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The First Amendment and Public Sector Labor Relations

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I. Introduction

In general, the First Amendment prohibits public employers from imposing or applying labor policies in a manner that infringes on public employees' constitutionally protected right to engage in speech, to engage in associational activities, and to petition government.

The U.S. Supreme Court has determined that the First Amendment provides protections enforceable in federal court when public employees speak out regarding matters of public concern. The First Amendment has also been interpreted to protect the right of public employees to participate in labor union activities and to engage in other forms of associational activities. The First Amendment also restricts the hiring and firing of nonpolicymaking employees based on partisan political considerations. In addition, work rules imposing terms and conditions of employment that violate the constitutional rights of public employees can be challenged under the First Amendment.

Frequently, the First Amendment forms the legal basis for a federal court challenge to an adverse personnel action or a change in labor policy that, in the collective bargaining context, would be routinely determined and resolved through arbitration. As a practical matter, for most public employees without tenure protections or the statutory or administrative right to be represented by a collective bargaining agent, litigation in federal or state courts constitutes the primary forum for challenging disciplinary and other adverse actions imposed by public employers.

Supreme Court case law regarding free speech by members of the public recognizes that a principal purpose of free speech "under our system of government is to invite dispute. It may indeed best serve its high purpose when [the speech] induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[1] In contrast, in the context of public employment, the First

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1. Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

Amendment has been interpreted far more narrowly. In balancing the interest of a public employee to engage in First Amendment activities against the interest of the public employer to provide governmental services, courts are reluctant to find First Amendment protections for public employee speech when the public employer perceives, in a reasonable manner, that the speech has the potential for causing disruption in the workplace.

II. Public Employee Speech and Expressive Conduct

The First Amendment has been held to protect both speech and expressive conduct by public employees.[2] The applicable test to determine whether expressive conduct is entitled to constitutional protection is whether the activity is "sufficiently imbued with elements of communication."[3] In *Zalewska,* the Second Circuit affirmed the dismissal of a First Amendment challenge to a county policy prohibiting van drivers from wearing skirts.[4] In rejecting the First Amendment claim, the Second Circuit concluded that wearing a skirt did not convey a specific particularized message or that such a purported message would be understood by those observing the employee wearing the skirt.[5]

Recently, the First Circuit expressed doubt whether blowing a truck horn at the conclusion of a union demonstration outside of city hall can constitute expressive conduct protected by the First Amendment.[6] Another circuit has held that wearing a deputy sheriff uniform during off-duty work does not involve expressive conduct protected by the First Amendment.[7]

A. *The* Pickering *Balancing Test*

In determining whether a public employer's adverse action violates the right of a public employee to engage in speech protected by the First Amendment, courts must balance the interest of the employee to comment on matters of public concern against the interest of the public employer in promoting the efficiency of government services performed through its employees.[8]

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2. *See* Zalewska v. County of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003); Lunow v. City of Oklahoma City, 61 Fed. Appx. 598, 603 (10th Cir. 2003). *See also Johnson,* 491 U.S. at 408–09 (regarding the scope of expressive conduct protected generally by the First Amendment).

3. *Zalewska,* 316 F.3d at 319 (quoting *Johnson,* 491 U.S. at 404).

4. *Id.* at 321.

5. *Id.* at 319–20.

6. Meaney v. Dever, 326 F.3d 283, 288 (1st Cir. 2003).

7. Shelby County Deputy Sheriffs' Ass'n v. Gilless, 67 Fed. Appx. 860, 862–63 (6th Cir. 2003).

8. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* United States v. Nat'l Treas. Employees Union, 513 U.S. 454, 465–66 (1995); Waters v. Churchill, 511 U.S. 661, 668 (1994); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979); Perry v. Sindermann, 408 U.S. 593, 598 (1972).

In *Pickering* and its progeny, the Supreme Court has recognized that public employers "may impose restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."[9] Indeed, as Justice O'Connor noted in the plurality opinion in *Waters,* "most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."[10]

Federal courts apply First Amendment protections only to speech by public employees that involves matters of public concern. Otherwise, absent statutory or collective bargaining protection, a public employee is treated, for constitutional purposes, as an employee at will:

> When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissal from government service which violate[s] no fixed tenure or applicable statute or regulation is not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.[11]

There is historical precedent for analyzing First Amendment protections based on an employee's status at will. In fact, Oliver Wendell Holmes' often quoted 1892 dictum that a policeman may have a constitutional right to talk politics but does not have a constitutional right to be a policeman was followed by Holmes' reiteration of the antiquated common law doctrine: "There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."[12]

Ironically, private sector employees in many states have greater legal rights than their public sector counterparts. Under the National Labor Relations Act, one of the fundamental rights gained by private sector employees is the right to engage in concerted activity by communicating with other employees regarding working conditions.[13] But public employee speech that is limited to working conditions, and does

9. *Nat'l Treas. Employees Union,* 513 U.S. at 465.
10. 511 U.S. at 672.
11. *Connick,* 461 U.S. at 146 (citations omitted).
12. McAuliffe v. Mayor and Bd. of Aldermen of New Bedford, 29 N.E. 517, 517–18 (1892).
13. *See* American Red Cross Blood Servs. Johnstown Region, 322 N.L.R.B. 590, 594, 153 L.R.R.M. (BNA) 1287, 1287 (1996); Guardian Indus. Corp., 319 N.L.R.B. 542, 548–49, 150 L.R.R.M. (BNA) 1280, 1280 (1995); Globe Sec. Sys., 301 N.L.R.B. 1219, 1223, 137 L.R.R.M. (BNA) 1259, 1259 (1991).

not touch upon matters of public concern, is virtually unprotected under the First Amendment.

B. *Speech Touching on a Matter of Public Concern*

A threshold issue under the *Pickering* balancing test is whether the public employee speech touches upon a matter of public concern.[14] Courts will only grant constitutional protection to speech by a public employee that meets this "public concern" test. Where employee speech focuses on workplace issues exclusively, the speech will be deemed unprotected under the First Amendment. Many of the cases below turn on the application of the "public concern" test.

In *Connick,* the majority emphasized that the public concern requirement is aimed primarily at limiting federal court subject matter jurisdiction with regard to public employee claims under the First Amendment:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, *a federal court* is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[15]

The *Connick* majority expressly stated in *dicta* that public employee speech regarding other matters, such as working conditions, is not beyond First Amendment protections:

> We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.[16]

Nevertheless, many state courts have misinterpreted *Pickering* and *Connick* by concluding that public employee speech that does not touch upon matters of public concern is unprotected under the First Amendment.[17]

Unlike the public school teacher in *Pickering,* who identified himself in his letter to the editor "as a citizen, taxpayer and voter, not as a teacher," public employees rarely draw fine distinctions between their roles as citizens and employees when engaging in speech activity, making it difficult for the courts to determine whether the speech is pro-

14. *See Connick,* 461 U.S. at 146; Sheppard v. Beerman, 18 F.3d 147, 151 (2d Cir. 1994); Bieluch v. Sullivan, 999 F.2d 666, 670 (2d Cir. 1993).

15. *Connick,* 461 U.S. at 147 (emphasis added).

16. *Id.* (citations omitted).

17. *See* Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112 (2000); Zaretsky v. New York City Health and Hosps. Corp., 638 N.E.2d 986 (1994); Hawkins v. Dep't of Pub. Safety and Corr. Servs., 602 A.2d 712 (1992); Chico Police Officers' Ass'n v. City of Chico, 283 Cal. Rptr. 610 (Cal. App. 3d Dist. 1991).

tected or unprotected.[18] As the Sixth Circuit recently noted, "[n]early anything a public employee says about the government entity might appear to be a matter of public concern."[19] Nevertheless, the Supreme Court has cautioned that "[to] presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[20]

When courts are confronted with facts involving "mixed questions of private and public concern," a determination must be made as to which concern, public or private, predominates.[21] Frequently, such distinctions constitute a "close call."[22] In fact, a review of the letter in *Pickering* reveals that it contained elements of both private and public concerns.[23]

In determining whether employee speech addresses a matter of public concern, the courts will consider "the content, form, and context of a given statement, as revealed by the whole record."[24] An employee's motivation, in addition to his or her choice of forum, will be considered.[25] The importance of the speaker's forum under the public concern test was highlighted in a recent decision by the Ninth Circuit. In *Roe v. City of San Diego,* the Ninth Circuit held that a sexually explicit video sold by a police officer on the Internet constituted constitutionally protected speech.[26] In rendering its decision, the majority concluded that the video, which included the officer engaging in a sex act, satisfied the public concern requirement because it was filmed and distributed off-duty and it did not include any content that could be construed as work related.

The fact that speech activity is conducted in private does not render it unprotected under the First Amendment.[27] Nevertheless, the private nature of the activity may impact a court's application of the balance between the interests of the public employee and employer.[28] Although subjective intent is relevant in determining whether the speech touches

18. *Pickering,* 391 U.S. at 578; *see also* Gragg v. Kentucky Cabinet for Workforce Dev., 289 F.3d 958, 966 (6th Cir. 2002); Sharp v. Lindsey, 285 F.3d 479, 484–85 (6th Cir. 2002).

19. Banks v. Wolfe County Bd. of Educ., 330 F.3d 888, 893 (6th Cir. 2003). *See also* Branton v. City of Dallas, 272 F.3d 730, 740 (5th Cir. 2001) ("the nature of [public] employment does not exclude the possibility that an issue of private concern to the employee may also be an issue of concern to the public").

20. *Connick,* 461 U.S. at 149.

21. Bonnell v. Lorenzo, 241 F.3d 800, 812 (6th Cir. 2001).

22. Pool v. Vanrheen, 297 F.3d 899, 907 (9th Cir. 2002).

23. *Pickering,* 391 U.S. 575–78.

24. *Connick,* 461 U.S. at 147–48.

25. *See* Lewis v. Cowen, 165 F.3d 154, 163–64 (2d Cir. 1999); Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994); Barkoo v. Melby, 901 F.2d 613, 618 (7th Cir. 1990).

26. 356 F.3d 1108, 1119–1120 (9th Cir. 2004).

27. *Givhan,* 439 U.S. at 414; Burley v. Wyoming Dep't. of Family Servs., 66 Fed. Appx. 763, 765 (10th Cir. 2003).

28. *Givhan,* 439 U.S. at 415, n.4.

upon an issue of public concern, it is not determinative.[29] Similarly, speaking publicly on a topic that may be of public importance does not guarantee that the speech will be found to address a matter of public concern.[30]

1. Speech Relating to Working Conditions and Union-Related Speech

a. SPEECH ON WORKING CONDITIONS

In *Connick,* the Supreme Court ruled that survey questions distributed to coworkers relating to the employer's transfer policy, office morale, the need for a grievance committee, and the level of confidence in supervisors were unprotected under the First Amendment because they did not meet the "public concern" test.[31] Similarly, the Second Circuit ruled that an anonymous letter sent to a radio station by a state court judge's secretary, signed "overheated worker" and seeking to correct an earlier news story regarding air conditioning in a public building that housed courtrooms and chambers, was unprotected speech.[32] The letter was found to fail the test for protected speech, although the appellate record included earlier newspaper articles in which state court judges were quoted discussing the condition of the same building where their chambers were located.[33]

When the content and context of the speech involves the employee's job performance and is made at the workplace during a personal dispute with a supervisor, the speech will not be found to be protected under the First Amendment.[34]

In *Snider v. Belvidere Township,* a female employee's public complaint regarding salary disparities between employees did not meet the constitutional test.[35] However, the Seventh Circuit distinguished the facts of the case from a situation where an employee makes a complaint about a sex-based wage disparity.[36] Also, complaints of harassment by a county employee regarding her supervisor's treatment toward her did not satisfy the public concern test because the complaints related to the supervisor's personal hostility toward the employee rather than the impact on the morale of the office as a whole.[37]

The circuit panel in *Gonzalez v. City of Chicago* ruled that comments about police corruption contained in reports prepared by a police

29. Perry v. McGinnis, 209 F.3d 597, 608–09 (6th Cir. 2000); *Banks,* 303 F.3d at 894.
30. Kokkinis v. Ivkovich, 185 F.3d 840, 844 (7th Cir. 1999).
31. 461 U.S. at 147–48.
32. Luck v. Mazzone, 52 F.3d 475, 477 (2d Cir. 1995).
33. *Id.*
34. *Gragg,* 289 F.3d at 966–67; Wilkins v. Jakeway, 44 Fed. Appx. 724, 730 (6th Cir. 2002).
35. 216 F.3d 616, 620 (7th Cir. 2000).
36. *Id.*
37. Wallscetti v. Fox, 258 F.3d 662, 667 (7th Cir. 2001).

investigator were not constitutionally protected because the reports were required as part of the investigator's job responsibilities.[38] Therefore, even though the employee may have been motivated as a good citizen to accept employment as a police investigator, the statements were unprotected because they were made in his employment capacity.[39] In contrast, the Sixth Circuit recently ruled that information contained in a use of force report filed by a police officer regarding police brutality by another officer failed the public concern test, although the report was prepared as part of the police officer's official job duties.[40]

Internal complaints made by a corrections officer that his supervisor was having an affair with a subordinate, as well as favoritism within a correctional facility, did not meet the public concern requirement.[41] In addition, the Sixth Circuit concluded that internal concerns expressed regarding the assistance provided to correctional officers in emergency situations constitutes unprotected speech because the content did not make an allegation that ineffective assistance may lead to the escape of prisoners and harm the public.[42]

Advocacy by a public employee to his employer's representatives in support of a coworker's right to representation during a disciplinary interrogation has been found insufficient under the test for protected speech.[43] The employee had attended the interrogation meeting on behalf of the coworker during nonwork hours and was permitted to attend as a nonparticipating observer.[44] Subsequently, the issue of legal representation for the coworker resulted in a heated argument that led to disciplinary action.[45]

Finally, The Ninth Circuit recently held that a public employee's protest regarding the layoff of other physicians at a public hospital was protected because it questioned the allocation of budgetary resources that impact hospital patient care.[46]

B. Union-Related Speech

The First Amendment has been interpreted to provide protections for public sector union organizing and associational activities. Public

38. 239 F.3d 939, 941 (7th Cir. 2001).

39. *Id. See also* Koch v. City of Hutchinson, 847 F.2d 1436, 1438–39 (10th Cir. 1988) (employee's fire investigation report and conclusion were found unprotected because they were not motivated by a desire to reveal governmental improprieties).

40. Taylor v. Keith, 338 F.3d 639, 645–46 (6th Cir. 2003).

41. Albert v. Mitchell, 42 Fed. Appx. 691, 693 (6th Cir. 2002) (distinguishing Belk v. City of Eldon, 228 F.3d 872 (8th Cir. 2000), where disclosure of an extramarital affair touched upon a matter of public concern because the paramour received extra financial benefits).

42. *Albert,* 42 Fed. Appx. at 693–94.

43. Fiesel v. Cherry, 294 F.3d 664, 667–68 (5th Cir. 2002).

44. *Id.* at 666.

45. *Id.*

46. Ulrich v. City and County of San Francisco, 308 F.3d 968, 979 (9th Cir. 2003).

employees who advocate on behalf of a labor union or association have been found to have certain constitutional protections under the First Amendment.[47] Speech that urges workers to unionize "certainly falls within the category of expression" protected by the First Amendment.[48]

The Supreme Court has determined that the content of a telephone conversation between a union negotiator and a public sector union president regarding the status of protracted collective bargaining was unquestionably a matter of public concern.[49] During that private conversation, the union representatives discussed the need for the union to be more forceful at negotiations as well as the timing of a proposed strike.[50] Similarly, the Ninth Circuit has held that a public sector labor representative's speech relating to the salary levels of the city's police force and the relationship between the police union and elected city officials meets the constitutional test.[51] However, the Second Circuit recently declined ruling on whether union membership, by itself, satisfies the "public concern" standard.[52]

In *Clue v. Johnson,* the Second Circuit held that public employee speech in the context of an intra-union dispute meets the test for protection when the speech discusses an employer's labor policy and the proper role of the union in seeking to change those policies.[53] The circuit panel emphasized that speech limited to union factional disputes relating to internal union affairs falls into a "gray area that may or may not state a public concern" under *Pickering.*[54]

While public sector union-related speech is sometimes held constitutionally protected, such speech is not viewed by many courts as being inherently a matter of public concern.[55] For example, the allocation of aide time among teachers, raised by a union representative, was found constitutionally unprotected.[56] In *Kuchenreuther v. City of Milwaukee,* the Seventh Circuit concluded that a note placed by a shop steward on the union's bulletin board stating her opinion about the employer's request for charitable contributions did not satisfy the public concern

47. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 463, 101 L.R.R.M. (BNA) 2091 (1979) (per curiam).

48. American Postal Workers Union v. U.S. Postal Serv., 830 F.2d 294, 301, 126 L.R.R.M. (BNA) 2506 (D.C. Cir. 1987). *See also* Gregorich v. Lund, 54 F.3d 410, 416, 149 L.R.R.M. (BNA) 2278 (7th Cir. 1995) (union organizing efforts touched upon matters of public concern because they were aimed at seeking to change the employer's leave policy that went beyond the employee's self-interest); Hanover Township Fed'n of Teachers, Local 1954 v. Hanover Cmty. Sch. Corp., 457 F.2d 456, 460, 79 L.R.R.M. (BNA) 2299 (7th Cir. 1972).

49. Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

50. *Id.* at 518–19.

51. McKinley v. Eloy, 705 F.2d 1110, 1113–14 (9th Cir. 1983).

52. *See* Cobb v. Pozzi, 352 F.3d 79 (2d Cir. 2003).

53. 179 F.3d 57, 61, 161 L.R.R.M. (BNA) 2596 (2d Cir. 1999).

54. *Id.*

55. Boals v. Gray, 775 F.2d 686, 692–93, 120 L.R.R.M. (BNA) 2913 (6th Cir. 1985).

56. Saye v. St. Vrain Valley Sch. Dist., 785 F.2d 862, 866 (10th Cir. 1986).

requirement.[57] In reaching its holding, the Seventh Circuit cited to the shop steward's articulated motive of "voicing [her] opinion."[58]

Repeatedly blowing a truck's air horn by an off-duty public employee at the tail end of a union demonstration outside of city hall was deemed by the First Circuit as failing the test for protected speech.[59] In arriving at its determination, the First Circuit relied heavily on the city's conclusions, reached during the course of the disciplinary process, that the employee and union were motivated by personal animus toward the mayor.[60] The circuit panel accepted the city's conclusions although the disciplinary action was subsequently overturned by the civil service commission, which ruled that the employee had not caused a public disturbance and that the city lacked just cause to discipline.[61]

In contrast, a contract grievance under a collective bargaining agreement can constitute protected speech under the First Amendment.[62] In order for a union grievance to receive First Amendment protections, the content of the grievance must address a matter of public concern.[63]

2. Speech Relating to Workplace Discrimination

In general, public employee speech relating to issues of employment discrimination may be found by courts to touch upon a matter of public concern. For example, assertions of race discrimination by a public sector employer satisfied the test because it involved information that would enable the community to make informed decisions regarding governmental operation.[64] Similarly, complaints by police officers to another officer regarding racial and sexual equality issues were found to meet the constitutional test.[65] Allegations of race discrimination within a law enforcement agency have been described as a matter of "serious public import."[66]

Some circuit panels have ruled that only public employee speech relating to a systemic discrimination issue, rather than a particular employee's personal situation, is protected by the First Amendment.[67]

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57. 221 F.3d 967, 974 (7th Cir. 2000).
58. *Id.*
59. *Meaney,* 326 F.3d at 289–90.
60. *Id.* at 288–89.
61. *Id.* at 286.
62. *See Givhan,* 439 U.S. at 414.
63. Roberts v. Van Buren Pub. Schs., 773 F.2d 949, 955–57, 120 L.R.R.M. (BNA) 2377 (8th Cir. 1985) (finding no First Amendment protection for grievances).
64. *Tao,* 27 F.3d at 640.
65. Cochran v. City of Los Angeles, 222 F.3d 1195, 1200–01 (9th Cir. 2000).
66. Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir. 1996). *See also* Wilson v. UT Health Ctr., 973 F.2d 1263, 1269–70 (5th Cir. 1992) (holding reports of sexual harassment are matters of public concern).
67. *See* Brown-Scott v. Hartford Bd. of Educ., 51 Fed. Appx. 70, 71 (2d Cir. 2002); Bennett v. Washington County, 2000 U.S. App. LEXIS 5229, at *3 (9th Cir. Mar. 24, 2000); Yatvin v. Madison Metro. Sch. Dist., 840 F.2d 412, 419–20 (7th Cir. 1988).

Therefore, filing an administrative discrimination charge or a Title VII lawsuit seeking remedies only for personal harm may not be viewed as satisfying the constitutional standard.[68] Allegations of workplace harassment constituting nothing more than complaints about an employee's working conditions have been found to be unprotected.[69] Even a police officer's statements during a television news interview regarding another officer's sex discrimination lawsuit did not satisfy the test because the comments "simply expressed the plaintiff's personal opinion as to the Chief's vindictiveness."[70]

Statements made concerning a public employer's failure to comply with an affirmative action policy have been held to touch upon a matter of public concern.[71] The First Circuit recently reinstated a free speech claim by a public employee who claimed she had been retaliated against for a memorandum sent on behalf of a caucus of minority faculty and staff members of color seeking a meeting with the university president to express their concerns regarding racial diversity and affirmative action.[72] Although the memorandum did not express the specific concerns to be discussed, the circuit panel concluded that the context was sufficiently clear to draw a reasonable inference that the memorandum related to an issue of public concern: recent changes in the university's diversity program.[73]

A news release issued by a firefighter alleging that the fire chief favored gays and lesbians and was lenient in disciplining female firefighters met the public concern requirement.[74] Similarly, a protest by public employees to a mandatory training program on gay and lesbian issues met the test for protected speech because it related to the employer's handling of a social issue.[75]

3. Speech Regarding Public Health and Safety

Public employee speech relating to public safety has been found to constitute "quintessential matters of 'public concern.'"[76] For example, a police chief's communication with the mayor about increasing the budget of the police department in order to improve the level of police protection constituted a matter of public concern.[77]

68. *See Brown-Scott,* 51 Fed. Appx. at 71; Badia v. City of Miami, 133 F.3d 1443, 1446 (11th Cir. 1998); *but see* Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) ("Appellant's filing of an EEOC charge and a civil rights lawsuit are activities protected by the first amendment."); *Yatvin,* 840 F.2d at 419–20.

69. *See* Tang v. Dep't. of Elderly Affairs, 163 F.3d 7, 10–13 (1st Cir. 1998).

70. *Kokkinis,* 185 F.3d at 844.

71. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 584 (6th Cir. 2000).

72. Nethersole v. Bulger, 287 F.3d 15, 17–18 (1st Cir. 2002).

73. *Id.* at 18 n.5.

74. Greer v. Amesqua, 212 F.3d 358, 371 (7th Cir. 2000).

75. Altman v. Minnesota Dep't of Corr., 251 F.3d 1199, 1202 (8th Cir. 2001).

76. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 353 (4th Cir. 2000).

77. Key v. Rutherford, 645 F.2d 880, 884, 107 L.R.R.M. (BNA) 2321 (10th Cir. 1981).

In *Myers v. Hasara,* the Seventh Circuit panel concluded that an inspector's statements to a mall manager regarding a market violating local laws were of sufficient public concern.[78] In reaching its holding, the court noted: "It is important to good government that public employees be free to expose misdeeds and illegality in their departments. Protecting such employees from unhappy government officials lies at the heart of the *Pickering* cases, and at the core of the First Amendment."[79] Similarly, disclosure to public officials regarding improper procedures being utilized by a municipality regarding building permits met the constitutional test because it related to public safety.[80]

The Tenth Circuit held that a private conversation between a firefighter and a member of the city council regarding the imminent purchase of a new fire truck satisfied the public concern requirement because it may impact public safety.[81]

4. Speech Discussing Misuse of Public Funds, Mismanagement, and Corruption

Public employee complaints regarding financial mismanagement of public funds will generally be constitutionally protected.[82] Allegations of official misconduct are considered to be of the highest order of First Amendment protected concerns.[83] Such complaints or allegations will be considered to address matters of public concern even if they have personal pecuniary ramifications for the employee.[84]

Allegations to an investigatory agency regarding alleged theft of money by a police chief met the constitutional test.[85] A police officer's efforts to bring to light exculpatory information relating to certain homicides met the public concern requirement because the officer was motivated by his desire to expose his employer's malfeasance.[86]

Cooperation with a state investigation regarding fraudulent billing meets the standard for protected speech.[87] A letter sent to a governor alleging that the state tax department was granting illegal tax

78. 226 F.3d 821, 826 (7th Cir. 2000).
79. *Id.*
80. Hoover v. Radabaugh, 307 F.3d 460, 466 (6th Cir. 2002).
81. Belcher v. City of McAlester, 324 F.3d 1203, 1207–08 (10th Cir. 2003). *See also* Edwards v. City of Goldsboro, 178 F.3d 231, 247 (4th Cir. 1999) (speech regarding proper handling of firearms affected public safety); Lee v. Nicholl, 197 F.3d 1291, 1294–96 (10th Cir. 1999) (memoranda regarding traffic safety at a particular intersection); Kincade v. City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995) (statements concerning potential danger to community's citizens).
82. *See* Gorman-Bakos v. Cornell Coop. Extension of Schenectady County, 252 F.3d 545, 554 n.4 (2d Cir. 2001); Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 747 (9th Cir. 2001); Vasbinder v. Scott, 976 F.2d 118, 119–20 (2d Cir. 1992).
83. Barnard v. Jackson County, 43 F.3d 1218, 1225 (8th Cir. 1995).
84. *See Kincade,* 64 F.3d at 396.
85. Stanley v. City of Dalton, 219 F.3d 1280, 1288 (11th Cir. 2000).
86. Dill v. City of Edmond, 155 F.3d 1193, 1202 (10th Cir. 1998).
87. Marohnic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986).

abatements and that political influence was negatively impacting the agency was found to satisfy the public concern standard.[88]

However, speech relating to public funds will not always be protected under this test. In *Bradshaw v. Pittsburg Independent School District,* a principal's letter criticizing the board of trustees' failure to defend her against allegations of misuse of public funds was determined to be unprotected under the First Amendment.[89] Similarly, a statement by a public employee to another public employee from another state agency regarding the funding status of a particular program was not sufficient to satisfy the test.[90]

Internal reports regarding financial mismanagement and corruption may be found to touch upon a matter of public concern. A report that discusses the proper administration of state facilities for the incarceration of juveniles met the test for protected speech.[91] An internal police memorandum prepared in the context of a criminal investigation containing information regarding alleged criminal conduct by an elected official's relative also satisfied the test.[92] Even private accusations of misconduct by a law clerk to a state court judge in chambers can constitute speech concerning a matter of public concern.[93]

5. Speech Related to Judicial or Administrative Proceedings

The Third Circuit deems testimony in court, whether voluntary or compelled by subpoena, as protected under the public concern test.[94] In *Meyers v. Nebraska Health and Human Services,* the Eighth Circuit concluded that testimony given by a caseworker regarding the placement of two brothers in foster care touched upon a matter of public concern.[95] During her testimony, the employee testified to the position of her agency regarding the placement and acknowledged her differing view regarding appropriate placement of the children in response to the judge's question.[96]

In *Lewis,* the Second Circuit panel held that the refusal by a policymaker to advocate in support of changes in a program to a governmental body satisfied the test.[97] Statements made by a police internal affairs officer to an assistant city manager regarding her perception of dishonest nonsworn testimony by another police officer during a dis-

88. Prager v. LaFaver, 180 F.3d 1185, 1190–91 (10th Cir. 1999).
89. 207 F.3d 814, 816–18 (5th Cir. 2000).
90. Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001).
91. Hale v. Mann, 219 F.3d 61, 71 (2d Cir. 2000).
92. Delgado v. Jones, 282 F.3d 511, 517–18 (7th Cir. 2002).
93. *See Sheppard,* 18 F.3d at 151.
94. Swartzwelder v. McNeilly, 297 F.3d 228, 238 (3d Cir. 2002); Green v. Philadelphia Housing Auth., 105 F.3d 882, 886–87 (3d Cir. 1997); Pro v. Donatucci, 81 F.3d 1283, 1290–91 (3d Cir. 1996).
95. 324 F.3d 655, 659 (8th Cir. 2003).
96. *Id.* at 657–58.
97. 165 F.3d at 164.

ciplinary hearing were also held to be constitutionally protected.[98] Detrimental testimony during a trial in a lawsuit between a former coworker and a state agency was also found to be protected.[99]

However, in *Padilla v. South Harrison R-II School District,* the court held that a schoolteacher's testimony setting forth his opinion about the appropriateness of a sexual relationship between a teacher and a minor did not satisfy the public concern requirement.[100] In addition, testimony given by an employee during a nonpublic disciplinary hearing against her former supervisor did not meet the constitutional test because it was aimed at supporting a grievance about the supervisor's misconduct.[101]

Some circuits have concluded that the mere commencement of a lawsuit by a public employee is not protected speech unless the content of the lawsuit involves a matter of public concern.[102] A lawsuit alleging retaliation for the filing of a Fair Labor Standards Act (FLSA) wage claim was dismissed on the grounds that the FLSA lawsuit did not touch upon a matter of public concern.[103] The Tenth Circuit recently held that a state lawsuit filed by an art teacher challenging his termination, as well as his testimony regarding retaliation over the discovery of pornography on school premises, met the test for constitutional protection because the lawsuit and subsequent testimony resulted in additional public debate and news coverage regarding the issue of pornography.[104]

C. *Applications of the* Pickering *Balancing Test*

After a plaintiff has established that the speech or conduct at issue touches upon an issue of public concern, the court will then balance the right of the employee to comment on the issue with the employer's duty to provide efficient governmental services.[105]

In *Waters,* the plurality concluded that when applying *Pickering,* the courts should consider what the employer reasonably believed to be the statements or conduct of the employee that formed the basis for the adverse personnel action.[106] Under *Waters,* if the employer is unsure of the employee's specific statements or conduct, it must conduct a reasonable investigation, prior to imposing discipline, to determine whether its interests in performing its official responsibilities outweigh the employee's interest in free speech.[107]

98. *Branton,* 272 F.3d at 740.
99. Hudson v. Norris, 227 F.3d 1047, 1049–50 (11th Cir. 2000).
100. 181 F.3d 992, 996–97 (8th Cir. 1999).
101. Maggio v. Sipple, 211 F.3d 1346, 1352–53 (11th Cir. 2000).
102. *See* Rendish v. City of Tacoma, 123 F.3d 1216, 1221 (9th Cir. 1997).
103. Tiltti v. Weise, 155 F.3d 596, 602–03 (2d Cir. 1998).
104. Burgess v. Indep. Sch. Dist., 65 Fed. Appx. 690, 693–94 (10th Cir. 2003).
105. *Pickering,* 391 U.S. at 568; *Connick,* 461 U.S. at 142.
106. 511 U.S. at 676–77.
107. *See id.*

The public employer has the burden of justifying its adverse employment action.[108] It must demonstrate that the employee's conduct interfered with governmental operations or that it reasonably believed that the speech would interfere with such operations.[109] Proof of actual interference is frequently unnecessary.[110] However, the "closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished."[111]

The Sixth Circuit has described its function in applying the *Pickering* balancing test as considering "whether an employee's comments meaningfully interfere with the performance of [his] duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employee."[112]

The position held by the public employee can play a significant role in the application of the *Pickering* balancing test.[113] Whether the employee held a high-level policymaking or confidential position is a very important factor in applying the *Pickering* test, but it is not conclusive.[114] In general, employees holding high-level positions have very limited protections under *Pickering* and will not prevail in a First Amendment claim when the speech or conduct at issue was critical of the public employer or the public employer's policies.[115]

For example, in *Sheppard v. Beerman*, the Second Circuit affirmed the granting of summary judgment to the defendant, holding, as reasonable, a state court judge's conclusion that the explosive and disrespectful behavior by a law clerk toward the judge would lead to future

108. *Nat'l Treas. Employees Union,* 513 U.S. at 466.

109. *Waters,* 511 U.S. at 673–74; *see also* Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995).

110. *Jeffries,* 52 F.3d at 13.

111. *Id.*

112. *Sharp,* 285 F.3d at 486 (quoting Williams v. Kentucky, 24 F.3d 1526, 1536 (6th Cir. 1994)).

113. *Pickering,* 391 U.S. at 570 n.3; *see also* McEvoy v. Spencer, 124 F.3d 92, 98 (2d Cir. 1997).

114. *McEvoy,* 124 F.3d at 102–03.

115. McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272, 279 (2d Cir. 1999); *see also Lewis,* 165 F.3d at 165 ("[A] public employer's interests in running an effective and efficient office are given the utmost weight where a high-level subordinate insists on vocally and publicly criticizing the policies of his employer."); Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 971 (7th Cir. 2001) ("[T]he First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of supervisors or their stated policies."); Curinga v. City of Clairton, 357 F.3d 305 (3d Cir. 2004) (sustaining termination of high-level policymaker for engaging in political campaign activity against incumbent city council members). *See also* Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891, 897–99 (6th Cir. 2001); McKinley v. Kaplan, 262 F.3d 1146, 1150–51 (11th Cir. 2001); Bonds v. Milwaukee County, 207 F.3d 969, 977 (7th Cir. 2000).

disruption in the judge's public office.[116] The court gave substantial weight to the judge's concern based on the confidential nature of the relationship between the judge and his law clerk.[117]

Unlike other circuits, the Sixth Circuit in *Rose v. Stephens* held that "where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the *Pickering* balancing favors the government as a matter of law."[118] Therefore, the circuit panel dismissed a claim by the former state police commissioner that his termination was improperly premised on the content of a memorandum without balancing the public concern of the speech against governmental interests.[119]

In applying the *Pickering* balancing test to speech by law enforcement officers and firefighters, courts recognize a heightened governmental interest in maintaining a lack of disruption in those departments.[120] In *Kokkinis,* the Seventh Circuit stated, "[d]eference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement."[121]

In *Pappas,* a Second Circuit panel held, after applying the *Pickering* balancing test, that a municipal police department's legitimate concerns regarding its public image relating to discrimination against people of color outweighed the right of a member of the police force to privately protest charitable appeal mailings received at his home.[122]

In *Washington v. Normandy Fire Protection Dist.,* negative reactions by the fire chief and other firefighters to an African American assistant fire chief's radio comments regarding race discrimination were found to be sufficient to outweigh the right of the employee to speak out on racism in the workplace.[123] In *Greer,* the Seventh Circuit ruled that because a firefighter utilized a news release rather than internal procedures to complain about perceived favoritism toward gays and women, the employer's interests in disciplining the employee and maintaining order were substantial.[124]

In *Sharp,* the Sixth Circuit concluded that the government's interest in maintaining harmony and good working relationships between the school superintendent and the school principals outweighed the right of a school principal to circulate an internal memorandum regarding

116. 317 F.3d 351, 355–56 (2d Cir. 2003).
117. *Id.*
118. 291 F.3d 917, 922 (6th Cir. 2002).
119. *Id.* at 923.
120. *See* Pappas v. Guiliani, 290 F.3d 143, 146–47 (2d Cir. 2002); *Pool,* 297 F.3d at 908–09; *Goldstein,* 218 F.3d at 354–55; *Belcher,* 324 F.3d at 1209.
121. 185 F.3d at 845.
122. 290 F.3d at 146–48.
123. 328 F.3d 400, 404–06 (8th Cir. 2003).
124. 212 F.3d at 371–73.

a district dress code issue that cast aspersions on the new superintendent.[125] In reaching its conclusion, the Sixth Circuit relied upon the subjective reaction of the new superintendent and his expectation that the principal would have spoken to him privately prior to circulating the memorandum.[126]

With respect to other positions requiring regular public contact, the Second Circuit has determined that public employers have a significant interest in regulating the content of employee communications with individuals receiving governmental services.[127] In *Knight,* the Second Circuit rejected a First Amendment challenge to a prohibition against employee religious speech when working with clients.[128] The circuit reasoned that the disruption caused by such religious speech along with the potential for an Establishment Clause claim was sufficient in upholding the restriction on such speech.[129]

In cases involving speech related to corruption, financial mismanagement, and health and safety, the courts will grant less weight to an employer's allegation of potential or actual workplace disruption resulting from the speech. In *Dangler v. New York City Off Track Betting Corp.*, the Second Circuit emphasized that employee "whistleblowing" regarding unlawful employer conduct should be given greater weight under *Pickering* than other forms of employee speech.[130]

> Thus, although the public employer normally need show only a "likely interference" with its operations, and "not an actual disruption," a public employer cannot with impunity, fire an employee who "blew the whistle" on other employees' violations of law on the ground that those disclosures impaired office morale.[131]

The societal importance regarding the disclosure of governmental corruption or threats to public safety will be found frequently to outweigh the public employer's interest in conducting operations in a harmonious manner.[132] For example, the Ninth Circuit held that an employee's complaint regarding the downloading of pornography to an employer's computer outweighed the employer's concerns regarding workplace disruption.[133]

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125. 285 F.3d at 286.
126. *Id.*
127. Knight v. State of Connecticut Dep't. of Pub. Health, 275 F.3d 156, 164 (2d Cir. 2001).
128. *Id.* at 163–66.
129. *Id.*
130. 193 F.3d 130, 140 (2d Cir. 1999).
131. *Id.* (citing *Lewis,* 165 F.3d at 163 (quoting *Jeffries,* 52 F.3d at 13) (emphases in *Jeffries*)).
132. *Hoover,* 307 F.3d at 466; *see also Prager,* 180 F.3d at 1191 (office tensions resulting from a state tax attorney disclosing to the governor the illegality of a tax abatement did not outweigh the substantial weight to be given to the attorney's disclosure of governmental corruption).
133. Hufford v. McEnaney, 249 F.3d 1142, 1145–50 (9th Cir. 2001).

D. *Requirement of an Adverse Employment Action*

A necessary element to state a meritorious public employee First Amendment claim is an allegation that an adverse personnel action resulted from the protected activity. Adverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.[134] In order to constitute an adverse action, the employer's conduct must be materially adverse in nature regarding the employee's terms and conditions of employment.[135] Alleged adverse employment actions that courts consider being inconsequential or of only speculative consequence may result in the dismissal of the claim.[136]

III. Public Employee Associational Rights

The First Amendment limits the power of employers to interfere with public employees' rights to freedom of association, including the right to engage in union activity. In *Arkansas State Highway Employees,* the Supreme Court held that the First Amendment protected the right of public employees to form and participate in unions.[137] This constitutional right includes protections for public employees to join labor organizations and engage in advocacy on behalf of fellow members.[138] This right also applies to activities on behalf of a union's dissenting minority when criticizing the employer.[139]

In *Hinkle v. Christensen,* the Eighth Circuit affirmed a jury verdict in favor of a teacher who claimed that she had been terminated in retaliation for her union activities.[140] In affirming the verdict, the circuit cited to evidence in the record including the school superintendent's hostility toward union activities by teachers and threats by the superintendent to retaliate against the teachers for filing unfair labor practice charges.[141] The court also relied on the fact that the Board of Education voted to terminate the employee at a meeting held to discuss the unfair labor practices hearing scheduled for the following day.[142]

The First Amendment does not, however, impose on public employers any affirmative obligation to listen to, respond to, or engage in

134. *See* Kaluczky v. City of White Plains, 57 F.3d 202, 208 (2d Cir. 1995).
135. *Meyers,* 324 F.3d at 659.
136. *See Belcher,* 324 F.3d at 1207 n.4.
137. 441 U.S. at 464.
138. Hitt v. Connell, 301 F.3d 240, 245, 170 L.R.R.M. (BNA) 2789 (5th Cir. 2002); *see also Clue,* 179 F.3d at 61; Stagman v. Ryan, 176 F.3d 986, 999 n.4, 161 L.R.R.M. (BNA) 2204 (7th Cir. 1999); Boddie v. City of Columbus, 989 F.2d 745, 749, 143 L.R.R.M. (BNA) 2172 (5th Cir. 1993); *Boals,* 775 F.2d at 693; Connecticut State Fed'n of Teachers v. Bd. of Educ. Members, 538 F.2d 471, 478, 92 L.R.R.M. (BNA) 3011 (2d Cir. 1976); *Hanover Township Fed'n of Teachers,* 457 F.2d at 459–60.
139. *Clue,* 179 F.3d at 61; *Connecticut State Fed'n of Teachers,* 538 F.2d at 479.
140. 733 F.2d 74, 77, 116 L.R.R.M. (BNA) 2387 (8th Cir. 1984).
141. *Id.*
142. *Id.*

collective bargaining with a public sector union or association.[143] In addition, public employers can bar managers and supervisors from union membership if the limitation satisfies a substantial state interest and is narrowly drawn to avoid unnecessary abridgement of the employee's right to association.[144]

Other circuit decisions demonstrate the limits of the constitutional right to engage in union activities. The Tenth Circuit affirmed the dismissal of a complaint for failure to state a cause of action under the First Amendment where the plaintiff alleged retaliation based on union activity.[145] In *Kuchenreuther,* the Seventh Circuit found that the removal of postings from a negotiated union bulletin board at the workplace did not violate the First Amendment.[146] The court reasoned that the postings did not comply with a police procedure requiring prior approval for all postings even if the procedure was inconsistent with the terms of the collective bargaining agreement.[147] In reaching this conclusion, the court stated that Kuchenreuther's "argument that she was able to post anything she wished via the union's negotiated agreement is immaterial to her constitutional claim."[148]

In *Melzer v. Board of Education of the City School District of New York,* the Second Circuit upheld the dismissal of a First Amendment challenge to the termination of a tenured high school physics teacher where the termination was based on his off-duty associational activities with an organization that promotes and advocates pedophilia.[149] The appellate record contained no evidence that the teacher had engaged in any unlawful or inappropriate conduct while at school.[150] However, in addition to his organizational membership, the teacher was a founder and editor of the organization's bulletin that published articles and letters regarding topics such as how to avoid disclosure of pedophilic relationships.[151]

Prior to the teacher's discipline being imposed, a local television station broadcasted a three-part series regarding public school teachers who were members of the same organization.[152] As part of the news series, a secretly recorded videotape of an organizational meeting was broadcast that showed the plaintiff advising another teacher to wait until he obtained tenure before admitting to membership in the organization.

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143. *Arkansas State Highway Employees,* 441 U.S. at 465; *Hanover Township Fed'n of Teachers,* 457 F.2d at 461.
144. *Key,* 645 F.2d at 885.
145. Mitchell v. City of Moore, 218 F.3d 1190, 1199–1200 (10th Cir. 2000).
146. 221 F.3d at 975.
147. *Id.*
148. *Id.*
149. 336 F.3d 185, 189, 200 (2d Cir. 2003).
150. *Id.* at 189.
151. *Id.* at 189–90.
152. *Id.* at 190.

In *Melzer,* the Second Circuit began its application of the *Pickering* balancing test by citing to the unique public trust entrusted to public school teachers and the sensitivity connected with their duties of instructing schoolchildren.[153] In affirming the dismissal, the circuit court relied upon evidence in the record demonstrating actual disruption in the school among teachers, parents, and students that resulted from the disclosure of the teacher's activities.[154] Moreover, the circuit concluded that there was sufficient evidence to justify a reasonable expectation that the teacher's continued employment would lead to additional disruption in the future.[155] In reaching its conclusions, the Second Circuit rejected any reliance on the content of organizational literature or the acts of other organizational members as a constitutionally legitimate rationale for sustaining the termination.[156]

In an associational case that may resonate with public sector attorneys, the Second Circuit in *Adler v. Pataki* held that the First Amendment provided public employees with a right to maintain a marital relationship free from undue public employer interference.[157] In *Adler,* a former state agency deputy counsel challenged his termination in federal court alleging that it was in retaliation for a well-publicized pending discrimination lawsuit by his wife, who had been previously terminated from her position as an assistant attorney general following the 1994 statewide elections.[158] In reversing the grant of summary judgment, the Second Circuit held that the lawsuit by Adler's wife against state officials could not reasonably be found to justify the discharge of Adler from his state position.[159] In holding that the First Amendment provides protections for a public employee to maintain a marital relationship, the Second Circuit noted that "[we] need not decide in this case whether in some circumstances the conduct, or even the identity, of a wife might raise such serious concerns about her husband's suitability for public employment as to justify the husband's discharge (or the discharge of an employee wife because of the identity or conduct of her husband)."[160]

Whether the public concern standard and the *Pickering* balancing test should be applied in examining freedom of association claims or hybrid free speech/freedom of association claims remains unresolved by the U.S. Supreme Court. There remains a split in the circuits regarding

153. *Id.* at 198.
154. *Id.*
155. *Id.* at 198–99.
156. *Id.* at 197.
157. 185 F.3d 35, 44 (2d Cir. 1999).
158. *Id.* at 38.
159. *Id.* at 44.
160. *Id.*

the applicability of the *Pickering* public concern requirement to freedom of association claims.[161] In *Melzer,* the Second Circuit ruled that unlike political associational activities by nonpolicymaking employees, associational speech activities unrelated to partisan politics, which result in actual disruption in the workplace, would not be given heightened protections under the *Pickering* balancing test.[162] Similarly, in *Knight,* the Second Circuit declined to apply the heightened strict scrutiny standard to a hybrid claim implicating both free speech and free exercise issues under the First Amendment.[163]

In *Hickman v. Valley Local School District Board of Education,* the Sixth Circuit has determined that the mere fact that a personality conflict arose between a teacher and principal because of the teacher's union activities is an insufficient basis for granting judgment to a defendant in a First Amendment claim premised on union activities.[164] In reaching the holding, the Sixth Circuit noted that such conflicts and negative feelings resulting from union activities are hardly surprising and to allow them to justify a dismissal would "decimate constitutional protections."[165]

IV. First Amendment Restrictions on the Use of Patronage

> The report was this: that Bartleby had been a subordinate clerk in the Dead Letter Office at Washington, from which he had been suddenly removed by a change in the administration. When I think over this rumor, I cannot adequately express the emotions which seize me.[166]

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161. *See Cobb,* 352 F.3d 79 (Second Circuit joined the Fourth, Sixth, and Seventh Circuits in concluding that the public concern requirement is applicable to freedom of association claims); *Boddie,* 989 F.2d at 747 (public concern standard inapplicable to free association claim based on union activities); Hatcher v. Bd. of Educ., 809 F.2d 1546, 1558 (11th Cir. 1987) (*Pickering* balancing test inapplicable to a freedom of association case); Balton v. City of Milwaukee, 133 F.3d 1036, 1040 (7th Cir. 1998) (questioning the applicability of the public concern test but applying the *Pickering* balancing test); *Hitt,* 301 F.3d at 246 (questioning the appropriateness of applying the public concern requirement to freedom of association cases); *Melzer,* 336 F.3d at 194 (applying the *Pickering* balancing test to a hybrid freedom of association and free speech claim); *Boals,* 775 F.2d at 692 (applying the public concern standard and *Pickering* balancing test to a freedom of association case); *Gregorich,* 54 F.3d at 414 n.4 (applying the balancing test to a hybrid speech/freedom of association case). *See also* Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 444 (5th Cir. 1999); Griffin v. Thomas, 929 F.2d 1210, 1212–13 (7th Cir. 1991) (applying the public concern standard to a freedom of association claim).

162. 336 F.3d at 195.

163. 275 F.3d at 166–67.

164. 619 F.2d 606, 609, 104 L.R.R.M. (BNA) 2412 (6th Cir. 1980).

165. *Id.*

166. HERMAN MELVILLE, *Bartleby, the Scrivener, in* MELVILLE'S SHORT NOVELS 3, 34 (Dan McCall ed., W. W. Norton 2002) (1853). Herman Melville's short story is worth rereading by attorneys practicing labor law or managing a law office. This well-studied classic of American letters provides a glaring literary example of the problems associated with an employer's failure to apply the doctrine of progressive discipline. In addition, it suggests the long-term personal consequences that may result from a patronage purge

In *Elrod v. Burns*,[167] and *Branti v. Finkel*,[168] the Supreme Court held that the First Amendment right to freedom of association, as a general rule, forbids government officials from discharging or threatening to discharge public employees for engaging in partisan political activities. Similarly, in *Rutan v. Republican Party of Illinois,* the court held that promotions, transfers, and recall of employees, based on support of a political party in power, impermissibly infringe on the First Amendment rights of public employees.[169]

In *Padilla-Garcia v. Rodriquez,* the First Circuit held that support for a rival political faction during a primary campaign constituted protected activity under the First Amendment.[170] Therefore, such support cannot be utilized as a basis for refusing to renew an employment contract.[171]

The First Amendment limitation on the use of patronage is also applicable to the manner in which a public employer selects private contractors to perform traditional governmental functions. In *O'Hare Truck Serv. v. City of Northlake,* the Supreme Court held that it was unconstitutional under the First Amendment for a private contractor to be retaliated against based on its refusal to make a campaign contribution to the party holding municipal power.[172] It remains untested whether *O'Hare* can form the basis for a successful constitutional challenge by a public sector union to a decision to privatize governmental services on the grounds that the decision was made in retaliation for the union's political support for an unsuccessful candidate.

Political affiliation has been held to be a permissible criterion for policymaking positions.[173] The term "policymaker" is a shorthand term for a government employee who occupies a position for which party affiliation, loyalty, or confidence is necessary.[174]

The Fourth Circuit held that sheriffs in Virginia have the right to terminate lawfully sheriff deputies and other employees engaged in law enforcement based on political affiliation.[175] In contrast, in *DiRuzza v.*

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following an electoral cycle. Melville, like Hawthorne, contributed substantially to American culture while employed as a public employee. *See Nat'l Treas. Employees Union,* 513 U.S. at 464.

167. 427 U.S. 347, 359–60 (1976).

168. 445 U.S. 507, 515–16 (1980).

169. 497 U.S. 62, 75 (1990).

170. 212 F.3d 69, 76–77 (1st Cir. 2000).

171. *See also* Mitchell v. Randolph, 215 F.3d 753, 754 (7th Cir. 2000) (where a court employee sued a municipal judge claiming that she was constructively discharged because she had been a long-time supporter of the judge's political opponent).

172. 518 U.S. 712 (1996). *See also* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (private contractors cannot be terminated in retaliation for criticizing a public employer regarding an issue of public concern).

173. *Elrod,* 427 U.S. at 367.

174. *Kaluczky,* 57 F.3d at 208.

175. Jenkins v. Medford, 119 F.3d 1156, 1163–65 (4th Cir. 1997).

County of Tehama, summary judgment in favor of a county employer was reversed when the Ninth Circuit concluded that there was no *per se* rule that all deputy sheriffs are "policymakers" and that there were several unresolved facts regarding the actual duties of deputy sheriffs.[176] However, highway superintendents have been held to be policymakers exempt from protections against political patronage discharge.[177]

The issue of whether a position is a policymaking position is a question of constitutional interpretation to be determined by the court and not a jury.[178] Courts will apply several factors in determining whether a political affiliation can be an appropriate requirement for a particular position. These factors include whether the employee (a) is exempt from civil service protection; (b) has some technical competence or expertise; (c) controls others; (d) is authorized to speak in the name of policymakers; (e) is perceived as a policymaker by the public; (f) influences government programs; (g) has contact with elected officials; and (h) is responsive to partisan politics and political leaders.[179]

For example, the Sixth Circuit, in determining that an employee holding and performing the duties of a gifted and talented teacher/coordinator was not a policymaker exempt from First Amendment protection, considered the provisions of state law regarding the position as well as the duties that were reassigned to another employee.[180]

V. The Right to Petition Government

The First Amendment contains a separate and distinct clause protecting the right of Americans to petition their government.[181] Whether the *Pickering* balancing test and its public concern test are applicable to the right of public employees to petition government remains unresolved by the Supreme Court. Many circuits, including the Second Circuit, have held that the public concern test is applicable to the public employee's right to petition claims.[182] In contrast, the Third

176. 206 F.3d 1304, 1311 (9th Cir. 2000).

177. *See* Gentry v. Lowndes County, 337 F.3d 481, 486–88 (5th Cir. 2003); Hoard v. Sizemore, 198 F.3d 205, 213–14 (6th Cir. 1999).

178. Gordon v. County of Rockland, 110 F.3d 886, 888–89 & n.4 (2d Cir. 1997).

179. Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994); Regan v. Boogertman, 984 F.2d 577, 579–80 (2d Cir. 1993).

180. Hager v. Pike County Bd. of Educ., 286 F.3d 366, 378 (6th Cir. 2002).

181. *See* WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1995), for a masterful historical exploration of the congressional battle in the 1830s, led by John Quincy Adams, to defend the right of Americans to submit antislavery petitions to Congress.

182. *See* Grigley v. City of Atlanta, 136 F.3d 752, 755–56 (11th Cir. 1998); Zorzi v. County of Putnam, 30 F.3d 885, 896 (7th Cir. 1994) ("If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern."); White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (2d Cir. 1993).

Circuit has held that the public concern test in inapplicable to such claims.[183]

A recent decision by the First Circuit suggests that private employers may have greater First Amendment rights to sue their employees in a labor dispute than a public employee has in suing his or her governmental employer under the right to petition clause.[184] In reiterating that the First Amendment right to petition government includes the right of citizens to have access to the courts, the circuit panel in *Fabiano* cited to an important Supreme Court precedent granting the National Labor Relations Board (NLRB) the power to enjoin an employer's retaliatory state court action against its workers.[185]

In *Bill Johnson's,* the Supreme Court recognized the NLRB's statutory power under the National Labor Relations Act,[186] to enjoin a private employer's retaliatory state court action when the lawsuit lacks a reasonable basis.[187] In that case, the state lawsuit was commenced by a restaurant employer to enjoin and obtain damages against four waitresses who had participated in picketing outside the restaurant.[188] In concluding that the NLRB had the power to enjoin a retaliatory state court action in certain circumstances, the Supreme Court emphasized that the NLRB's power is limited to when the state lawsuit did not present a genuine issue of material fact.[189]

In contrast, in *Fabiano,* the circuit panel applied the *Pickering* analysis in determining whether a terminated city attorney's First Amendment right to petition was violated when he was retaliated against for commencing a state lawsuit challenging a municipal zoning decision relating to a restaurant impacting his private real estate.[190] Although the First Circuit found the issue to be a "very close case," it ruled that the lawsuit met the "public concern" test.[191]

Until there is a final Supreme Court decision on the issue, the application of the *Pickering* balancing test to the First Amendment right to petition by public employees remains dubious. Both the legislative and judicial branches of government play important and unique roles in determining issues directly related to public employee working conditions. For example, public employee lobbying is frequently central in establishing and maintaining certain terms and conditions of employment. Court decisions upholding retaliation by executive government

183. Filippo v. Bongiovanni, 30 F.3d 424, 435–36 (3d Cir. 1994).
184. *See* Fabiano v. Hopkins, 352 F.3d 447 (1st Cir. 2003).
185. *Id.* at *10 (citing Bill Johnson's Rest., Inc. v. NLRB, 461 U.S. 731, 113 L.R.R.M. (BNA) 2647 (1983)).
186. 29 U.S.C. §§ 158(a)(1) and (4) (2000 & Supp. I 2001).
187. *Bill Johnson's,* 461 U.S. at 741.
188. *Id.* at 733–34.
189. *Id.* at 745–46.
190. *Fabiano,* 352 F.3d at 450–51, 453–57.
191. *Id.* at 455–56.

officials against public employees for contacting legislators or commencing litigation regarding employment issues is inconsistent with the separation of powers doctrine.

VI. Prior Restraint Caused by Public Employer Work Rules

Employment policies and work rules that ban and restrict public employee speech and association can be challenged under the First Amendment. In *National Treasury Employees Union,* the Supreme Court determined that the *Pickering* balancing test needed to be applied differently when evaluating a public employer's prior restraint of employee First Amendment activities.[192] The Supreme Court noted that *Pickering* and its progeny involved "post hoc analysis of one employee's speech and its impact upon that employer's public responsibilities."[193] However, a public employer's work rule that prohibits or severely regulates certain speech has a wider impact because it chills potential speech rather than punishing actual speech.[194] Therefore, the Supreme Court concluded that in a case challenging a public employer's policy prohibiting or limiting employee speech, the employer has the burden to demonstrate that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government."[195]

A public transit authority's dress code prohibiting uniformed employees from wearing buttons, badges, or other insignia on their uniform was found to constitute a prior restraint that violated the First Amendment rights of the employees.[196] In *Scott,* the dress code prohibited the wearing of buttons "regardless whether the employee's job ever places the employee in contact with the public and regardless whether the employee is in contact with the public while wearing the button."[197] Similarly, a preliminary injunction against a police department policy prohibiting members of a Latino police organization from marching in uniform behind their organizational banner in various parades was affirmed.[198]

In *Burrus v. Vegliante,* the Second Circuit vacated a permanent injunction that had enjoined the applicability of the Hatch Act[199] to the display of campaign posters related to the 2000 presidential election on bulletin boards maintained by a union in nonpublic postal

192. 513 U.S. at 466–468.
193. *Id.* at 466–67.
194. *Id.* at 468.
195. *Id.* (quoting *Pickering,* 391 U.S. at 568).
196. Scott v. Meyers, 191 F.3d 82, 88, 162 L.R.R.M. (BNA) 2077 (2d Cir. 1999).
197. *Id.*
198. Latino Officers Ass'n, Inc. v. City of New York, 196 F.3d 458, 469 (2d Cir. 1999).
199. 5 U.S.C. § 7324 (2000 & Supp. I 2001).

workstations.[200] Pursuant to 5 U.S.C. section 7324, federal employees are prohibited from engaging in political activities while on duty in any room or building occupied for the discharge of official duties.[201] The posters had been prepared by the union for its members to present a comparison of the respective records of the presidential candidates.[202] In reversing the entry of the permanent injunction, the Second Circuit panel relied upon the language contained in the 1993 amendments to the Hatch Act as well as the legislative history related to those amendments.[203]

The Third Circuit affirmed the issuance of a preliminary injunction against the enforcement of a police department order and a subsequent memorandum requiring police employees to obtain written authorization from the police chief prior to providing expert testimony in any criminal or civil proceeding.[204] In affirming the injunctive order, the circuit panel rejected the city's argument that the standards set forth in *National Treasury Employees Union* should not be followed because the restrictions were limited to only one department.[205]

In *Harman v. City of New York,* the Second Circuit concluded that city regulations requiring employees to obtain permission prior to speaking with the media violated the employees' First Amendment rights.[206] However, in *Latino Officers Association v. Safir,* the Second Circuit affirmed the denial of a preliminary injunction sought by Hispanic police officers seeking to challenge regulations that required police officers to notify the department of their intent to speak publicly and to provide a summary of their comments after the fact.[207] The court found that under *Pickering,* the challenged regulations struck a reasonable balance between police officers speaking regarding issues of public concern and the city's strong interest in being informed about police officers' statements regarding "the sensitive nature of police work."[208]

VII. Qualified Immunity and Legislative Immunity

A. *Qualified Immunity*

The defense of qualified immunity shields individual government defendants from claims for monetary damages if it was objectively reasonable for them to believe that their actions did not violate the

200. 336 F.3d 82, 83–84, 172 L.R.R.M. (BNA) 3155 (2d Cir. 2003).
201. *Id.*
202. *Id.*, 336 F.3d at 84.
203. *Id.* at 86–90.
204. *Swartzwelder,* 297 F.3d at 232, 242.
205. *Id.* at 235–238. *See also Latino Officers Ass'n,* 196 F.3d at 463.
206. 140 F.3d 111, 115–16, 124 (2d Cir. 1998).
207. 170 F.3d 167, 168, 173 (2d Cir. 1999).
208. *Id.* at 171–72.

plaintiff's constitutional rights.[209] Although qualified immunity may shield individual government defendants from claims for monetary damages, it does not bar actions for declaratory or injunctive relief such as reinstatement.[210] In contrast to the qualified immunity that may be granted to a supervisory public official, the First Amendment has not yet been interpreted to grant public employees any form of immunity from being disciplined or adversely treated by their governmental employer when employees reasonably but wrongfully believe that their speech or conduct was protected under the First Amendment.

Qualified immunity will attach to discretionary functions of a public sector manager if the conduct did not violate clearly established rights of which a reasonable person would have known or if it was objectively reasonable to believe that the conduct did not violate clearly established rights. The standard for the application of qualified immunity is not premised on what an attorney would conclude, following legal research, but rather what a reasonable person should know regarding the constitutionality of his or her conduct.[211] For example, qualified immunity was granted to an employer's director of labor relations for her retaliation against members of a dissident union faction because the circuit case law at the time of the retaliation was not sufficiently clear that union factional activities were protected by the First Amendment.[212] Similarly, a county sheriff's assertion of qualified immunity was granted when the Fourth Circuit concluded that the law was insufficiently clear that a county sheriff could not refuse to reappoint dispatchers for supporting an unsuccessful candidate who had challenged the incumbent.[213]

B. *Legislative Immunity*

In general, members of a legislature are entitled to absolute immunity from civil liability for their legislative actions.[214] In determining whether to grant legislative immunity, the courts will focus on the nature of the act challenged rather than the intention of the legislators. In *Harhay,* the Second Circuit emphasized that discretionary administrative personnel decisions regarding a single employee "even if undertaken by public officials who otherwise are entitled to immunity,

209. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Smith v. Garretto, 147 F.3d 91, 94 (2d Cir. 1998); *White Plains Towing,* 991 F.2d at 1063–64; *Bieluch,* 999 F.2d at 670; Frank v. Relin, 1 F.3d 1317, 1327–28 (2d Cir. 1993).

210. *Adler,* 185 F.3d at 48.

211. *McCullough,* 187 F.3d at 278.

212. *Clue,* 179 F.3d at 62.

213. Pike v. Osborne, 301 F.3d 182, 185 (4th Cir. 2002).

214. *See* Harhay v. Town of Ellington Bd. of Educ., 323 F.3d 206, 210 (2d Cir. 2003); Carlos v. Santos, 123 F.3d 61, 66 (2d Cir. 1997) (citing Hill v. City of New York, 45 F.3d 653, 660 (2d Cir. 1995)).

do not give rise to immunity because such decision making is no different in substance from that which is enjoyed by other actors."[215]

VIII. Conclusion

In promulgating and applying labor policies and work rules, public employers must be cognizant and sensitive to First Amendment principles and case law. As demonstrated above, even where a public employee has no statutory or contractual tenure protections, the First Amendment provides protections against adverse personnel actions that violate the employee's First Amendment rights to free expression and association as well as the right to petition the government.

Our system of freedom of expression is premised on the proposition that government restrictions on speech should be content neutral.[216] However, public employer retaliation is rarely content neutral. An adverse action based on employee speech or conduct usually stems from an employee disagreeing with his or her employer and rarely from an employee's expression of support for the employer. Under present constitutional precedent, public employers have been granted a very powerful authoritarian tool to stifle debate and discussion within the walls of government.

Although a public employer's retaliation for employee speech or association may ultimately be found to be lawful, there are strong reasons for attorneys to discourage their public employer clients from engaging in such retaliation. The suppression of dissenting viewpoints within government can lead to the implementation of bad public policy that can result in serious consequences for the nation or the local community. Moreover, the suppression of speech and association can deprive public bureaucracies of the intellectual vibrancy needed to develop cogent public policy and provide effective governmental services. Intolerance and retaliation toward employee speech and association can lead to low public employee morale, resulting in less effective governmental services. Finally, as a practical matter, termination and other extreme forms of public employer retaliation can transform labor disputes, traditionally resolved at arbitration, into extensive and expensive federal constitutional litigation.

215. 323 F.3d at 210–11.

216. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (Harvard 2003).