



MESSER ★ FORT ★ McDONALD

THE MUNICIPAL LAW FIRM

NORTH TEXAS | AUSTIN | ABILENE

# Can I Say That? Public Employee Speech Protections

# FIRST AMENDMENT TO THE U.S. CONSTITUTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



# WHY DOES THE FIRST AMENDMENT APPLY DIFFERENTLY TO PUBLIC EMPLOYEES?

“The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon the 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. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 568 (1968).

# FREE SPEECH CLAIMS AGAINST PUBLIC EMPLOYERS

Prior Restraint: *pre*-speech analysis of employer policies

Retaliation: *post*-speech analysis of adverse actions and governmental interest versus free speech interests

# PRIOR RESTRAINT: PRE-SPEECH ANALYSIS

A governmental entity's regulation of speech must:

1. Be narrowly tailored;
2. Be content-neutral;
3. Serve a significant governmental interest;
4. Allow for alternate means of communication or expression.

- Three judge panel determined no prior restraint occurred where fire department had policy requiring employees to obtain pre-approval from chain of command before giving media interviews.
- “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.”

## MOORE V. CITY OF KILGORE

-Moore v. City of Kilgore, 877 F.2d 364 (5th Cir. 1989).

## OVERBROAD POLICIES - *LIVERMAN*

City's social media policy was unconstitutionally overbroad, and a prior restraint to speech, where its social media policy restricted negative comments criticizing internal operations of the department, or specific conduct of supervisors and peers that impacts the public's perception of the department, constituting sweeping bans on speech.

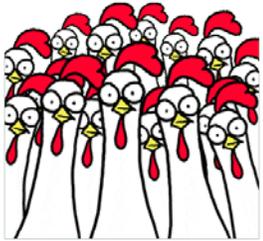
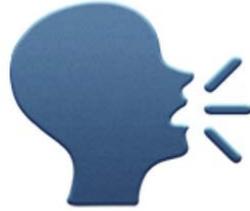
-Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016)

# RETALIATION: POST-SPEECH ANALYSIS

Employee argues that employer made an adverse employment action against the employee—such as termination, demotion, suspension—in response to employee’s speech.



Speaking as **private citizen**



Speaking on a matter of **public concern**

**Public employee's rights  
outweigh government  
interests in *Pickering***



THRESHOLD ISSUE:  
WHEN FIRST  
AMENDMENT  
PROTECTS PUBLIC  
EMPLOYEE

- 1) **Is the employee's speech made pursuant to his or her official duties, or as a private citizen. If official duties, then the speech is not protected by the First Amendment.**
- 2) **If as private citizen, was the speech made on a matter of public concern?**
- 3) **Finally, if speech made as private citizen, and on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees.**

**THRESHOLD ISSUE:  
WHEN FIRST  
AMENDMENT  
APPLIES TO PUBLIC  
EMPLOYEE**

# OFFICIAL DUTIES

- Internal auditor's complaints about university's response to investigation made to superiors\*

- Davis v. McKinney, 518 F.3d 304, 315 (5<sup>th</sup> Cir. 2008)

\*Same case, three different analyses of speech made

# PRIVATE CITIZEN

Complaints about excessive number of university VP's

AND

Complaints by internal auditor employee about the presence of possible child pornography on university computers directed to FBI, and employee's complaints to EEOC about racial discrimination\*

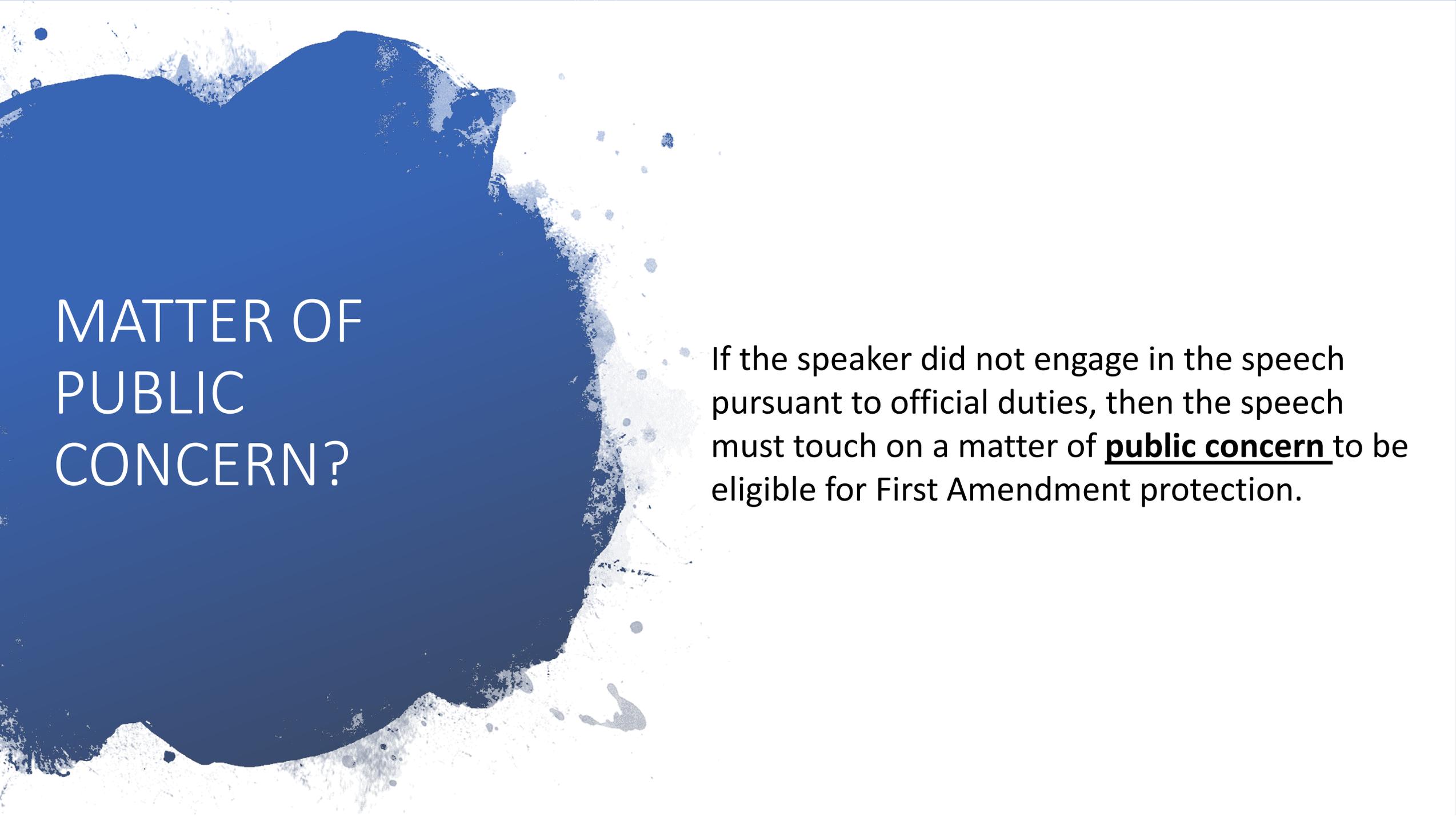
- Davis v. McKinney, 518 F.3d 304, 315 (5<sup>th</sup> Cir. 2008)

# OFFICIAL DUTIES

- School Athletic Director's memo re budget mismanagement reflected "special knowledge"
  - Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689 (5<sup>th</sup> Cir. 2007)
- TABC Licensing Director's email of findings on stock portfolio conflicts of interest
  - Harrison v. Lilly, 20-50687, 2021 WL 1157277, at \*4 (5<sup>th</sup> Cir. Mar. 25, 2021).

# PRIVATE CITIZEN

- Sworn testimony in judicial proceedings- any obligations as employee are independent from citizen's obligation to speak the truth
  - Lane v. Franks, 573 U.S. 228, 240 (2014)
- Law clerk's disciplinary complaint about judge because all lawyers have duty to report malfeasance
  - Charles v. Grief, 522 F.3d 508, 514 (5<sup>th</sup> Cir. 2008)



# 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.



# MATTER OF PUBLIC CONCERN?

## Factors:

- Whether the speech was merely an extension of an employment dispute
- Whether the speech occurred at work or on the speaker's own time and outside 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 bring to light actual or potential wrongdoing or breach of public trust on part of superiors

Need not be before a public audience

# *PICKERING* BALANCING TEST

Employee's  
right to free  
speech



Employer's interest  
in effective and  
efficient fulfillment  
of responsibilities to  
public

# PICKERING BALANCING TEST

Does the speech:

- Impair discipline by superiors or harmony among co-workers?
- Have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary?
- Impede the performance of the speaker's duties?
- Interfere with the regular operation of the enterprise?



# PICKERING BALANCING TEST

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.



Lane v. Franks, 573 U.S. 228, 240 (2014)

# PICKERING BALANCING TEST



9-1-1 operator used racially-charged language to discuss results of Presidential election. Court found that the speech impaired the harmony of the terminated employee's co-workers, had a detrimental impact on close working relationships with her office, and detracted from the employer's mission.

*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).

# PICKERING BALANCING TEST

Employer constable's interest in discharging the clerical employee (for expressing hope for the assassination of the President) were outweighed by employee's free speech rights because her duties were purely clerical and were limited solely to the civil process function of the Constable's office.



Rankin v. McPherson, 483 U.S. 378 (1987)

# ADVERSE EMPLOYMENT ACTION

Alters an important condition of employment, results in the denial of an employment benefit, or has a negative consequence on the plaintiff's employment.



Employee's  
Speech

CAUSATION

Adverse  
Employment  
Action

In a “mixed motives” case, where there may be multiple reasons for adverse action, courts may apply the *Mt. Healthy* standard: if employee meets burden of proof to show speech was substantial or motivating factor to adverse action, then burden shifts to employer to show that it would have taken the same action in absence of speech.

- *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

# LEGISLATIVE LOOKOUT

SB 12 has been called on by Governor Abbott as a bill to be examined in the Special Session which would prohibit a social media site of over 100 million users from censoring a person or the content that person posts based on the person's viewpoint or on the viewpoint expressed in the post. The bill provides for civil suit against any site that violates the statute by harmed party or Texas Attorney General.

## HELPFUL RESOURCES

Messer Fort & McDonald

[www.txmunicipallaw.com](http://www.txmunicipallaw.com)

(972-668-6400)

Texas Municipal League

[www.tml.org](http://www.tml.org)

(512-231-7400)

Texas Attorney General

<https://www.texasattorneygeneral.gov/open-government>

(877-OPEN TEX)



MESSER★FORT★McDONALD

THE MUNICIPAL LAW FIRM

NORTH TEXAS | AUSTIN | ABILENE