

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

Raising claims under Rev. Stat. § 1979, 42 U.S.C. § 1983; 18 U.S.C. § 2701 et seq., popularly known as the Stored Communications Act (SCA); and California law, Quon filed suit against petitioners in the United States District Court for the Central District of California. * * * Among the allegations in the complaint was that petitioners violated respondents' Fourth Amendment rights and the SCA by obtaining and reviewing the transcript of Jeff Quon's pager messages and that Arch Wireless had violated the SCA by turning over the transcript to the City.

* * *

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. [Camara v. Municipal Court of City and County of San Francisco](#), 387 U.S. 523, 530 (1967). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. [Skinner v. Railway Labor Executives' Assn.](#), 489 U.S. 602, 613–614 (1989). The Fourth Amendment applies as well when the Government acts in its capacity as an employer. [Treasury Employees v. Von Raab](#), 489 U.S. 656, 665 (1989).

The Court discussed this principle in [O'Connor \[v. Ortega\]](#), 480 U.S. 709 (1987). There a physician employed by a state hospital alleged that hospital officials investigating workplace misconduct had violated his Fourth Amendment rights by searching his office and seizing personal items from his desk and filing cabinet. All Members of the Court agreed with the general principle that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." A majority of the Court further agreed that

“‘special needs, beyond the normal need for law enforcement,’” make the warrant and probable-cause requirement impracticable for government employers.

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Later, in the *Von Raab* decision, the Court explained that “operational realities” could diminish an employee’s privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. In the two decades since *O’Connor*, however, the threshold test for determining the scope of an employee’s Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O’Connor* plurality controls. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy.

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The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. * * * It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve.

Even if the Court were certain that the *O’Connor* plurality’s approach were the right one, the Court would have difficulty predicting how employees’ privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of

course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions *arguendo*: First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has held that the "'special needs'" of the workplace justify one such exception.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is " 'justified at its inception' " and if " 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' " the circumstances giving rise to the search. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not " 'excessively intrusive.' " Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used.

* * *

Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

■ JUSTICE STEVENS, concurring.

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■ JUSTICE SCALIA, concurring in part and concurring in the judgment.

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NOTES AND QUESTIONS

1. Does the ubiquity of pagers, e-mail, cell phones, and similar forms of communications technology suggest that employees have greater or lesser expectations of privacy in their communications? To what extent is your answer influenced by the public/private nature of the employment or more specific facts of a particular job?

2. In its decision, the Ninth Circuit held that the search was unreasonable. It pointed to less intrusive methods of reviewing Quon's pager use, including reminding him that he was forbidden from using his pager for personal communications and that the contents would be subject to audit, to ensure that the pager was only used for work-related purposes. It also suggested that it could have asked Quon to count the characters himself or asked him to redact personal messages and grant the OPD permission to review the redacted transcript. The Supreme Court held this was unnecessary. "Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search was unreasonable." Do you agree?

3. In his opinion, Justice Kennedy was careful to avoid stating principles of electronic communication privacy in the workplace more broadly. He noted that world of communications technology is changing rapidly. Is the Court being too timid and too limited in its pronouncements to afford sufficient guidance or is it being wise and cautious? See generally [Paul M. Secunda, Privatizing Workplace Privacy, 88 Notre Dame L. Rev. 277 \(2012\)](#).

4. Title I of the Electronic Communications Privacy Act of 1986, [18 U.S.C. § 2510](#) et seq., prohibits the interception, defined as the acquisition, of the contents of any wire, electronic, or oral communication through the use of an electronic, mechanical, or other device at the time the communication is transmitted. Title II of the Act creates civil liability for the unauthorized access of a facility through which electronic communications services are provided, and thereby obtains, alters, or prevents electronic storage of the communications. There is an exception for the seizure of e-mails authorized by the person or entity providing the wire or electronic communications service. Courts have held that where an employer provides an e-mail server, the provider exception precludes civil liability for accessing the communications stored therein, including employee e-mails. [Fraser v. Nationwide Mut. Ins. Co.](#), 334 F. Supp. 2d 755 (E.D. Pa. 2004)

5. Other monitoring technologies, including radio frequency identification devices (RFID) and global positioning systems (GPS) have important implications for the workplace. Employers can track employee movements wherever they go during work time or off-work hours, especially when they are using company-owned vehicles. Do you think the workplace application of this technology should be regulated? If so, why and how? See [Jill Yung, Big Brother IS Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It](#), 36 Seton Hall L. Rev. 163 (2005) (recommending legislation to deal with the after-hours location-based tracking of employees).

C. FREEDOM OF EXPRESSION

Legal regulation of employee speech, inside the workplace or out, depends to a large extent on whether the employer is private or public. Where government is the employer, the U.S. Constitution protects employees from arbitrary “state action” adversely affecting their job status. The Fourteenth Amendment ensures government employees “due process” protection against discipline or discharge, while the First Amendment provides at least limited substantive protection. In [Perry v. Sindermann](#), 408 U.S. 593 (1972), the Supreme Court stated:

For at least a quarter century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. * * * Such interference with constitutional rights is impermissible.

[Id.](#) at 597. As developed by the courts, however, the individual’s freedom to speak out on the job is not unlimited.

The procedural limits on the government employer’s ability to discharge employees are discussed *infra* at pp. 568–576.

1. PUBLIC SECTOR

Rankin v. McPherson

483 U.S. 378 (1987).

■ JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether a clerical employee in a county constable's office was properly discharged for remarking, after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him."

On January 12, 1981, respondent Ardith McPherson was appointed a deputy in the office of the constable of Harris County, Texas. The constable is an elected official who functions as a law enforcement officer. At the time of her appointment, McPherson, a black woman, was 19 years old and had attended college for a year, studying secretarial science. Her appointment was conditional for a 90-day probationary period.

Although McPherson's title was "deputy constable," this was the case only because all employees of the constable's office, regardless of job function, were deputy constables. She was not a commissioned peace officer, did not wear a uniform, and was not authorized to make arrests or permitted to carry a gun. McPherson's duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access. Her job was to type data from court papers into a computer that maintained an automated record of the status of civil process in the county. Her training consisted of two days of instruction in the operation of her computer terminal.

On March 30, 1981, McPherson and some fellow employees heard on an office radio that there had been an attempt to assassinate the President of the United States. Upon hearing that report, McPherson engaged a co-worker, Lawrence Jackson, who was apparently her boyfriend, in a brief conversation, which according to McPherson's uncontroverted testimony went as follows:

"Q: What did you say?

"A: I said I felt that that would happen sooner or later.

"Q: Okay. And what did Lawrence say?

"A: Lawrence said, yeah, agreeing with me.

"Q: Okay. Now, when you—after Lawrence spoke, then what was your next comment?

"A: Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

"* * * But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him."

McPherson's last remark was overheard by another deputy constable, who, unbeknownst to McPherson, was in the room at the time.

The remark was reported to Constable Rankin, who summoned McPherson. McPherson readily admitted that she had made the statement, but testified that she told Rankin, upon being asked if she made the statement, "Yes, but I didn't mean anything by it." After their discussion, Rankin fired McPherson.

McPherson brought suit in the United States District Court for the Southern District of Texas under 42 U.S.C. § 1983, alleging that petitioner Rankin, in discharging her, had violated her constitutional rights under color of state law. She sought reinstatement, back pay, costs and fees, and other equitable relief.

* * *

It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.

The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [Pickering v. Board of Education](#), 391 U.S. 563, 568 (1968); [Connick v. Myers](#), 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is * * * a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

The threshold question in applying this balancing test is whether McPherson's speech may be "fairly characterized as constituting speech on a matter of public concern." "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." The District Court apparently found that McPherson's speech did not address a matter of public concern. The Court of Appeals rejected this conclusion, finding that "the life and death of the President are obviously matters of public concern." Our view of these determinations of the courts below is limited in this context by our constitutional obligation to assure that the record supports this conclusion: " 'we are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they * * * are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' "

Considering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. § 871(a) or 18 U.S.C. § 2385, or, indeed, that could properly be criminalized at all. The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and * * * may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Bond v. Floyd*, 385 U.S. 116, 136 (1966): "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected."

Because McPherson's statement addressed a matter of public concern, *Pickering* next requires that we balance McPherson's interest in making her statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The state bears a burden of justifying the discharge on legitimate grounds.

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest. From this perspective, however, petitioner fails to demonstrate a state interest that outweighs McPherson's First Amendment rights. While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was evidently not afraid that McPherson had disturbed or interrupted other employees—he did not inquire to whom respondent had made the remark and testified that he "was not concerned who she had made it to." In fact, Constable Rankin testified that the possibility of interference with the functions of the Constable's office had *not* been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.

Nor was there any danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement. Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark. Not only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the constable that the remark demonstrated a character trait that made respondent unfit to perform her work.

While the facts underlying Rankin's discharge of McPherson are, despite extensive proceedings in the District Court, still somewhat unclear, it is undisputed that he fired McPherson based on the content of her speech. Evidently because McPherson had made the statement, and because the constable believed that she "meant it," he decided that she was not a suitable employee to have in a law enforcement agency. But in weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal. We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective function of the public employer that they cannot prevail over the free speech rights of the public employee.

This is such a case. McPherson's employment-related interaction with the Constable was apparently negligible. Her duties were purely clerical and were limited solely to the civil process function of the constable's office. There is no indication that she would ever be in a position to further—or indeed to have any involvement with—the minimal law enforcement activity engaged in by the constable's office. Given the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.

Because we agree with the Court of Appeals that McPherson's discharge was improper, the judgment of the Court of Appeals is

Affirmed.

■ JUSTICE POWELL, concurring.

* * *

If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so

great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, off-hand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful. To the extent that the full constitutional analysis of the competing interests is required, I generally agree with the Court's opinion.

In my view, however, the case is hardly as complex as might be expected in a dispute that now has been considered five separate times by three different federal courts. The undisputed evidence shows that McPherson made an ill-considered—but protected—comment during a private conversation, and the Constable made an instinctive, but intemperate, employment decision on the basis of this speech. I agree that on these facts, McPherson's private speech is protected by the First Amendment.

I join the opinion of the Court.

■ JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I agree with the proposition, felicitously put by Constable Rankin's counsel, that no law enforcement agency is required by the First Amendment to permit one of its employees to "ride with the cops and cheer for the robbers." The issue in this case is whether Constable Rankin, a law enforcement official, is prohibited by the First Amendment from preventing his employees from saying of the attempted assassination of President Reagan—on the job and within hearing of other employees—"If they go for him again, I hope they get him." The Court, applying the two-prong analysis of [Connick v. Myers](#), 461 U.S. 138 (1983), holds that McPherson's statement was protected by the First Amendment because (1) it "addressed a matter of public concern," and (2) McPherson's interest in making the statement outweighs Rankin's interest in suppressing it. In so doing, the Court significantly and irrationally expands the definition of "public concern"; it also carves out a new and very large class of employees—i.e., those in "nonpolicymaking" positions—who, if today's decision is to be believed, can never be disciplined for statements that fall within the Court's expanded definition. Because I believe the Court's conclusions rest upon a distortion of both the record and the Court's prior decisions, I dissent.

* * *

Even if I agreed that McPherson's statement was speech on a matter of "public concern," I would still find it unprotected. It is important to be clear on what the issue is in this part of the case. It is not, as the Court suggests, whether "Rankin's interest in *discharging* [McPherson] outweighed her rights under the First Amendment." Rather, it is whether his interest in *preventing the expression of such statements in his agency* outweighed her First Amendment interest in making the statement. We are not deliberating, in other words, (or at least should not be) about whether the sanction of dismissal was, as the concurrence puts it, "an * * * intemperat[e] employment decision." It may well have been—and personally I think it was. But we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service. We are asked to determine whether, given the