burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[798]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public.[799] In *Rankin v. McPherson*[800] the Court held as protected an employee's statement "if they go for him again, I hope they get him," made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President and in a context critical of the President's policies. Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[801]

In *City of San Diego v. Roe*,[802] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play."[803] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[804] "was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[805] The Court, therefore, had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e.*, *Pickering* or *NTEU*]."[806] This leaves

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[798] 461 U.S. at 150. The Court explained that "a stronger showing [of interference with governmental interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Id. at 152.

[799] This conclusion was implicit in *Givhan*, 439 U.S. 410 (1979), characterized by the Court in *Connick* as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but . . . [speaking] privately." 461 U.S. at 148, n.8.

[800] 483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

[801] "Where . . . 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." 483 U.S. at 390–91.

[802] 543 U.S. 77 (2004) (per curiam).

[803] 543 U.S. at 84.

[804] 513 U.S. 454 (1995) (discussed under Government as Employer: Political and Other Outside Activities, *supra*).

[805] 543 U.S. at 84.

[806] 543 U.S. at 80.