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Texas City Attorneys Association

Can They Say That? Employee Speech for Public Employers

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Table of Contents

I. Introduction

Governmental employers face a complex gamut when managing employee speech. There are many mediums, locations, and forums for which a public employee may be speaking. Are they at a city council meeting? Are they at home on their phone on social media? Are they at their full-time job, but speaking on the phone with a constituent? What's the topic or nature of the speech at issue? Each of these details may play a role in whether public employee speech may be protected.

In interpreting employee speech through the lens of the First Amendment, employers must examine speech within the context of the worker's job duties, organizational demands balanced against the right of the employee to freely share and participate in public discourse, among other interests. Courts are performing this analysis in an increasingly political and polarized world, where an individual's right to free speech is often measured against the interests of the State, as the employer, in promoting the efficiency of public services performed through public employees.[1]

This paper discusses how the First Amendment applies to public employees with respect to their free speech right, the common claims of prior restraint and retaliation, how these issues play out in today's cases, and the legislative approaches at monitoring free speech rights.

II. A Matter of Balance

Fortunately, just because you become a public employee does not mean that you cannot speak your mind on public matters—the exercise of free speech remains a cornerstone of responsible citizenship and interaction with the government. However, while the speech of a public employee is protected under different standards than it is for a non-public employee, recent decisions signal a trend of courts closely examining the span and scope of an employer's ability to regulate an employee speech. Moreover, with the advent of social media, both public and private speech can intrude on the employment relationship. Often, employers learn of concerns or grievances through public platforms and social media platforms provide fertile ground for both unfiltered opinions and information in a marketplace of ideas.

Justice Marshall, writing for the court in *Pickering v. Board of Ed. of Tp. High School Dist. 205, will County, Illinois*, stated the premise that public employees do not relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest which they would otherwise enjoy as citizens.[2] However, the court acknowledged a governmental employer has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. Justice Marshall discerned the problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of

[1] Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, at 568 (1968).
[2] *Id*.

public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.[3] This balancing test became written in precedential stone as the "*Pickering* balancing test".

However, the balancing test is not reached until after speech is made. First, employers need to be conscious of their employment policies, and ensure that their standards meet constitutional muster. These policies are most commonly challenged under a prior restraint claim.

III. Prior Restraint of Employee Speech

The analysis of an employee's right of speech begins with an employer's policies and practices, before any speech occurs. When a governmental employer seeks to regulate speech in advance, the employer runs the risk of violating the First Amendment as a prior restraint. In general, efforts by a governmental entity to regulate speech must meet a four-part test:

1. The restriction must be narrowly tailored;
2. It must be content-neutral;
3. The restriction must serve a significant governmental interest;
4. The government must allow for alternate means of communication or expression.

Policies which chill potential speech before it happens must demonstrate a higher burden of governmental interest as a restriction on expression than with respect to an isolated disciplinary action.[4] In *Maldonado v. City of Altus*, the court considered whether the City of Altus, Oklahoma's English-only policy for its employees created an impermissible prior restraint for the City's Spanish-speaking Hispanic employees.[5] The employees in *Maldonado* additionally sought recovery under disparate impact and disparate treatment theories under Title VII, raising a question as to whether an employer's policies related to speech can also constitute a discriminatory employment practice under other statutes.[6]

Blanket restrictions on speech, especially when combined with the threat of discipline or adverse action, remain unconstitutional even under the official duties test promulgated in *Garcetti v. Ceballos*.[7] For example, a policy restricting federal employees from giving public speeches in exchange for honoraria was determined to contravene the employee's First Amendment rights.[8] The court in *United States v. Nat'l Treasury* held the public's interest in hearing informed opinions of governmental employees as to the operations and policy of the governmental agencies for which the employees worked outweighed the government's interest in regulating that speech based on the possibility of an ethical abuse of the

[3] *Id*. at 568.
[4] Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).
[5] *Id*.
[6] *Id*.
[7] Garcetti v. Ceballos, 547 U.S. 410, 421-422 (2006).
[8] United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 477 (1995).

employee's position.[9] Under the "NTEU" test, where the government singles out expressive activity for regulation to address anticipated harms, the government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[10] As a result of the *Nat'l Treasury* holding, employers should examine media policies closely to narrowly tailor restrictive language and approve alternate means of expression, even when the speech is potentially critical of the employer.

On the other hand, a three-judge panel in *Moore v. City of Kilgore* determined a firefighter lacked standing to challenge the department's policy requiring employees to obtain pre-approval from the employee's chain of command before giving a media interview complaining of staffing levels within the department.[11] The court held that as the firefighter had not sought and been denied permission to provide an interview and instead was disciplined for disregarding the policy, the policy did not operate as a prior restraint to his speech.[12] The court also expressed doubt that the policy would be overturned under an overbreadth analysis, holding "a fire department must have the authority to sanction its workers for releasing confidential facts that will compromise ongoing investigations or business negotiations; for spreading malicious gossip about co-workers; for misrepresenting departmental positions; for lying; or for acting without permission as official spokespeople for the department."[13] But employers may be cautious in relying on the holding in *Moore* as expansive as the court also determined the City's interest in eliminating insubordination and controlling information did not justify its discipline of the employee for his statements made after an incident which resulted in the death of one firefighter and the injury of another.[14]

Relative to the overbreadth analysis, in *Trotter v. City of Dallas*, Magistrate Rutherford of the Northern District of Texas recently examined the social media policy of the Dallas Police Department in comparison to the unconstitutional policy from *Liverman v. City of Petersburg*, noting the court's holding that the City of Petersburg social media policy was so broad that it constituted a sweeping ban on critical speech.[15] In *Liverman*, the department's social media policy restricted negative comments criticizing internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department, and the Court held that the department regulated "officers' rights to speak on matters of public concern," and the "Department fail[ed] to satisfy its burden of demonstrating actual disruption to its mission... sufficient to justify such sweeping restrictions."[16] In her examination of the Dallas Police Department's Social Media policy, Magistrate Rutherford noted the similarity between the *Liverman* and DPD policies, but stopped short of making a

[9] *Id*.
[10] *Id*. at 475.
[11] Moore v. City of Kilgore, 877 F.2d 364 (5th Cir. 1989).
[12] *Id*. at 387.
[13] *Id*. at 392.
[14] Id. at 389.
[15] Trotter v. City of Dallas, Tex., 3:19-CV-1327-L-BT, 2020 WL 5260546, at *10 (N.D. Tex. Aug. 14, 2020), report and recommendation adopted, 3:19-CV-1327-L-BT, 2020 WL 5250548 (N.D. Tex. Sept. 2, 2020); Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016).
[16] *Liverman*, 844 F.3d at 407-09.

determination on the constitutionality of the policy as Officer Trotter's claim was determined to fail on other grounds. However, both wholesale prohibitions of speech and restrictions which regulate the speaker's content, regardless of the platform, are likely to raise an issue of whether the policy constitutes a prior restraint of free speech.

IV. Post-Speech Analysis: Retaliation

The other major line of cases for a First Amendment free speech claim involves post-speech actions—a retaliation claim. In short, a person making a retaliation claim argues the employer made a negative employment action against the employee (fired, demoted, suspended, etc.) in response to the employee's speech.

A public employee's First Amendment retaliation claim—derived from 42 U.S.C. § 1983—has four elements: (1) an adverse employment action; (2) speech involving a matter of public concern; (3) the employee's interest in commenting on matters of public concern outweighs the employer's interest in efficiency; and (4) the speech must have motivated the adverse employment action.[17]

Determining the second and third prongs of the retaliation analysis involves three considerations:

1) First, it must be determined whether the employee's speech is pursuant to his or her official duties.
2) Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern.
3) Third, if the speech is on a matter of public concern, the *Pickering* test must be applied.

Therefore, in addition to establishing that the public employee's speech is protectable under the First Amendment, which is certainly the more substantial challenge, the employee must also show two other elements: that there was an adverse employment action and that the public employee's speech caused the adverse action.

A. Is First Amendment Protection Available?

a. Is the Speech Made as a Public Employee or Private Citizen?

In the watershed case *Garcetti v. Ceballos*, the United States Supreme Court raised the bar for employee speech to garner First Amendment protection. The court held that speech by a government employee, even when addressing matters of public concern, is not protected by the First Amendment if it is made pursuant to the employee's official duties.[18] Leapfrogging the previous balancing standard under *Pickering*, the court stated, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any

[17] Serna v. City of San Antonio, 244 F.3d 479, 482 (5th Cir.2001); *see also* Anderson v. Valdez, 845 F.3d 580, 590 (5th Cir. 2016).
[18] *Garcetti*, 547 U.S. at 421-422 (2006)

liberties the employee might have enjoyed as a private citizen."[19] As a result of the Garcetti holding, courts have determined the official duties test is a threshold question which may subject a pleading to dismissal under Federal Rule of Civil Procedure 12(b)(6) for a failure to state a claim.[20] In determining whether speech flowed from an employee's official duties, both the Supreme Court and 5th Circuit have noted that the following factors are relevant but not dispositive: "whether a certain task is listed in a formal job description, whether the speech concerns the subject matter of employment, and whether the speech occurs inside the office.[21]

In many circumstances, the speech in question involves complaints about other employees, processes, or internal harassment or misconduct and an important delineation is made by courts here. Regarding complaints which travel through an employee's chain of command at the workplace about job duties—courts have identified that speech as made in the course of the job.[22] For example, the 5th Circuit considered a case where a Houston firefighter posted critical comments about the district's transfer policies on a private social media group for Houston firefighters.[23] The Court held that the post did not address a matter of public concern because the post was made in a private group for Houston firefighters, so the comment was only relevant to Houston fire department employees who might have been considering transferring, not the general public.[24] On the other hand, if the complaints are made outside of the workplace, whether or not they were *also* made in the workplace up the chain of command, then those external communications have been found to be made as a private citizen, not as a public employee.[25] Courts may also analyze speech made by employees by analyzing different parts of the speech. Speech from an employee may be differentiated by the recipient, form, content, or motivation, each of which would play a role in a First Amendment protection analysis. In a suit where an employee has several instances of speech in question, which may not be uniformly categorized as being within official capacity or as a private citizen—also known as "mixed" speech cases—the court may separately analyze each aspect of communications with multiple topics and recipients.[26] Although this approach provides flexibility for courts to analyze separate acts of speech, for an employer determining whether an employee's speech is subject to discipline, it can create complexity and uncertainty.

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[19] Id. at 421.
[20] Harrison v. Lilly, 20-50687, 2021 WL 1157277, at *4 (5th Cir. Mar. 25, 2021)
[21] *Id*. at 2 (citing *Garcetti*, 547 U.S. at 420-21, 424-25).
[22] *Davis*, 518 F.3d at 313 (5th Cir. 2008); *see also* Spiegla v. Hull, 481 F.3d 961, 966 (7th Cir. 2007) (correction officer's reports to assistant superintendent of the prison in which she worked regarding a possible security lapse which occurred at her assigned position at the main gate was part of her official responsibility as a correction officer to keep the prison secure.); Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir.2006) (university employee's internal report which alleged improprieties in her supervisor's handling of federal financial aid funds was made pursuant to her official employment responsibilities as a financial aid counselor.); Foraker v. Chaffinch, 501 F.3d 231 (3d Cir.2007) (instructors at Delaware State Police Firearms Training Unit were acting within their duties as employees by bringing health and safety concerns about the range up the chain of command and to the state auditor.).
[23] Dunbar v. Pena, 827 Fed. Appx. 419, 420 (5th Cir. 2020)(unpublished).
[24] *Id*. at 421.
[25] *Davis*, 518 F.3d at 313 (2008); *see also* Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006).
[26] *Davis*, 518 F.3d at 314 (2008).

The Supreme Court has delineated speech that is within the scope of an employee's duties from speech that concerns those duties.[27] The Court has found in *Garcetti* and *Lane* that the mere fact that a citizen's speech concerns information acquired by virtue of being a public employee does not automatically make that speech the speech of an employee.[28] The Court identified that speech by public employees on subject matter *related to* or *concerning* employment "holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[29] However, the Court has corrected lower courts in applying its *Garcetti* decision overbroadly: "in holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. The court overturned the 11th circuit in holding that a director's sworn testimony at a former program employee's corruption trial was citizen speech protected by the First Amendment.[30] The court stated the critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. [31]

Further, speech is made as a part of an employee's official duties when made as a part of the employee's responsibilities. Whether the employee performed his job incorrectly, in an unauthorized manner, or in contravention of the wishes of his superior does not convert his statement into protected citizen speech.[32] However, the speech of an employee who acts in an unauthorized manner may simply be considered insubordinate.

The below chart provides more examples of cases where the court found that the actions were made as part of the employees official public duties, or as a private citizen, and you'll see that the facts of each case are central to this analysis.

Official Public Duties
Supervising district attorney writes disposition memo to supervisors regarding serious misrepresentations in police affidavit to obtain search warrant.[33] SCOTUS held that 1A did not protect the DA's expressions in the memo, which were written pursuant to his official duties as an employee.[34]
Complaints about the university's inadequate response to employee's computer pornography investigation for the internal audit department, directed to president of

[27] *Lane*, 573 U.S. at 240 (2014); *Garcetti*, 547 U.S. at 421.
[28] *Lane*, 573 U.S. at 240; *Garcetti*, 547 U.S. at 421.
[29] *Lane*, 573 U.S. at 240; *see also* Pickering, 391 U.S. at 563 (1968)("teachers are… the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.")
[30] *Lane*, 573 U.S. at 228.
[31] *Lane*, 573 U.S. at 240.
[32] Nixon v. City of Houston, 511 F.3d 494, 496-97 (5th Cir. 2007).

[33] *Garcetti*, 547 U.S. at 410.
[34] *Id*.

university, and to immediate supervisor were made pursuant to employee's official duties as internal auditor for the university, rather than as a citizen.[35] However, compare this to other complaints this auditor made as a private citizen to the FBI and EEOC, below.
School athletic director who submitted internal memo to his principal accusing the school of athletic budget mismanagement engaged in unprotected employee speech, because his speech focused on his "daily operations," reflected "special knowledge" gleaned from his position, and was "part-and-parcel of his concerns" in running the school's athletic department.[36]
Licensing Director for the TABC who emailed findings on potential conflict of interest involving stock portfolio of TABC Chairman was speaking in her official capacity when she received the request for review via workplace email, her communications were premised on "special knowledge" gleaned from her position, and her email was sent up the chain of command (albeit indirectly).[37]
Court held a Judge was acting within scope of official responsibilities where she provided a journalist, and ultimately the public, with access to a courthouse tape showing an attack by a custodial defendant, who had smuggled a shank into a courtroom and assaulted the prosecutor with it, because the reporter viewed the footage on court equipment used by Judge and her staff to conduct court business and no one other than court employees had access to the video.[38]

Private Citizen
Complaints about excessive number and pay of university vice presidents made to university president and immediate supervisor were not made pursuant to employee's official duties and could be protected under 1A retaliation claim. These complaints did not relate to employee's specific job or the internal audit department for which the employee worked.[39]
Complaints by state university employee about the presence of possible child pornography on university computers directed to the FBI, and employee's complaints to the EEOC about racial discrimination at the university were not made pursuant to employee's official duties as internal auditor.[40]
"Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are

[35] *Davis*, 518 F.3d at 315.
[36] Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 690-91, 694 (5th Cir. 2007)(as summarized in Harrison v. Lilly, 20-50687, 2021 WL 1157277, at *2 (5th Cir. Mar. 25, 2021)).
[37] *Harrison*, 20-50687, 2021 WL 1157277, at *4 (5th Cir. Mar. 25, 2021).
[38] Aquilina v. Wrigglesworth, 298 F. Supp. 3d 1110, at 1115 (W.D. Mich. 2018), aff'd sub nom. Aquilina v. Wriggelsworth, 759 Fed. Appx. 340 (6th Cir. 2018)(unpublished)
[39] *Davis*, 518 F.3d at 315.
[40] *Id*. at 316.

distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee."[41]
Law clerk applicant for Texas state court judge who was denied the position alleged that his disciplinary complaint about judge spurred retaliation. The court recognized that all lawyers, even those that are public employees, have a duty to report malfeasance, therefore the complaint was not made pursuant to official duties as a public employee.[42]
Texas Lottery Commission systems analyst engaged in citizen speech where he emailed workplace employee discrimination complaints to Texas legislators because the communications were "not even indirectly related to his job" and he bypassed the "normal chain of command" by communicating directly to elected representatives.[43]

b. Does the speech touch on a matter of public concern?

If the speaker did not engage in the speech pursuant to official duties, then the speech must touch on a matter of public concern to be eligible for First Amendment protection.[44] A public employee speaks on a matter of public concern when the speech "can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[45] Statements criticizing a department head or supervisor have been determined not to be entitled to First Amendment protection when they address a "wholly intragovernmental concern."[46] In *Pickering*, a teacher's letter to a newspaper editor regarding the budget of the school for which he worked and critical of the school's revenue streams was held to be a matter of public concern.[47] And in *Lane*, the Court found that the content—corruption in a public program and misuse of state funds—and the form and context of the speech—sworn testimony in a judicial proceeding—certainly made the speech one on a matter of public concern.[48]

In making the "public concern" determination, courts analyze the content, form, and context of the speech in order to determine whether protections should apply.[49] The courts have derived the following factors from *Connick*, among others:

- whether the speech was merely an extension of an employment dispute;
- whether the speech was focused on "gather[ing] ammunition for another round of controversy" with the employee's superiors;

[41] *Lane*, 573 U.S. at 238-39.
[42] Anderson v. Valdez, 845 F.3d 580, 597-99 (5th Cir. 2016).
[43] Charles v. Grief, 522 F.3d 508, 514 (5th Cir. 2008).
[44] Connick v. Myers 461 U.S. 138 (1983).
[45] *Snyder*, 562 U.S. at 453.
[46] Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362-63 (5th Cir. 1986).
[47] *Pickering*, 391 U.S. 563 at 571.
[48] *Lane*, 573 U.S. at 241 (2014).
[49] *Id*. at 454; see also Graziosi v. City of Greenville Miss, 775 F.3d at 738 (5th Cir. 2015) (quoting *Connick*, 461 U.S. at 146).

- whether the speech occurred at work or on the speaker's own time and outside of the working areas of the office;
- whether the speech impeded the ability of the speaker or other employees to perform their duties;
- whether the employee sought to inform the public that the employer "was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases"; and
- whether the employee "[sought] to bring to light actual or potential wrongdoing or breach of public trust" on the part of superiors.[50]

Although these factors are not all inclusive standards against which statements must be judged, they illustrate the application of the "content-form-context" test required by *Pickering* and incorporated into Connick and its progeny.

In *Salge v. Edna Independent School Dist.*, the Fifth Circuit refined the *Connick* factors relative to "mixed speech" cases, meaning "a case in which an employee's speech contains elements of both personal and public concern."[51] Former school secretary Charlene Salge was terminated either for her age, or because of her responses to questions posed by a local journalist about the resignation of the principal of the high school and Salge's direct supervisor.[52] According to her employer, Salge was terminated for violating policies prohibiting employees from discussing confidential personnel matters and from contacting the media about school district news.[53] In determining that Salge was terminated in violation of her First Amendment rights, the 5th Circuit curated three principles which bear on whether the speech is on a matter of public concern:

(1) the speech "does not involve solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager's status as an arm of the government"[54];
(2) the speech need not be made before a public audience, but may relate to public concern if made against the backdrop of public debate[55]; and
(3) speech is not a matter of public concern if made solely "in furtherance of a personal employer-employee dispute" such as discussing personnel matters directly impacting a job or criticizing other employees' performance.[56]

c. <u>*Pickering* Balancing Test</u>

[50] Turner v. Perry, 278 S.W.3d 806, 815–16 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)(*citing Connick*, 461 U.S. at 149).
[51] Salge v. Edna Indep. Sch. Dist., 411 F.3d 178, 182 (5th Cir. 2005).

[52] *Id*.
[53] *Id*. at 183.
[54] *Salge*, 411 F.3d at 186-87 (5th Cir. 2005)(*citing* Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 366 (5th Cir.2000)(citing *Connick*, 461 U.S. at 147, 103 S.Ct. 1684)).
[55] *Salge*, 411 F.3d at 187 (*citing Kennedy*, 224 F.3d at 366-67).
[56] *Salge*, 411 F.3d at 187 (*citing Kennedy*, 224 F.3d at 372); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 n. 10 (5th Cir.1989).

Even if an employee's speech is found to touch on a matter of public concern, the employer's interest in maintaining order and efficiency may overcome that determination. Under this prong, courts ask, did the government have "an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer."[57] While courts have a duty to uphold the constitutional rights of a public employee, they must also promote public employers' "legitimate interests in the effective and efficient fulfillment of [their] responsibilities to the public," including "promoting efficiency and integrity in the discharge of official duties" and "maintaining proper discipline in public service."[58]

In other words, public employers should be able to function without being deterred by First Amendment challenges in the day-to-day operations of the government. While the *Pickering* test prioritizes operational necessity, courts recognize the substantial challenge in this established test which "requires [courts] to compare incomparable interests."[59]

In performing this balancing test, as under the *Connick* factors, courts consider multiple factors in order to have a fair analysis, such as the manner, time, place, and context of the employees expression.[60] Other considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, 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."[61]

For example, in *Lane*, the Court held that the employer had no governmental interest in the employee's testimony regarding another employee, such as it being false or erroneous, or that it disclosed sensitive, confidential, or privileged information—therefore *Pickering* weighed in favor of the employee.[62]

In 2020, when a 9-1-1 operator used racially-charged language on social media to discuss the results of the 2016 presidential election, the 6th Court of Appeals weighed *Pickering* in favor of the employer who terminated her.[63] The court found that the speech impaired the harmony of the terminated employee's co-workers, had a detrimental impact on close working relationships in her office, and detracted from the employer's mission, all factors in determining that the employer's interests outweighed the employee's.[64] However you'll see

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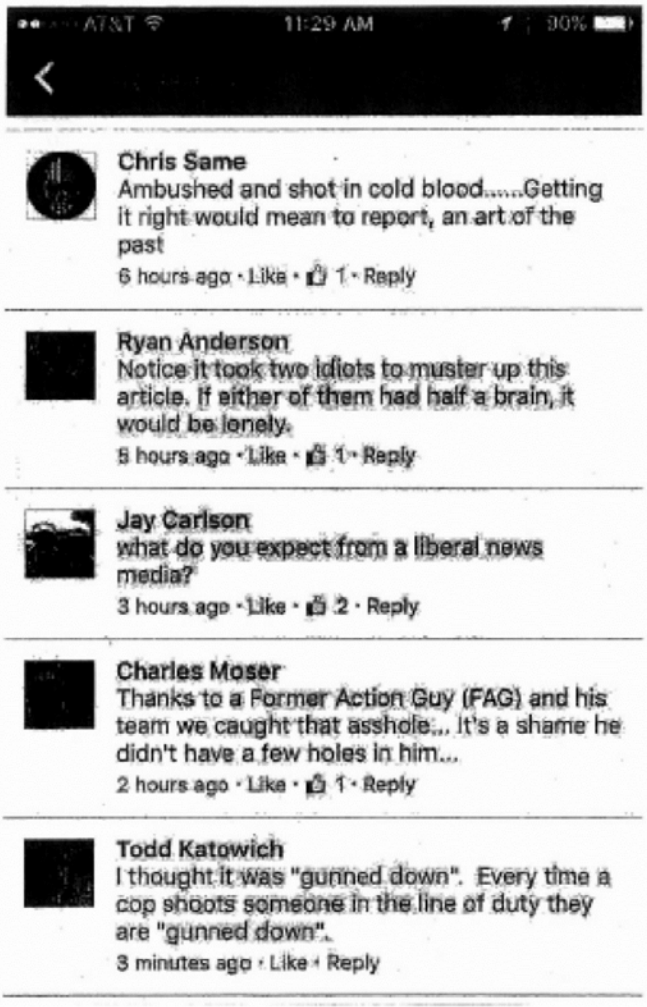
[57] *Lane*, 573 U.S. at 242 (*quoting Garcetti*, 547 U.S. at 418).
[58] *Lane*, 573 U.S. at 242 (*quoting Connick*, 462 U.S. at 150-151).
[59] Bennett v. Metro. Gov't of Nashville & Davidson Cty., 977 F.3d 530, 554 (6th Cir. 2020) (Murphy, J., concurring).
[60] Rankin v. McPherson, 483 U.S. 378, 388 (1987)(*citing Connick*, 461 U.S., at 150; Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 415, n. 4 (1979)).
[61] *Rankin*, 483 U.S. at 388 (*citing Pickering*, 391 U.S. at 570-573).
[62] *Lane*, 572 U.S. at 242.
[63] Bennett v. Metro. Govt. of Nashville & Davidson County, Tennessee, 977 F.3d 530 (6th Cir. 2020), cert. denied sub nom. Bennett v. Nashville, TN, 20-1078, 2021 WL 2519108 (U.S. June 21, 2021).
[64] *Id*.

also that the 6th Circuit took some liberties in its decision in declaring that the employee's speech did not "occupy the highest rung of public concern."[65]

Early this year, the 9th Circuit considered a case involving a Las Vegas police officer (Moser) posting about another officer being shot, and the assailant:[66]



Following his dismissal from the department, Moser sued the Las Vegas Metro Police Department for retaliation.[67] In a holding that sums up not only the tumultuous times we live in, but also the nuanced differences in enforcing the First Amendment on public employees, versus private employees, the Court said:

> "We have entrusted law enforcement with the solemn duty of using lawful force if necessary, and police officers thus must behave beyond reproach. We are also mindful that our society

[65] *Id*. at 538.
[66] Moser v. Las Vegas Metro. Police Dept., 984 F.3d 900 (9th Cir. 2021)
[67] *Id*. at 904.

> is in a self-reflective moment about excessive force and abuse of power by those who have taken an oath to protect all citizens equally and uphold the Constitution. But we live in a time when a careless comment can ruin reputations and crater careers that have been built over a lifetime because of the demand for swift justice, especially on social media. For private employers, it is their prerogative to take action against an intemperate tweet or a foolish Facebook comment. But when the government is the employer, it must abide by the First Amendment. In this case, we hold that the district court did not adequately address the objective meaning of Moser's Facebook comment in its *Pickering* analysis to weigh Moser's First Amendment right against the government's interest in workplace discipline. And because of the disputed facts here, the district court erred in granting summary judgment for Metro."[68]

And in an equally measured and passionate dissent, Judge Berzon stated:

> "I do not for a minute doubt that protecting the First Amendment right of public employees to contribute to the public dialogue on issues of public importance is of critical importance to our ongoing experiment in self-government. But we are living in a time when, driven by public concern, police departments nationwide are engaged in self-examination concerning how best to curb the use of excessive force by police officers as they carry out law enforcement's critical role. Tying the hands of those departments in making personnel decisions based on reasonable evaluations of those officers' ability to make measured judgments about the use of force—especially where, as here, the decision concerns an elite officer entrusted with high-caliber weapons and particularly dangerous assignments—can only stand in the way of these efforts. I would therefore affirm the district court's grant of summary judgment, and so dissent."[69]

These two excerpts from the 9th Circuit (with the Hon. Eugene E. Siler for the 6th Circuit sitting by designation) demonstrate just how crucial, informative, and delicate of a moment we live in due to social media, free speech, police action, and societal divide; so much so that a Facebook comment invokes conversation from federal judges about police use of force, and those same federal judges have a difficult time discerning how to apply one of the most fundamental of Constitutional protections.

[68] *Id*. at 911-12.
[69] *Id*. at 917-18.

In some instances, courts will want to consider the influence of the employee's role relative to the risk of disruption for the employer. In *Rankin*, the Court found that "where a public employee serves no confidential, policy making or public contact role, danger to an agency's successful function from an employee's private speech is minimal, for the purposes of determining whether an employee can be discharged for speech.[70] Ultimately, the Court found that the employer constable's interest in discharging the clerical employee—for expressing hope for the assassination of a President—did not outweigh the employee's First Amendment rights because "her duties were purely clerical and were limited solely to the civil process function of the Constable's office."[71] 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 by the Constable's office."[72] This case displays the importance of all facts in the *Pickering* balancing test, and the increasing amount of responsibility that public employees face when taking on more influential roles, in not only their actions, but their words.

Often, a First Amendment claim may arise where a public employee engages in symbolic or political speech, through the use of clothes, jewelry, or accessories. In a case that could only come out of the year 2020, several employees of a county port authority were directed to wear facemasks.[73] In light of societal concerns, some employees began wearing facemasks that displayed "Black Lives Matter" which were eventually banned by the port authority's amended policies.[74] Ultimately, the Pennsylvania District Court found that the port authority could not use the *Pickering* test to show that the impact of the facemasks was disruptive to the efficient operation of the governmental entity in such a way that outweighed the employees' free speech interests, therefore the ban on those facemasks violated the First Amendment.[75]

B. Adverse Employment Action

In addition to proving that speech is protected, an employee must also show he experienced an adverse employment action. Adverse employment actions have been held to include discharge, demotion, refusal to hire, refusal to promote, denial of benefits, transfer, suspension, or reprimands.[76] To qualify as an adverse employment action that supports a First Amendment retaliation claim, the act taken must alter an important condition of employment, result in the denial of an employment benefit, or have a negative consequence on the plaintiff's employment. [77] Reprimands must qualify as a formal reprimand, not simply mere criticism. [78] A pattern of social ostracism, tampering with an employee's gear and

[70] *Rankin*, 483 U.S. at 390.
[71] *Id*. at 392.
[72] *Id.*
[73] Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny County, 2:20-CV-1471-NR, 2021 WL 164315, at *1 (W.D. Pa. Jan. 19, 2021).
[74] *Id*. at 14.
[75] *Id*.
[76] Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000) (quoting Pierce v. Tex. Dep't of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir. 1994)).
[77] *Id*. at 159 & n. 16 (5th Cir. 2000).
[78] Colson v. Grohman, 174 F. 3d 498, 512 n.7 (5th Cir. 1999).

delayed responses have been held to be an adverse action and a retaliatory pattern when not countermanded by supervisors.[79]

C. **Did the employee's speech motivate the employer's adverse action?**

Finally, to prevail on a retaliation claim, an employee must show causation— namely, that the adverse action was motivated by the employee's speech. The timing of an adverse action relative to the employee's speech weighs heavily in this analysis. "Temporal proximity between the protected activity and the alleged adverse employment action" is sometimes enough to establish causation.[80]

In examining mixed motive questions, the Supreme Court has adopted a burden shifting approach under the "*Mt. Healthy*" standard.[81] Under *Mt. Healthy*, if an employee meets their burden of proof to show that protected conduct (including speech) was a "substantial factor" or "motivating" factor to the adverse action, then the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the same adverse action in absence of the protected conduct.[82]

As a result, retaliation analysis should take into consideration the timeline and factual connections surrounding the employee's discipline, speech, employment relationship and history, and other possible reasons for employee discipline or termination. These factors may bear not only on the *Pickering* analysis as to the government's interest in efficiency but are essential to demonstrate a non-discriminatory intent of the government as an employer.

V. Legislative Lookout

At the time of writing this paper, Governor Abbott added social media reform to his agenda for the year's Special Session. The Special Session would re-consider a bill where "a social media site of over 100 million users is prohibited from censoring a person or the content that person posts based on the person's viewpoint or on the viewpoint expressed in the post."[83] The bill would provide for civil suit against any site that violates the statute, either from the harmed party or the Texas Attorney General.[84]

The Senate State Affairs Committee's statement of intent for the bill reasoned that "social mediate sites are the modern public square, and while almost all speech is protected from governmental censorship, private digital spaces that host public speech present a novel challenge. Although these sites are privately owned, the nearly universal adoption of a few sites has created a need for protection from speech selection by social media companies."[85]

[79] Sharp v. City of Houston, 164 F. 3d 923 (5th Cir. 1999).
[80] See, Porter v. Houma Terrebonne Housing Authority Bd. of Com'rs, 810 F.3d 940, 948-9 (2015).
[81] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
[82] *Id*.
[83] S.B. 12, 1st C.S., State Affairs Committee Report, at 1 (March 15, 2021).
[84] *Id*.
[85] *Id*.

While this new bill does not necessarily bear specifically on the speech of a public employee, it's interesting and important to know that state governments are putting their hands on free speech.

VI. Conclusion

First Amendment issues as applied to public employees are evergreen issues that will hinge on the facts of each case. Due to the complexity of a First Amendment analysis, employers should understand the parameters of when an employee's speech is protected before instituting policies—which could result in a prior restraint claim—or taking disciplinary action in response to speech—which could result in a retaliation claim. While governmental employers have a significant interest in ensuring the efficient function of government, that interest is measured against the employee's assigned duties and freedom to share their own thoughts and opinions into the marketplace of ideas.