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HOW A RULING ON ABORTION TOOK ON A LIFE OF ITS OWN

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Linda Greenhouse

SUPREME Court Justices can usually time their own departures, as Justice Harry A. Blackmun did with grace and good humor last week. "I know what the numbers are, and it's time," the 85-year-old Justice said in announcing his decision to leave the Court this summer after 24 years.

But Justices have no such control over their legacy, and as Justice Blackmun has long acknowledged, he will always be known by one of the earliest Supreme Court opinions to bear his signature: Roe v. Wade, the 1973 decision that established the constitutional right to abortion. With passion and pride, he embraced and defended his handiwork as it came under sustained attack from all sides: from abortion opponents, obviously, but also from critics who, while supporting rights as a matter of policy, viewed the opinion as an example of judicial overreaching, weak in its constitutional theory and mired in detail about the stages of pregnancy and other matters best left to legislatures.

In the end, Roe v. Wade took on a life of its own, evolving into something so in tune with the ideals of the American mainstream that even conservative Republican Justices, who almost surely would not have joined the original Roe v. Wade majority, would not repudiate it.

Harry Blackmun alone could not have preserved Roe v. Wade. As the decision's margin of support dwindled -- from the original 7-to-2 to 6-to-3 and then to 5-to-4 -- on a Court reshaped by two Presidents who vowed to see the precedent wiped off the books, the likelihood that Roe v. Wade would outlast its author appeared remote. Of the seven members of the majority in 1973, only Justice Blackmun remained by 1991. All the others had been replaced by Republican Presidents. The momentum against the decision seemed unstoppable.

And yet Justice Blackmun is retiring and Roe v. Wade is still the law. More precisely, it is still the law as somewhat redefined at the margins by a trio of Republican Justices whose suprising opinion two years ago in Planned Parenthood v. Casey reaffirmed what they called the "central principle" and "essential holding" of Roe v. Wade: "the woman's right to terminate her pregnancy before viability."

While the 1992 decision left unresolved questions, that basic premise appears to be settled. Harry Blackmun will leave the Court with his legacy secure. How, against all the apparent odds, did Roe v. Wade survive?

One answer may be that there are two Roe v. Wades, the one he announced for the Court in 1973 and the one that it became, occupying a special place in the social fabric beyond the expectations of those who received it, with relief, anger or disdain, 21 years ago.

A comment from Justice Blackmun himself at the White House news conference announcing his retirement underscored, almost certainly inadvertently, the full dimension of the opinion's evolution. Asked to explain the decision's continuing importance, he said: "I think it's a step that had to be taken as we go down the road toward the full emancipation of women."

Yet in the 53 pages of the original opinion, there is scarcely a passage that could be distilled into a rallying cry for the emancipation of women. Unwanted motherhood "may force upon the woman a distressful life and future," the opinion stated. "Mental and physical health may be taxed by child care." The "continuing stigma of unwed motherhood may be involved."

The premise of the opinion was that unwanted pregnancy presents women with potential medical and social problems that "the woman and her responsible physician necessarily will consider in consultation" when deciding how to proceed. The point of view, reflecting Justice Blackmun's sympathy for the medical profession developed during a decade as general counsel to the Mayo Clinic, was that of a doctor seeking the ability to exercise informed medical judgment about a patient's problem without government intrusion.

The Justice From Mayo

"Harry Blackmun was speaking as the Justice from Mayo," said David J. Garrow, the historian and author of a new book on the roots of Roe v. Wade, "Liberty & Sexuality" (Macmillan). "What Roe meant has changed over the years and we have to understand that Blackmun's understanding of

Roe has changed as well. He began speaking for women and not for doctors."

This sentence -- "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives" -- is not from Roe v. Wade. It is from the plurality opinion in Planned Parenthood v. Casey written jointly by Justices Sandra Day O'Connor, Anthony M. Kennedy and David H. Souter. Given that the Casey opinion provides the current definition of Roe v. Wade, the sentence marks the place on the American landscape to which the original opinion has migrated. Roe v. Wade survived, perhaps, by transcending itself.

Those who oppose the right to abortion and who regard Roe v. Wade as an exercise in illegitimate judicial power tend to explain its survival in terms of politics.

"The single biggest reason that Roe v. Wade is the law of the land today is the November 1986 Senate election," said Clarke Forsythe, vice president and general counsel of Americans United for Life, a leading advocacy group. In that election, Democrats recaptured the Senate, which they had lost in the Reagan landslide of 1980, and made it possible to defeat the Supreme Court nomination of Robert H. Bork in 1987. Had Judge Bork been on the Court five years later instead of Anthony M. Kennedy, President Reagan's eventual choice for the vacancy, the 5-to-4 vote in the Casey decision would almost surely have been to overturn Roe v. Wade rather than preserve it.

But the defeat of Judge Bork could, at most, have bought only a few years for the pro-choice side had the public disliked Roe v. Wade enough to make its reversal a priority at the polls. Six months after the Casey decision, Bill Clinton was elected President, and barely six months after that, with his choice of Ruth Bader Ginsburg to succeed Justice Byron R. White, the margin of support for the right to abortion grew to 6-to-3.

"In the end, the power of courts is the power of persuasion," said Walter Dellinger, a Duke University law professor who is now an assistant attorney general. "Their opinions are only successful if they are consistent with the deepest movements in society."

Mr. Dellinger, a strong advocate of abortion rights, continued: "Roe v. Wade is like an old Dick Tracy cartoon -- it's shot full of holes but it's still standing. Blackmun had the instinct for the right result. It was picked apart by law professors, but it turns out that the reasoning of Roe appeared much more thin and brittle at the time than it does now. The more that women came to be seen as full moral agents, with rights against intrusion from the state, the more it has seemed to tap into a deep anti-totalitarian principle that's embedded in our notion of liberty.

"That's where we've come since 1973," he said.

COURT UPHOLDS BUFFER ZONES AROUND CLINICS
Abortion Foes Must Keep Distance

The Legal Intelligencer
July 1, 1994, Friday

Richard Carelli, Associated Press

A STATE JUDGE DID not violate the free-speech rights of anti-abortion protesters when he kept them 36 feet away from a Melbourne, Fla., abortion clinic, the Supreme court ruled yesterday. But the court also said the judge went too far in limiting protesters' activities within 300 feet of the clinic.

Yesterday's ruling in the closely watched Florida case immediately fanned the emotional national debate over abortion at a time when violence at abortion clinics has escalated to include bombings, fires and even a murder. Abortion-rights advocates said they consider the decision a victory; anti-abortion activists were enraged. The decision was fragmented, yielding four separate opinions.

Chief Justice William H. Rehnquist wrote for a 6-3 majority in ruling that the 36-foot buffer zone generally "burdens no more speech than necessary to accomplish the government interest at stake" -- protecting access to the clinic. Rehnquist was joined in that view by Justices Harry A. Blackmun, John Paul Stevens, Sandra Day O'Connor, David H. Souter and Ruth Bader Ginsburg.

SCALIA DISSENTS

Justices Antonin Scalia, Clarence Thomas and Anthony M. Kennedy dissented. "Creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly and association . . . (is) profoundly at odds with our First Amendment precedents and traditions," Scalia wrote for the three. The Constitution's First Amendment protects the freedom of speech.

Owners of the Aware Women Center for Choice in Melbourne sued Operation Rescue, an anti-abortion group, in 1991. The lawsuit led to a permanent injunction banning certain activities outside the clinic. Reacting to subsequent anti-abortion demonstrations at the clinic, a judge last year said the original restrictions were insufficient.

PATIENT INTERFERENCE

The judge found that Operation Rescue members often interfered with patients and staff members trying to enter or leave the clinic. Demonstrators went to the homes of clinic patients and employees, sometimes ringing the doorbells of neighbors and identifying clinic employees as "baby killers." They sometimes followed patients and clinic employees "in a stalking manner," according to the judge, and on occasion threatened violence against clinic patients and employees.

The judge's 1993 injunction barred certain Operation Rescue members and others "acting in concert" with them from, among other things:

* Entering the property or premises of the clinic.

* Blocking, impeding or obstructing access to any building or parking lot of the clinic.

* Singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns or other loud sounds within earshot of patients inside the clinic.

Most notably, the judge created a 36-foot protective bubble around the clinic. He barred the Operation Rescue members and their cohorts from picketing or carrying out any other type of demonstration within that area. He also created a 300-foot protest-free zone, and barred demonstrations from approaching, uninvited, anyone seeking to enter or leave the clinic.

The Florida Supreme Court upheld the injunction, but in a separate case the Atlanta-based 11th U.S. Circuit Court of Appeals said it probably is unconstitutional. The state court's ruling was appealed by Judy Madsen and Ed Martin, members of Rescue America, and Shirley Hobbs, another anti-abortion activist. All three said they never had blocked access to the Melbourne clinic.

300-FOOT BAN DENIED

Yesterday's decision allows much of the judge's injunction to stand, but said the case record

did not support such a broad -- 300-foot -- ban on picketing and other peaceful forms of protest. Rehnquist said the judge and local officials can require protesters to turn down the volume of their protests, however.

> "The First Amendment does not demand that patients at the medical facility undertake Herculean efforts to escape the cacophony of political protests," Rehnquist said. "If over-amplified loud-speakers assault the citizenry, government may turn them down. This is what the state court did here, and we hold that its action was proper."

Twice before in the past 18 months the court has decided disputes over abortion clinic demonstrations. The court last year ruled that federal judges could not invoke a Civil War-era law, the Ku Klux Klan Act, to stop protesters who try to block women's access to clinics. But the court last January ruled that some such protesters may be sued and thwarted in federal court as racketeers.

FATAL SHOOTING

Responding to the fatal shooting last year of Dr. David Gunn outside his Pensacola, Fla., abortion clinic, Congress passed legislation providing stringent penalties for anti-abortion violence and for blocking access to clinics. President Clinton, in signing the law May 26, said it was "designed to eliminate violence and coercion" and was "not a strike against the First Amendment." But anti-abortion groups around the country quickly went to court and mounted First Amendment challenges to the law. Lower courts must now comb through yesterday's ruling for guidance in judging the constitutionality of the new federal law.

Madsen, present at the court to hear the decision, said, "If I were pro-choice, I'd be allowed to say anything I wanted to say anywhere . . . as a pro-lifer, my rights have been trampled on." Madsen's lawyer, Mathew Staver, said, "Today, the Supreme Court betrayed us."

Eleanor Smeal of the Feminist Majority said the ruling "establishes that a woman doesn't have to walk a gauntlet to protect her right to abortion." Smeal said, however, she was concerned about the court striking the judge's 300-foot protection zone. (Madsen v. Women's Health Center, 93-880.)

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93-1820 SEJPAL v. CORSON, MITCHELL, TOMHAVE & MCKINLEY M.D.S. INC.

Ban against tort claims for wrongful birth.

Ruling below (Pa SuperCt, 1/26/93):

Wrongful birth and wrongful life actions are specifically barred by Pennsylvania statute, 42 Pa. Cons. Stat. Ann. 8305; couple's claim that such statutory preclusion places impermissible burden on woman's right to abortion, and is thus unconstitutional under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 LW 4795 (US SupCt 1992), was waived because state was not party to action and record reveals no indication that plaintiffs provided state attorney general with notice of their constitutional challenge in accordance with Pa.R.A.P. 521(a).

Question presented: Does Pennsylvania statute, 42 Pa. Cons. Stat. Ann. 8305, that prohibits civil tort claims for "wrongful life" and "wrongful birth" violate fundamental right to make procreative decisions or, by its purpose or effect, impose "undue burden" on woman's right to choose abortion?

Petition for certiorari filed 5/12/94, by Kathryn Kolbert, Lenora M. Lapidus, Sarah E. Graves, and Center for Reproductive Law & Policy, all of New York, N.Y., and Linda Wharton, Susan Frietsche, and Women's Law Project, all of Philadelphia, Pa.

93-1943 SHEPPARD v. BEERMAN

Discharge of law clerk who threatened to expose judicial misconduct—Search of clerk's papers.

Ruling below (CA 2, 18 F.3d 147):

Free flow of information between law clerk and judge precludes law clerk's reasonable expectation of privacy in chambers' appurtenances, desks, file cabinets, or other work areas; accordingly, judge's search of clerk's work area following clerk's dismissal did not violate Fourth Amendment, and, even if some of clerk's belongings were seized for short period of time during search, seizure was not unreasonable under circumstances and did not violate Fourth Amendment; law clerk who was escorted from courthouse following dismissal by judge and was prevented from returning to courthouse or judge's chambers, was free to go anywhere else and was thus not restrained to extent required to constitute violation of Fourth Amendment's restrictions on seizures.

Questions presented: (1) In ruling that law clerks as class do not have reasonable expectation of privacy in their private offices and their desks and file cabinets therein, did Second Circuit properly apply case-by-case approach espoused by plurality of this court in *O'Connor v. Ortega*, 480 U.S. 709 (1987)? (2) Is seizure of government employee's private belongings upon his or her retaliatory discharge reasonable if purpose of seizure is to suppress evidence of employer's misconduct that led to discharge and if seizure continues over period of days? (3) If law clerk is discharged for objecting to misconduct of judge for whom he or she works, does Fourth Amendment impose any restrictions on judge's examination of clerk's private papers found during search of clerk's workplace after discharge? (4) Is court employee seized within meaning of Fourth Amendment when he or she is forcibly removed from courthouse and prevented from re-entering it?

Petition for certiorari filed 6/1/94, by Brian Sheppard, pro se, of New Hyde Park, N.Y.

BRIAN SHEPPARD, Plaintiff-Appellant, v. LEON BEERMAN, as an individual and in his official capacity as Justice of the Supreme Court of the State of New York, Defendant-Appellee.

Docket No. 93-7658

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

18 F.3d 147; 1994 U.S. App. LEXIS 3985

November 2, 1993, Argued

March 3, 1994, Decided

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Eastern District of New York (Glasser, J.), dismissing plaintiff-appellant's complaint on the pleadings pursuant to Fed. Civ. P. 12(c).

DISPOSITION: Affirmed, in part, and vacated and remanded, in part.

COUNSEL: BRIAN SHEPPARD, New Hyde Park, N.Y., Pro Se.

JOHN J. SULLIVAN, Assistant Attorney General of the State of New York, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Albany, N.Y., of counsel), for Defendant-Appellee.

JUDGES: Before: OAKES, KEARSE, and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Plaintiff-appellant Brian Sheppard, appearing pro se, appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, J.), dismissing his complaint on the pleadings pursuant to Fed. R. Civ. P. 12(c) ("Rule 12(c)"). Sheppard, a law clerk to defendant-appellee Leon Beerman, a justice of the Supreme Court of the State of New York, was discharged following a heated dispute with Beerman. Sheppard subsequently brought an action under 42 U.S.C. § 1983 (1988) alleging that his discharge and Beerman's conduct following the discharge violated his First and Fourth Amendment rights. In his complaint, Sheppard claimed that he was fired in "retaliation for [his] protesting, and [sic] considering to expose, judicial misconduct." He further alleged that subsequent to the discharge, Beerman illegally searched his office and seized his belongings. The district court dismissed Sheppard's claims on the pleadings, finding that he failed to state any cognizable constitutional claims. On appeal, Sheppard challenges the dismissal of each of his claims, generally arguing that the district court made certain improper factual findings in ruling on Beerman's Rule 12(c) motion to dismiss on the pleadings. For the reasons discussed below, we agree with Sheppard only as to one of his First Amendment claims. Accordingly, we affirm, in part, and vacate and remand, in part.

BACKGROUND

Sheppard served as a law clerk to Beerman from 1986 until he was fired on December 11, 1990. Because this case comes to us on a motion to dismiss, we must view the facts in the light most favorable to Sheppard. Accordingly, his view of the facts alleges the following series of events preceding and following his discharge.

Sheppard alleges that on December 6, 1990, after engaging in ex parte communications with the prosecution in a pending murder case, Beerman ordered him to draft a decision denying the defendant's pending speedy trial motion without a hearing, regardless of the motion's merits, so that the defendant would stand trial at a time advantageous to the prosecution. Sheppard refused to follow Beerman's direction, stating that he would not take part in the "railroading" of the defendant. Beerman responded that although Sheppard was not being discharged, he should seek other employment if he felt that way.

At this time, Sheppard informed Beerman that he had taken extensive notes of instances of other judicial misconduct by Beerman during the preceding four years of Sheppard's service in chambers. As an example, Sheppard noted a case that Beerman had assigned to himself in order to take personal revenge against the accused. Beerman expressed concern about Sheppard making his notes

public. Harsh words were exchanged between the parties: Sheppard called Beerman "corrupt" and a "son of a bitch," and Beerman called Sheppard "disturbed" and "disloyal." Sheppard immediately apologized for his characterization. The argument ended with no resolution, and Sheppard worked the remainder of the day.

When Sheppard next returned to work on December 11, 1990, he was removed from chambers by court officers, who informed him that Beerman had fired him. Sheppard was forced to leave immediately and not allowed to take his belongings with him. Both before and after his discharge on that day, Sheppard's property was searched by Beerman or by others at his direction. Specifically, Sheppard's file cabinets and desk drawers were searched, and a box of his personal file cards was seized and removed to Beerman's private office and examined. On December 13, 1990, Sheppard was permitted to return to chambers accompanied by court officers to retrieve certain of his belongings. On December 21, 1990, he was permitted to retrieve the rest of his personal files.

Following his discharge, Sheppard returned to Beerman's courtroom on a number of occasions. On January 18, 1991, while attending Beerman's calendar call, Sheppard began ruffling through court files. Beerman subsequently directed him to leave the courtroom if he wished to examine documents. On January 28, 1991, Beerman told an attorney not to speak with Sheppard and warned Sheppard not to involve himself in the cases Sheppard had worked on when he was a clerk. On February 11, 1991, Sheppard was told not to keep coming in and out of the courtroom, and was told to be quiet when he sought to reply to this direction.

Sheppard's Lawsuit

In April 1991, Sheppard commenced an action under 42 U.S.C. § 1983, alleging that the above actions by Beerman violated Sheppard's First Amendment right to free speech, his First Amendment right of access to criminal proceedings and documents, his First Amendment right to petition the government for redress of grievances, and his Fourth Amendment right to be free from unlawful searches and seizures. Sheppard also asserted pendent state law tort claims for, among other things, false imprisonment, trespass, conversion, and defamation. Beerman filed an answer and then moved for judgment on the pleadings pursuant to Rule 12(c) on the grounds that Sheppard had not met threshold pleading requirements, that the complaint failed to state a cause of action, and that Beerman was entitled to qualified immunity.

On May 21, 1993, the United States District Court for the Eastern District of New York (Glasser, J.) granted Beerman's motion for judgment on the pleadings on the grounds that Sheppard could not state any cognizable constitutional claim under any set of facts as a matter of law. Having held that plaintiff failed to state any cognizable constitutional claims, the court declined to exercise its pendant jurisdiction over plaintiff's state law claims.

Sheppard now appeals.

DISCUSSION

We review the district court's grant of Beerman's motion to dismiss Sheppard's claims de novo. See Grimes v. Ohio Edison Co., 992 F.2d 455, 456 (2d Cir.), cert. denied, 126 L. Ed. 2d 419, 114 S. Ct. 467 (1993). In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6). See Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College, 835 F.2d 980, 982 (2d Cir. 1987). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). This standard is "applied with particular strictness when the plaintiff complains of a civil rights violation." Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (citations omitted).

On appeal, Sheppard generally contends that the district court erred in finding that he had not stated cognizable constitutional claims. Each of Sheppard's First and Fourth Amendment claims will be discussed in turn.

I. First Amendment Claims

a. Free speech claims

Sheppard first contends that the district court made improper factual findings in dismissing his claim that his discharge amounted to a violation of his First Amendment right to free speech. We agree, and for the reasons discussed below vacate the district court's dismissal of that claim and remand for proceedings not inconsistent with this opinion.

A state may not discharge an employee for reasons which infringe on that employee's constitutionally protected interest in freedom of speech. See Perry v. Sindermann, 408 U.S. 593,

597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). If an employee is discharged for making statements concerning a matter of public concern, the employee's freedom of speech may have been violated. See Rankin v. McPherson, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). In such a situation, the Court must balance the employee's interest in making the statement against "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Rankin, 483 U.S. at 388 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)).

Sheppard specifically alleges that he was dismissed in retaliation for his exercise of free speech in confronting Beerman about the judge's alleged misconduct. In order for Sheppard's claim to withstand a motion to dismiss on the pleadings, he must establish that his speech concerned a matter of public concern, and that the speech was a motivating factor in his discharge. See Frank v. Relin, 1 F.3d 1317, 1330 (2d. Cir.), cert. denied, 126 L. Ed. 2d 569, 114 S. Ct. 604 (1993). Speech will be fairly characterized as a matter of public concern if the speech "relat[es] to any matter of political, social, or other concern to the community." Connick, 461 U.S. at 146. Whether speech involves a public concern is a question of law to be determined on the basis of the "the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48 & n.7.

In analyzing the validity of Sheppard's claim, the district court made a determination that Sheppard was actually discharged for insubordination and not for his speech. We find this determination problematic for two reasons. First, the motive behind Sheppard's firing in his retaliation claim is clearly a question of fact. See Frank v. Relin, 1 F.3d at 1328-29. Because this question is in dispute, it was improper for the district court to answer it on a motion for dismissal on the pleadings. Second, the district court's determination that Sheppard was actually dismissed for insubordination seemed to impact its determination that Sheppard's speech was not a matter of public concern. Because the reason for Sheppard's dismissal is not relevant to the legal determination of whether his speech was a matter of public concern, we find fault with the district court's public concern analysis. Accordingly, we reverse the district court's dismissal of Sheppard's First Amendment free speech claim and remand for proceedings not inconsistent with this opinion.

b. Remaining First Amendment claims

Sheppard next contends that the district court erred in dismissing his claims concerning a violation of his First Amendment right of access to criminal cases, and his First Amendment right to petition the government for redress of grievances. As to these contentions we disagree. Even assuming that all the facts alleged by Sheppard in his complaint are true, we find, as did the district court, that the facts do not support either of those claims.

Sheppard claims that Beerman violated his right to access to criminal proceedings by (i) directing Sheppard to examine court files outside of the courtroom; (ii) telling certain attorneys that it would be improper for them to speak to Sheppard about anything that Sheppard had learned during his tenure as Beerman's law clerk; (iii) refusing to field courtroom questions by those who were not parties to cases on the calendar; and (iv) admonishing Beerman to stop using the courtroom as a "revolving door" when Sheppard went in and out of Beerman's courtroom during a calendar call. Even assuming that all of the above incidents occurred, they do not indicate that Sheppard was denied a right of access to criminal proceedings. Sheppard admits that he was allowed to examine files outside of Beerman's courtroom, and that he was also permitted to listen to cases as long as he did not disrupt Beerman's courtroom proceedings or waste the court's time. Clearly, Beerman was entitled to exercise his discretion in keeping decorum in his courtroom.

Sheppard's claim that he was deprived of his right to petition for redress of grievances is equally without merit. The instant action provides such a vehicle. Accordingly, we affirm the district court's dismissal of these claims.

II. Fourth Amendment Claims

A. Search/Seizure of Office, Desk, and File Cabinets

Sheppard alleges that after the dismissal, Beerman searched his office, desk, and file cabinets in violation of his Fourth Amendment rights. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). See also O'Connor v. Ortega, 480 U.S. 709, 715, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987). The district court ultimately concluded that Sheppard had no reasonable expectation of privacy in his office furniture or file cabinets, and therefore any search was not violative of Sheppard's Fourth Amendment rights. For the reasons discussed below, we agree.

An "employee's expectation of privacy must be assessed in the context of the employment relationship." Ortega, 480 U.S. at 717. The working relationship between a judge and her law clerk, as noted by the district court, is unique. Unlike a typical employment relationship where an employer may limit the information she wants to share with her employees, in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. More importantly, clerks regularly have access to the judge's confidential thoughts on a case. The judge may discuss her feelings with her clerk, or may allow the clerk access to her personal notes. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas." Accordingly, the district court was correct in finding that there was no violation of Sheppard's Fourth Amendment rights.

Moreover, we also agree with the district court's finding that any alleged seizure done in connection with the search was similarly not violative of Sheppard's Fourth Amendment rights. Even assuming that Sheppard's belongings were seized for a short time during the judge's search of his things, a short delay by a judicial employer in returning a disgruntled employee's belongings after the employee has been fired does not rise to the level of a Fourth Amendment violation. The unlawfulness of an interference with an individual's possessory interest in property depends on the reasonableness of the seizure. See Soldal v. Cook County, 121 L. Ed. 2d 450, 113 S. Ct. 538, 549 (1992). Because a judicial employer has an overriding interest in securing the confidentiality of chambers' work product and in making sure that an angry clerk does not attempt to confiscate or destroy important court property, the brief alleged withholding of Sheppard's belongings while they were searched was not unreasonable.

B. Seizure of Sheppard's Person

Sheppard's final claim is that there was an unlawful seizure of his person when he was escorted out of the courthouse by court officers on December 11, 1990. The district court dismissed this claim finding that Sheppard's liberty was never restrained. We agree.

In order to determine whether a particular encounter between police officers and an individual constitutes a "seizure" for the purposes of the Fourth Amendment, a court must decide "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980).

In the present case, as correctly noted by the district court, Sheppard was "free to go anywhere else that he desired," with the exception of Beerman's chambers and the court house. Had Beerman retained Sheppard's car keys or his wallet, then perhaps Sheppard arguably could have been seized, because it would have prevented him from being "free to leave." See, e.g., United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990) (noting factors that might suggest a seizure include "prolonged retention of a person's personal effects, such as airplane tickets or identification."). Because there are no such allegations in Sheppard's complaint, Sheppard has failed to state a claim that his person was seized.

We have examined Sheppard's remaining contentions and find them to be without merit.

CONCLUSION

Based on the foregoing, we affirm the district court's dismissal of all of Sheppard's claims other than his First Amendment free speech claim. Regarding that claim, we find that in concluding that Sheppard failed to state a violation of his First Amendment right to free speech, the district court made certain factual determinations that were not appropriate on a motion for judgment on the pleadings. Accordingly, we vacate the district court's dismissal of Sheppard's First Amendment freedom of speech claim on the pleadings and remand for proceedings not inconsistent with this opinion. In doing so, however, we make no comment on the merits of the claim nor do we preclude the district court from re-examining the matter at some future, more appropriate time in the proceedings. Our ruling today is based only on the procedural posture in which the case came before the district court.