am hopeful that I'm trying -- I'm trying to address that. The record does not support that the -- that the -- that there were believable reports of substantiated insubordinate speech. That just isn't what the record

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shows. Each one of the individual petitioners testified explicitly as to what it was that motivated him and her.

Waters, Cynthia Waters who was the department head in OB, was the one to whom Ballew, the eavesdropper, overheard -- reported what she had overheard. And what she reported was this. She said something bad is going on and you should be aware of it. Cheryl took a cross-trainer into the kitchen and talked about you and how bad things were in OB.

That was the report. On that basis Waters went immediately to Davis and to Hopper, and she told them what Ballew had reported. Davis and Hopper said that's got to be confirmed by talking to Melanie Perkins --

QUESTION: Mr. Bisbee, do I take it that what you're saying is you had a triable case on what that employer understood at the time?

MR. BISBEE: Absolutely.

QUESTION: All right, but so that's quite --

MR. BISBEE: Absolutely.

QUESTION: -- different from the -- That was the question that I was asking your adversary. Even if the Seventh Circuit is wrong that -- and it doesn't matter that the employee believed the speech was unprotected at the time the employer acted, would the summary judgment be appropriate.

And he said you didn't come forward with anything to show that the employer understood, at the time it was acting, that it was dealing with protected speech. But what did you come forward with at the time of summary judgment in the district court to make out a case that at the time this woman was fired, the people who fired her knew that she was dealing in protected speech?

MR. BISBEE: They reasonably knew that she was dealing in protected speech because what was reported? What was reported to them was basically a headline. Things were bad in OB and the administration was responsible.

Kathy Davis, the vice president of nursing who implemented the cross-training program, was said, reportively, to be ruining the hospital. And there were a couple of other general statements like that which, again, were in headline form only, saying that things were bad in OB and the administration was harming the hospital.

QUESTION: Mr. Bisbee, do you take the position that everything -- that on the record that the Court has before it in considering summary judgment, that all of the speech by the employee was protected, all of it was protected speech, or is some of it unprotected in your view?

MR. BISBEE: I take the position, Your Honor, on

the record -- on the basis of what the employer knew, 62 percent --

QUESTION: No, on the basis of the record --

MR. BISBEE: Well, on the basis of the entire --

QUESTION: -- Before the court for summary judgment.

MR. BISBEE: On the basis of the entire record, I take the position that virtually 90 percent of her speech was protected because she was talking about the cross-training policy.

QUESTION: Not all of it.

MR. BISBEE: Well, there was -- there were some questions she answered.

QUESTION: And in -- and in answering that question, you bear in mind the Connick case which dealt with criticism of the management of the district attorneys office, whether it was well managed and had good morale, where the Court said that was not a matter of public concern?

MR. BISBEE: That's correct, Your Honor.

QUESTION: Uh-huh.

MR. BISBEE: But that did not go to the delivery of the public office's public service. What we're talking about here, a nurse staffing issue which directly affects patient care --

QUESTION: So a portion of the speech went to that.

MR. BISBEE: Excuse me?

QUESTION: A portion of the speech went to that.

MR. BISBEE: In this case 62 percent of what the employer knew at the time they discharged her is consistent with the speech being on a matter of public concern.

QUESTION: Let me ask you another thing. Do you think that even protected speech could also serve to demonstrate sufficient disruption to the employer's operation that a firing could be justified?

MR. BISBEE: I do, I concede that.

QUESTION: Yes.

MR. BISBEE: There is no evidence on the record, however, Your Honor, to support that that happened. The only way the district court came up with its inherently disruptive theory is this way. There are 38 pages of Cheryl Churchill's testimony. The district court considered three of those pages.

It disregarded altogether the testimony of the supervisor of the shift in question, who corroborated 100 percent that Cheryl Churchill's speech was on this public concern issue. It disregarded altogether the clinic -- the medical-clinical director's testimony, who was

present -- who was one of the conversants, who said that the speech was on this cross-training issue. It disregarded altogether the testimony that it was the cross-trainer herself who initiated the conversation on cross-training.

QUESTION: Well, I'm not sure it disregarded that. Justice O'Connor's question is, even assuming that it was about the cross-training issue, might that not be a valid cause for discharge? Does every employee of a -- of a public hospital have a right to go about running down the hospital to subordinates simply because that employee doesn't like the way the hospital's being run, and that is a public issue and therefore it can be done constantly?

MR. BISBEE: Your Honor, if you're talking simply about mere statements of disparagement, in order to disparage, for the purpose of disparagement.

QUESTION: No, in the best of good faith, in the best of good faith.

MR. BISBEE: Well, if you're -- to impose the Pickering factors, to pose any kind of the -- the Pickering factors test, Your Honor, it seems to me there has got to be some reasonable basis for thinking that the speech was doing that.

You had the speech in this case given on January 16, 1987. 4 days later, without anybody knowing about it,

it is brought by the eavesdropper to the attention of the supervisors. Everybody who testified said there was no disruption. The supervisor on the shift in question said there was no disruption; in fact, that she herself would have been involved in the conversation had she not finished her dinner.

QUESTION: If she had been telling this to the super -- to the board of trustees of the hospital or someone who had the authority to change the situation that she thought was bad for the public, I could understand it. But telling it to a subordinate nurse, what did she hope to achieve by telling it to -- to one of the cross-trainees except dissatisfaction?

MR. BISBEE: Your Honor, this is fundamental to what the First Amendment rights are all about of public employees. The whole basis of the right to engage in free speech is the right to exchange ideas, the idea that truth comes out in the exchange of ideas and the competition of the market. How do you -- how do you --

QUESTION: To criticize the operation, so long as it's a public operation, all of the employees must be free to run down the operation to subordinate employees --

MR. BISBEE: Your Honor --

QUESTION: -- Even though the subordinate employees can't do anything about it.

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MR. BISBEE: Your Honor, number one, I disagree with your assessment that there was a subordinate employee here. It was a coemployee. It was a nurse from another floor is all. A coemployee --

QUESTION: A person of no authority in the operation to make the changes that she thought were necessary.

MR. BISBEE: Your Honor, the thing is, though, the whole idea of free speech, the whole idea of public employee speech is the refinement of knowledge, so that the -- because these public employees are the ones who are possessed -- that's what Pickering held, they are the ones who are possessed of how something is working. These are people exchanging notes.

She stood to teach -- Cheryl Churchill stood to teach the other employee what -- her perspective of how this nurse staffing issue was working. She stood to learn from the other nurse how the nurse staffing issue was working. Both stood to learn from Thomas Koch, the doctor, the clinical head, how the nurse staffing issue was working. These are the kinds of things that employees can talk about and then bring to the attention, perhaps, of the supervisors.

QUESTION: Well, but that may be a justification for employee free speech, but under the balancing test

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certainly some of what Justice Scalia says is relevant. To whom the speech is addressed was -- could this person do anything about it, that sort of thing.

MR. BISBEE: Your Honor, here's where -- here's what that -- here's where that question leads, I believe, with all respect. She could have gone out and made a statement to the newspaper. She could have done -- she -- I mean you're saying she could have gone and done the same thing, gone public with something which may have been not fully accurate, which may have not been fully accurate because she would not have apprised herself or allowed herself the benefit of the perspective of, say, Melanie Perkins-Graham.

QUESTION: Well, don't you think --

QUESTION: That would be a much stronger case for you. I'd have a lot more trouble with that firing than I would with this one.

MR. BISBEE: But, Your Honor, it seems to me you're overlooking the predicate -- the predicate that is absolutely necessary for public employee speech to be informed.

QUESTION: Well, counsel --

MR. BISBEE: Yes.

QUESTION: Do you agree that an employer can have reasonable rules on time, place, and manner for

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addressing problems of public concern.

MR. BISBEE: Absolutely.

QUESTION: And would you agree that one of those rules might be that you don't criticize the hospital during the middle of an operation, of a surgical operation?

MR. BISBEE: I agree. But that didn't happen in this case. The only -- the only circumstance that happened in this case was done by Cindy Waters herself, who interrupted a surgical procedure to start ordering people out of the room, when the surgical procedure was underway, being performed by a doctor, no less. And when the doctor attempted to reprimand the nurse, this Cindy Waters, for having interrupted the operation, what happened?

The head of the hospital takes notes, copious notes. I couldn't have done it -- no one could do it better himself to show what a concerned doctor this is, talking about just what you said, how bad it is to interrupt operations, surgical procedures.

QUESTION: Mr. Bisbee --

QUESTION: Does -- yes.

QUESTION: -- The Seventh Circuit may have had the wrong fix on the case, but it did say twice that its holding is if the employer is ignorant of the nature of

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the speech, it doesn't matter, that's not insulating. And I want you to tell me, as far as that's concerned, how that can be squared with a qualified immunity, with the very reason for being of a qualified immunity doctrine? If a person acts on the basis of credible but ultimately, it turns out, wrong information, how can such a person not have qualified immunity?

MR. BISBEE: It's not credible information. I disagree with that, number one. But, number two -- but, number two --

QUESTION: Well, that's -- unfortunately that's the question that cert was granted on.

MR. BISBEE: I understand that.

QUESTION: That terminates an employee based on credible substantiated reports of unprotected --

MR. BISBEE: I understand that, Your Honor. But from the beginning of my opposition to cert, I've questioned that the record supports anything like that. But, number two, your question goes directly to the point you and Justice Souter were bringing up earlier.

Mount Healthy, unlike -- unlike any of the other cases, is a mixed speech motive. I mean, this is a mixed speech motive case, whereas Mount Healthy was a straight mixed motive case. Here you have a mixed speech motive case which sort of ties in, then, with a pretext-type

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case. And I'm willing to con -- I'm willing to assume that I've got the obligation to show, at least prima facie, that the -- that the -- that her speech, as reported, motivated the discharge, the retaliatory action.

QUESTION: At the time -- at the time they acted.

MR. BISBEE: Yes, Your Honor.

QUESTION: Then isn't -- then isn't the bottom line of your argument that we must remand to the Seventh Circuit, because they said it doesn't matter that they didn't know when they acted.

MR. BISBEE: Your Honor, I --

QUESTION: And we -- wouldn't we have to say, Seventh Circuit, it does matter that they knew when they acted.

MR. BISBEE: Your Honor, I don't think -- I think you can affirm the Seventh Circuit's judgment and indicate that the ground of decision has to be somewhat different. Because I agree with you that it is not irrelevant, and I think that you've got to understand that the Seventh Circuit was writing in the context of the historical context, directly out of Arlington Heights, directly out of Washington v. Davis. And if you think of --

QUESTION: Well, in your -- in your view, what

are the standards that an employer must follow in evaluating a report that there has been disruptive speech that's nonprotected --

MR. BISBEE: Well --

QUESTION: -- Before the employer can terminate the employee.

MR. BISBEE: All right, look at it in terms of Arlington Heights, where it talks about the historical context. The standard ought to be is their view a reasonable one. I don't say at this point there's a duty to investigate, but in this case they talked to only those people who corroborated that it was insubordinate speech. They did nothing else. They made a conscious decision not to talk to Cheryl Churchill. Why did -- how do we know it's a conscious decision --

QUESTION: I want you to just confine yourself to what the legal standard ought to be. We can evaluate the facts of this record.

MR. BISBEE: All right. If their information is reasonable, is reasonably based, objectively reasonably based, and this brings into bear -- this brings to bear footnote 6 out of Anderson v. Creighton. If it's reasonably based that the speech was insubordinate, I think they're entitled to take -- I think that summary judgment would have been appropriate for the petitioners

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in this case.

But that couldn't have been reasonably based in this case because what they acted on -- what they acted on was consistent, fully consistent with her speech being on the protected issue of the nurse staffing problem of cross-training: Kathy Davis ruining the hospital, things bad in OB. If you look at the depositions of Hopper, you look at the depositions of Davis, that's what they acted upon.

Not only that, they had no reason to disbelieve -- and I know I stress that perhaps ad nauseam in the brief, for which I ask your forgiveness. But nevertheless, they had no reason to disbelieve that that speech had anything -- was on anything other than cross-training. The standard has to be an objectively reasonable one, and it's not reasonable if, in fact, there is no attempt, when you're talking First Amendment -- and you -- you pointed out in a recent dissent last term, Your Honor, that there is the notion of some sensitive inquiry which the First Amendment, by itself, imposes, some inquiry as to what the circumstances were.

And Connick itself says that the speech has to be viewed in terms of the whole record. What --

QUESTION: Mr. Bisbee --

QUESTION: Mr. --

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QUESTION: -- Do you know how the Seventh Circuit got this notion that what they were dealing with was an employer ignorant of the nature of the employee's speech? And how did -- how did -- since you say that that's not what this case is about, how did they manage to think that that -- that that was before them, that you can impute to the employer what comes up after, even if you accept that at the time the employer acted it was ignorant of what the content of the speech was?

MR. BISBEE: I don't accept that the employer was ignorant of what the context -- content of the speech was.

QUESTION: I'm just asking you where did the Seventh Circuit get that notion from, that it put it in its opinion a couple of times?

MR. BISBEE: Well, Your Honor, far be it from me to venture a guess as to how the Seventh Circuit arrived at that particular dicta. But I think that's all that it is, is dicta, because I think the holding of the Seventh Circuit is fully consistent with the very detailed historical analysis that the Seventh Circuit did.

QUESTION: But you never made -- you never made such an argument, that it doesn't matter what they knew when they acted, it only matters what the -- after the firing comes out.

MR. BISBEE: I absolutely -- I did not. I did not make that argument. What I was doing, basically, was showing that there were issues of fact in all respects, as to the content, the context, and the form of the speech, in order to get around the summary judgment that had been imposed against me in the district court. I did not make that argument.

It may have been my fault, Your Honor. I may have not properly given the Seventh Circuit an analytical framework.

QUESTION: Well, Mr. Bisbee, may I ask you this. I just don't know the answer to it. At the time the district court acted, and hence when you were describing to the circuit what the district court had before it -- at the time the district court acted, was there an affidavit or a deposition on file by Churchill saying I was talking about nurse staffing in that conversation?

MR. BISBEE: 38 pages.

QUESTION: She came out and said it explicitly, okay.

MR. BISBEE: 38 pages worth, explicitly. The district court considered only three of those pages, and in those three pages the district did not consider she was being asked matters of what she did not say, not what she said. And then it went on and said that Melanie

Perkins-Graham was more explicit. Melanie Perkins-Graham, in her report, said she didn't remember exactly what was said, except that Kathy Davis was ruining the hospital, and things were bad in OB and the administration was responsible.

The problem, as I see it, was adumbrated by you in an earlier question, Justice Souter, to the effect that what happens under Mount Healthy if you merge the Mount Healthy formula with the Anderson v. Creighton formula set forth in the -- in footnote number 6? That's where you come up with the notion that there's got to be some reasonable basis for the employer to believe that the speech was protected.

And here what they acted upon was fully consistent with the nurse -- with the 6-month dispute on the cross-training. And furthermore, under Arlington Heights, if you look at how -- you can determine from the context or the sequence of events what motivated someone, what motivated the petitioners in this case was her free speech.

For example, they disregarded their own procedures when it came to doing such things as viewing Dr. Koch's written concerns, that Hopper noted. At no point after this Code Pink -- which was the beginning of the end for Churchill. The Code Pink was the beginning of

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the end for Churchill and the attempted beginning of the end for Dr. Koch. They went and -- the three of the, Hopper, Davis, and Waters concluded that Koch was a guy who was out of control because he had a temper, because he was angry at his procedure being interrupted.

Did the -- did those three individuals bring to anybody's attention that he had tremendous policy concerns about what was going on in OB? They did not. They instead initiated the action to take away his staff privileges, and they gave Churchill a written warning for having simply snapped at Waters when she gave, Waters, an instruction contrary to what the doctor had said.

But worse than that, worse than that, at her year-end evaluation -- and this is critical, her year-end evaluation 3 weeks before she was discharged, she's given a tremendous -- a good evaluation in all respects.

QUESTION: These are arguments perhaps as to what the motive of the hospital was. I don't think they address the question presented in the Petition for Certiorari.

MR. BISBEE: The ultimate question in the case is whether or not there -- what was the motive of the hospital, Your Honor. And the thing is, I -- as I'm trying --

QUESTION: Well, the ultimate question in the

case is -- when we take it here -- is a question of law.

MR. BISBEE: That's correct.

QUESTION: And that is if the employer discharges for speech without knowledge that it's protected speech, is that a violation -- does that come under Mount Healthy as a violation of the First Amendment or not?

MR. BISBEE: Your Honor --

QUESTION: And all the facts you bring up I don't think really address that.

MR. BISBEE: But, Your Honor, that's the problem in this case. I don't think the facts posed in the petitioner's question --

QUESTION: You -- you've made that point for 25 minutes. Are you going to address the question of law that's presented in the Petition for Certiorari at all?

MR. BISBEE: I'm sorry if I haven't done that, Your Honor, but it seems to me that the Court doesn't even really need to reach that question. I don't know the answer to that question exactly. If the -- if you're talking now purely hypothetically, and unlike what I say the record shows in this case. If you're saying that an employer reads -- hears substantiated reports, believable, of insubordinate speech, what can it do; the Court doesn't need to reach that decision in this case.

QUESTION: Suppose we think we need to reach that decision. What should -- what's the answer to it?

MR. BISBEE: Well, the answer to it -- Your Honor, I don't know the answer to it. Because -- I just don't know the answer to it. That is not presented in this case.

QUESTION: Well, we didn't take this case to determine who said what in the cafeteria.

MR. BISBEE: I understand that.

QUESTION: We determine this case to see what the rule of law ought to be if an employer acts on reasonable, substantiated information, but is wrong.

MR. BISBEE: Your Honor, but -- see -- and I didn't want to have the temerity to suggest that the writ had been perhaps improvidently granted, because there's a lot of effort that's involved in that. But it seems to me that the record simply doesn't support that question. And I know I've been arguing for 25 or maybe 27 minutes, now, on that point.

QUESTION: And you did raise -- you did so argue in your brief in opposition.

MR. BISBEE: Pardon me?

QUESTION: You did so argue in the brief in opposition.

MR. BISBEE: Yes, Your Honor, I did. I did. I

argued that, that it's simply not presented. That isn't what the record in this case shows. And I say that with some trepidation --

QUESTION: But it certainly is what -- it certainly is what the Seventh Circuit held. I mean, the Seventh Circuit has used language here that says it doesn't matter what the motive is.

MR. BISBEE: The Seventh Circuit used language that was broader than it needed to. The Seventh Circuit used language that was broader than the analysis the Seventh Circuit used.

QUESTION: Well, then maybe we need to send it back, because they seem to be operating on a legal theory that even you aren't here defending.

MR. BISBEE: That is basically correct. I don't think you have to send it back. It seems to me that you can affirm the judgment and say that the legal test employed by the Seventh Circuit was not altogether correct. I mean, I'm not arguing --

QUESTION: Well, do I -- do I understand your theory to be that if the employer acts on a premise that's factually incorrect, but is nonetheless reasonable in reaching its conclusion, that a discharge of the employee -- and that's in those circumstances -- is not a violation of the Constitution?

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MR. BISBEE: That's what I've argued, if the employer is reasonable. But that takes into account the content, the context, the form of the speech. That takes into account -- the procedures, as you have pointed out, are necessarily implied by the First Amendment itself when speech is at issue.

QUESTION: Sort of a negligence standard. So if an employment -- if an employer is negligent about finding out what the conversation was, he's guilty of a constitutional violation?

MR. BISBEE: Absolutely not. We're talking about objective reasonableness. If the employer's reasoning. If the employer --

QUESTION: Well, I thought negligence is what a reasonable man would not do.

MR. BISBEE: Well, Your Honor --

QUESTION: I don't see any difference between a reasonableness standard and a negligence standard.

MR. BISBEE: I disagree. I think the objective reasonableness standard that's been imposed by this line of -- by the line of decisions in this Court culminating in Anderson v. Creighton and Hunter v. Bryant, is far different. It's a kind of -- it's a kind of standard which indicates that there has been an abuse of governmental power, that a reasonable governmental officer

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would have known that what he was doing was violating the law. That's how you phrased it in Anderson --

QUESTION: Different from negligence, you say?

MR. BISBEE: Huh?

QUESTION: That's different from negligence.

MR. BISBEE: I think that you've indicated it's different from negligence. I -- that's how I've read Anderson v. Creighton, Your Honor. I've read Anderson v. Creighton as being fully consistent -- fully consistent with this Court's decisions in things like Daniels v. Williams, where we -- where you've held that negligence is not actionable.

QUESTION: Well, Mr. Bisbee, what's the difference between your standard for liability and your standard for qualified immunity?

MR. BISBEE: You know, under the facts of this case they come awfully close to merging.

QUESTION: Why -- why didn't they just merge in what you said? I thought they did.

MR. BISBEE: I -- that's what I was -- we're talking here about a mixed speech motive case. That's why, in response to Justice Kennedy's questions, I say if the information that the -- that the employer has is reasonable that the speech is unprotected and insubordinate, the employer is justified in discharging.

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But the speech -- the -- but the --

QUESTION: There can be no -- no -- there can be no reinstatement? An employee can engaged in protected speech, it can be proven that it's protected speech, but there's no reinstatement?

MR. BISBEE: I didn't say that.

QUESTION: As opposed to damages?

MR. BISBEE: I didn't say that. I don't know. I don't know the answer to that. But all I'm talking --

QUESTION: Well, can we explore what the answer might be?

MR. BISBEE: Yes.

QUESTION: Do you think there's a distinction between employer's liability for reinstatement and the employer's liability for damages under 1983?

MR. BISBEE: I don't think so.

QUESTION: This model would apply across the board as far as the city is concerned? That's also a foggy question -- where there's a difference between the standard for damages and the standard for judgment.

MR. BISBEE: Well, yes, I think the governmental -- the governmental entity could remain liable, and the governmental entity, as the Ninth Circuit has held, would be liable for reinstatement. The individuals might be -- might -- could be immune from

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money damages.

QUESTION: Yeah, because you're suing the individuals who wouldn't have the authority to reinstate her. It would have to be the municipal unit.

MR. BISBEE: That's correct, Your Honor. My time --

QUESTION: Are you -- by the way, did you ask for reinstatement relief or just money?

MR. BISBEE: Both.

QUESTION: Thank you, Mr. Bisbee.

MR. BISBEE: Thank you, Your Honor.

QUESTION: Mr. Manson, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE A. MANSON

ON BEHALF OF PETITIONERS

MR. MANSON: I would strongly urge this Court that this matter should not be sent back on remand, but in fact that summary judgment was appropriate in this case.

In response to Justice Souter's comment, we have conceded, for purposes of summary judgment, that Cheryl Churchill's version of what she said that night is correct, but that was not what was reported. And the test under Connick is that if an employer reasonably believes that an employee grievance has occurred, insubordination, then the employer can act to terminate the employee.

In the Connick case it is said that a public employee gets no greater First Amendment rights for a personal grievance than does a private employee, and we think that is exactly what happened in this case.

QUESTION: Did the district court find that there was a reasonable belief on the part of the employer?

MR. MANSON: Yes, it did, Your Honor. And it also found that under the Pickering balance --

QUESTION: Where did -- it said that explicitly, that the belief was reasonable?

MR. MANSON: The district court held, Your Honor, that under either version of the -- of the case, that the point of the speech, the employee's point of the speech -- because Cheryl Churchill admitted, in addition to her -- in her version of the speech, that she talked about nonprotected items, namely her evaluation and her thoughts concerning the manager of that unit.

And what the employee that overheard the conversation said was the overall message was not a positive one as far as Cheryl Churchill's relationship with Cindy Waters. She discussed the evaluation. She told me she and Cindy Waters didn't get along. Cheryl said that Cindy Waters had said that they should wipe the slate clean in that evaluation session, and Cheryl Churchill told Cindy Waters it wasn't possible to do that.

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She said Cindy Waters didn't do much, and that the general gist of that conversation was negative feelings between Cheryl Churchill and Cindy Waters.

We contend that is not, in any way, protected speech. And we contend, furthermore, that, under Mount Healthy, it was only these reports that motivated the employer.

And I want to ask this --

CHIEF JUSTICE REHNQUIST: Thank you.

MR. MANSON: I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Manson.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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CYNTHIA WATERS V. CHERYL CHURCHILL

CASE 92-1450

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)