

A clerical worker has been employed for the past two years in a permanent position in the county public records office in a state. The clerk has been responsible for copying and filing records of real estate transactions in that office. The clerk works in a nonpublic part of the office and has no contact with members of the public. However, state law provides that all real estate records in that office are to be made available for public inspection.

On the day an attempted assassination of the state's governor was reported on the radio, the clerk remarked to a coworker, "Our governor is such an evil man, I am sorry they did not get him." The coworker reported this remark to their employer, the county recorder. After the clerk admitted making the remark, the county recorder dismissed him stating that "there is no room in this office for a person who hates the governor so much."

The clerk sued for reinstatement and back pay. His only claim is that the dismissal violated his constitutional rights.

What will the court likely hold?

- A. The case is nonjusticiable, because public employment is a privilege rather than a right and, therefore, the clerk lacked standing to bring this suit.
- B. The dismissal was constitutional, because the compelling interest of the state in having loyal and supportive employees outweighs the interest of any state employee in his or her job or in free speech on a matter of public concern.
- C. The dismissal was unconstitutional, because in light of the clerk's particular employment duties, his right to express himself on a matter of public concern outweighed any legitimate interest the state might have had in discharging him.
- D. The dismissal was unconstitutional, because it constitutes a taking without just compensation of the clerk's property interest in his permanent position with the county.

## Explanation:

The First Amendment **right to free speech**, applied to the states through the Fourteenth Amendment, does *not* extend to **public employees** speaking pursuant to their official duties. Therefore, the government can **freely discipline or terminate** employees for the content of their **employment-related speech**. But since this right *does* extend to public employees speaking as **private citizens**, the government can only regulate the content of that speech if its **interest in efficient government function outweighs** the employee's free speech right.

Here, the clerk was fired for remarking that he was sorry that the governor had not been assassinated. But the clerk spoke as a private citizen because his comment was made to a single coworker and was unrelated to his job duties—copying and filing real estate records with no public interaction. And since there is no indication that his comment impeded government efficiency, his right to express himself on this matter of public concern outweighs any legitimate state interest in discharging him. Therefore, the dismissal will likely be held unconstitutional.

**(Choice A)** To have a **justiciable** claim, a plaintiff must have standing—ie, suffered an injury-in-fact (unemployment) caused by the challenged action (termination) and redressable by the remedy sought (reinstatement and back pay). The fact that public employment is a privilege rather than a right is irrelevant.

**(Choice B)** The state's compelling interest in loyal and supportive employees does *not* outweigh a government employee's right to free speech on a matter of *public* concern (as seen here). But the state's interest will *always* outweigh an employee's right to free speech on a matter of *private* concern (eg, co-worker grievances).

**(Choice D)** The Fifth Amendment takings clause prohibits the government from taking private property for public use without just compensation. Under this clause, private property includes real property and personal property—but not the clerk's property interest in continuing public employment.

## Educational objective:

The government may regulate private speech by a public employee if the government's legitimate interest in efficient government function outweighs the employee's right to free speech.

## References

- Rankin v. McPherson, 483 U.S. 378, 388–90 (1987) (discussing when a government employee can be punished for speaking as a private citizen).

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## Regulating private speech by public employee

