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FIRST AMENDMENT PROTECTION FOR TEACHERS WHO CRITICIZE ACADEMIC POLICY: BITING THE HAND THAT FEEDS YOU

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A public employee who criticizes the policies or practices of his employer may jeopardize his employment, despite the guarantee of freedom of speech contained in the first amendment to the Constitution[1] and incorporated through the fourteenth amendment[2] to apply to the states.[3] Public school teachers, particularly, have not been immune from an employer's wrath stemming from the teacher's criticism of academic policies and practices.[4]

The recurrent debate in first amendment adjudication is whether first amendment rights are absolute or require the balancing of competing interests. This question has long been settled in favor of the balancing approach.[5] Previously, first amendment rights of public

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1. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. CONST. amend. I.

2. The fourteenth amendment provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. *See* Duncan v. Louisiana, 391 U.S. 145 (1968), for discussion of incorporation of the provisions of the Bill of Rights through the fourteenth amendment. *See also* Palko v. Connecticut, 302 U.S. 319, 327 (1937), wherein Justice Cardozo, discussing the incorporation concept, characterized protection of speech as a fundamental liberty in part because "our history, political and legal, recognizes freedom of thought and speech as the indispensable condition of nearly every other form of freedom."

4. *See, e.g.*, Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977).

5. Over the years the Supreme Court has devised several balancing tests. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919), where the Court stated that the first amendment does not protect one who falsely shouts fire in a crowded theatre and causes panic. In *Schenck*, Justice Holmes suggested the "clear and present danger" test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. In 1951, in Dennis v. United States, 341 U.S. 494, the "clear and present danger" test was replaced by the test suggested by Judge Learned Hand in his Second Circuit Court of Appeals *Dennis* opinion. In *Dennis*, the Supreme Court stated: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (quoting Judge Learned Hand, 183 F.2d 201, 212). This has often been referred to as the "not improbable" test. In Brandenburg v. Ohio, 395 U.S.

employees had been accorded less protection than non-public employees who had made similar statements.[6] Since 1968, however, public employees' first amendment rights have begun to receive greater protection. In *Pickering v. Board of Education*,[7] the United States Supreme Court recognized the importance of first amendment protection for a public school teacher's utterances and stated that "the interests of the teacher, as a citizen, in commenting upon matters of *public concern* [must be balanced against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[8]

This note will examine federal court decisions which attempt to balance the competing interests of the teacher and the state with respect to teachers' criticism of academic policy. Its goal is to determine the relative weight to be given to the various considerations and to discover where the balance now stands between a teacher's freedom to criticize and an employer's right to terminate the employment relationship. Finally, it will be shown that the balancing test can be used successfully in resolving cases in other areas of public employment.

THE CURRENT JUDICIAL STANDARD OF REVIEW

A public school teacher's claim of retaliatory discharge, denial of tenure, contract non-renewal, or transfer for engaging in activity pro-

444 (1968), the Court held that "[a] statute which fails to draw this distinction [between the abstract teaching of the moral propriety or moral necessity for a resort to force or violence and preparing a group for violent action and steeling it to such action] impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.* at 448. Finally, in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980), the Court developed a four-part test for dealing with commercial speech cases: 1) whether the expression is protected by the first amendment (concerns lawful activity and is not misleading); 2) whether the asserted governmental interest is substantial; 3) whether the regulation directly advances the governmental interest asserted; and 4) whether it is not more extensive than is necessary to serve that interest.

For further discussion of the balancing of competing interests, *see* FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and MASON & BLANEY, AMERICAN CONSTITUTIONAL LAW 515-48 (6th ed. 1978).

6. *See* Adler v. Board of Education, 342 U.S. 485 (1952), for the proposition that persons seeking public employment are subject to "the reasonable terms laid down by the proper authorities [of the state]". *Id.* at 492. *See also* Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir. 1970), wherein the court noted that the special circumstances of certain employment relationships could allow the public employer some flexibility in limiting the exercise of the employee's first amendment right, and Connick v. Myers, 103 S. Ct. 1684 (1983), for a history of cases which restricted public employees' first amendment rights.

7. 391 U.S. 563 (1968). The *Pickering* Court, citing Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967), held that a teacher does not surrender constitutionally protected rights as a condition of public employment. *Id.* at 568.

8. *Id.*

tected by the first amendment is generally brought in a federal court suit under the first and fourteenth amendments and section 1983.[9] Beginning in 1968 with *Pickering v. Board of Education* and culminating in 1977 with *Mt. Healthy City School District Board of Education v. Doyle*,[10] the United States Supreme Court has gradually articulated a two-step analysis by which such claims may be adjudicated.

First, the teacher must show that he or she engaged in a constitutionally protected activity.[11] In *Pickering*, a tenured teacher who was also a resident of the school district, was fired after writing a letter to the editor of a local newspaper. The letter criticized the board of education's allocation of school funds between educational and athletic programs, and the concealment by the board and the superintendent of information about why additional tax revenues were being sought. The Supreme Court recognized that the problem inherent in such a case was to "arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the [s]tate, as an employer, in promoting the efficiency of the public services it performs through its employees."[12]

The Court held that Pickering's letter was protected by the first amendment and ordered him reinstated.[13] Further, the Court stated that comments on matters of legitimate public concern by public school teachers are ordinarily protected activity.[14]

9. 42 U.S.C. § 1983 (1976) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress."

Because state-supported schools obviously meet the "color of state law" requirement, the central question, then, is whether, by its conduct, the school has deprived the complainant of the right of free speech guaranteed to him by the first and fourteenth amendments.

10. 429 U.S. 274 (1977).

11. In this context, the first amendment proscriptions against the abridgment of freedom of speech, of the press, or the right to peacefully assemble have been liberally extended to the applications of such rights—to letter-writing, broadcasting, leafletting, etc. Pickering v. Board of Education, 391 U.S. 563 (1968).

12. *Id.* at 568. The balancing test has also been characterized as (1) involving a determination of "whether a public employee's statements unduly interfere with the efficiency with which governmental services are provided," Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980); and (2) whether or not the employee's exercise of constitutional privileges "clearly over-balanced" the employee's "usefulness" as an employee, Kaprelian v. Texas Woman's University, 509 F.2d 133, 139 (5th Cir. 1975), *citing* Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970). The *Pickering* language is the most widely cited.

13. 391 U.S. at 574-75.

14. *Id.* at 570. Acknowledging that the question of whether a school system requires additional funds is a matter of legitimate public concern, the Court further stated that teachers, as a class, are more likely to have informed and definite opinions as to how funds allotted to the operation of the school should be spent than do other members of the community, and as such it is

Unfortunately, the *Pickering* Court failed to establish a standard that specified the relative weight to be given the competing interests. Instead, it only described the interests to be considered on both sides. For the state's position, it suggested several situations in which a teacher's right to speak freely might be curbed by the legitimate interest of the state: 1) the need to maintain discipline and harmony among superiors and co-workers;[15] 2) the need for confidentiality;[16] 3) "when the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship;"[17] 4) the need to curtail conduct which impedes the teacher in the "proper performance of his daily duties in the classroom;"[18] and 5) freedom from interference in the regular operation of the schools generally.[19] For the teacher's position, it stressed two considerations: 1) "the public interest in having free and unhindered debate on matters of public importance;"[20] and 2) the teachers' expertise in school matters which make it essential that they be able to speak out freely on such matters without fear of reprisal.[21]

The *Pickering* Court adopted the *New York Times Co. v. Sullivan*[22] defamation standard for teacher's criticism of employers, and held that where teachers' statements are made with actual malice, as evidenced by knowledge of their falsity or a reckless disregard for their truth or falsity, discharge will be upheld. Use of this standard strongly protects outspoken teachers from retaliatory action.[23]

essential that they be able to speak out freely on such matters without fear of retaliation. *Id.* at 571-72.

15. *Id.* at 570. This factor may necessitate an examination of the employment relationship between the teacher and the Board, administration, and direct supervisors or other faculty members.

16. *Id.* at 570 n.3. "It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." The *Pickering* Court did not give an example of such a situation.

17. *Id.*

18. *Id.* at 572-73.

19. *Id.* at 573.

20. *Id.*

21. *Id.* at 572.

22. 376 U.S. 254 (1964). Although *New York Times* involved balancing speech which was of public concern against common law libel standards, the *Pickering* Court applied that standard to Pickering as a member of the general public, and stated that "the State's power to afford the . . . Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times*." 391 U.S. at 573.

23. Under this view, despite a potentially negative impact on the employee-employer relationship resulting from an untruthful criticism, so long as an employee's statement is made with the belief in its truthfulness, he remains protected. For further background to *Pickering* and com-

For the teacher to prevail in cases immediately following *Pickering*, it was only necessary for him or her to demonstrate that the speech at issue was protected by the first amendment and that the speech was *one* of the factors that led to negative action against him.[24] The *Pickering* test was further refined in *Mt. Healthy City School District Board of Education v. Doyle*,[25] in which the Supreme Court added a second step to the analytic process. The added step involved the standard of proof of cause in fact in instances where the speech was clearly protected by the first amendment. In *Mt. Healthy*, Doyle, a non-tenured teacher with a controversial employment record,[26] telephoned a local radio station to report the substance of an administrative memorandum about teacher dress and appearance. After the radio station announced the dress code as a news item, Doyle was cited by the School Board for his lack of tact in handling professional matters and advised that he would not be rehired. The district court, the Sixth Circuit, and the Supreme Court[27] held that Doyle's phone call was clearly protected by the first amendment, similar to the protection afforded to the teacher for his letter in *Pickering*. But the two cases differed in one important respect. The *Pickering* test would have required reinstatement if the protected speech played a substantial part in the decision not to rehire, even though the School Board might have decided not to rehire on other grounds. In *Mt. Healthy*, however, the Supreme Court wanted to avoid putting a teacher in a better position simply because he had exercised a constitutional right.[28] Therefore, the Court devised an additional test which would "protect against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[29] Under this second prong, once a teacher has proven that his activity was constitutionally protected and was a substantial or motivating factor in a decision not to rehire, renew or trans-

ments on the case, *see generally* Comment, *Free Speech: Dismissal of Teacher for Public Statements*, 53 MINN. L. REV. 864 (1969); Recent Decisions, *Constitutional Law: Balancing Test Applied to Teacher's Criticism of School Board*, 35 BROOKLYN L. REV. 270 (1969).

24. *See* Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972); Lusk v. Estes, 361 F. Supp. 653 (N.D. Tex. 1973).

25. 429 U.S. 274 (1977).

26. The trial court noted that Doyle had, 1) been involved in an argument with another teacher which culminated in the other teacher slapping him, the ultimate result of which was both teachers being suspended—in turn leading to a general teacher walkout (and a lifting of the suspensions); 2) complained to cafeteria employees about the amount of spaghetti served to him; 3) referred to students involved in disciplinary complaints as "sons of bitches;" and 4) made an obscene gesture to two girls when they disobeyed his commands in the cafeteria. *Id.* at 281-82.

27. *Id.* at 283, 287. The Sixth Circuit's affirmance of the district court's decision can be found at 529 F.2d 524 (6th Cir. 1975).

28. 429 U.S. at 286.

29. *Id.* at 287.

fer, then the burden shifts to the administration to prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.[30] Because Doyle met his burden of proof, the Supreme Court vacated the circuit court's decision reinstating him and remanded for a determination as to whether the Board could meet its burden of proof.[31]

In *Givhan v. Western Line Consolidated School District*,[32] the Supreme Court broadened the scope of the *Pickering/Mt. Healthy* test and standard, which related to *public* criticism of school policy by school employees. In *Givhan*, the Court held that *private* communications are to be afforded the same degree of first amendment protection as public utterances,[33] but, in addition to the considerations described in *Pickering*, further considerations would come into play. In addition to evaluating the content of the speech, the manner, time and place of its occurrence must also be assessed.[34] The Court reasoned that private criticism was inherently more destructive to a working relationship than was public criticism.

In *Givhan*, a non-tenured black teacher was transferred to an all-white school in accordance with a court-ordered desegregation decree. On repeated occasions Givhan privately requested changes in the white school's practices which she perceived to be racially discriminatory.[35] As a result of her "demands",[36] which the principal viewed as "petty and unreasonable"[37] and made in a manner variously described as "in-

30. *Id.* at 285-87.

31. On remand, in Doyle v. Mt. Healthy City School District Board of Education, 670 F.2d 59 (6th Cir. 1982), the Board of Education presented adequate independent reasons for terminating Doyle beyond the first amendment reasons he had alleged. The Board's decision not to renew Doyle's contract was affirmed. For further discussion of the ramifications of the *Mt. Healthy* test, *see* Wolly, *What Hath Mt. Healthy Wrought?* 41 OHIO ST. L.J. 385 (1980); Lane, *The Effect of Mt. Healthy City School District v. Doyle Upon Public Sector Labor Law: An Employer's Perspective*, 10 J.L. & EDUC. 509 (1981).

32. 439 U.S. 410 (1979).

33. *Id.* at 414-15. The Court reasoned that freedom of speech should not be "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Id.* at 415-16.

34. *Id.* at 415 n.4. The Court noted that public speech involves assessment of the *content* of the statements with regard to the *Pickering* considerations of impeding proper performance in daily classroom duties or interfering with the regular operation of the schools generally. Private expression, however, brings the need for additional considerations because of the ramifications attendant upon a personal confrontation between the antagonists. The Court stated that "[w]hen a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered." *Id.*

35. This is the district court's characterization of Givhan's complaints. *Id.* at 413.

36. The principal's characterization of her comments. *Id.* at 412.

37. *Id.*

sulting," " hostile," "loud" and "arrogant,"[38] Givhan was told that she would not be rehired at the end of the school year. Although Givhan's private speech was afforded first amendment protection,[39] the decision was vacated and remanded for a *Mt. Healthy* determination as to whether the Board would have reached the same decision not to rehire Givhan but for her criticism.[40]

By recognizing protections for private as well as public speech, *Givhan* indicates that the Court is generally willing to tolerate a substantial interference in the working relationship between an employee and employer before the employee's speech will be considered unprotected. However, it is important to note that by taking into account the additional considerations of manner, time, and place of the private speech, it will be easier for an employer to show detrimental impact on the working relationship than in public speech situations. This is true primarily because private speech is more likely to be heated or vitriolic and therefore more detrimental to a working relationship than public speech, which is generally tempered to suit the more exposed situation.

Bearing in mind the *Pickering/Mt. Healthy* two-part test and the *Pickering/Givhan* considerations used to balance the competing interests of the teacher and employer, this note shall proceed with an overview of recent federal court decisions that apply the test and considerations to specific fact situations. First, however, it is necessary to examine the unspoken consideration that courts apply in reviewing these cases.

THE UNSPOKEN CONSIDERATION: IMPACT OF TEACHER TENURE OR NON-TENURE ON A COURT'S DECISION

The granting or withholding of tenure[41] to a teacher is one of the

38. *Id.*

39. *Id.* at 413-17. The Court held that, having opened his office door to Givhan, the principal could not then be heard to complain that he was the "*unwilling* recipient" of her views. *Id.* at 415 (emphasis in original).

40. The district court ordered Givhan reinstated and awarded back pay and attorney fees. On appeal, the circuit court held that the district court's finding that, but for Givhan's first amendment protected expression, her contract to teach would have been renewed, and that the reasons belatedly alleged by the Board for her discharge were afterthoughts or pretextual, was not clearly erroneous. Givhan's reinstatement was affirmed and the court remanded to the district court for a determination of fees and back pay. Ayers v. Westline, 691 F.2d 766 (5th Cir. 1982).

For further discussion of *Givhan, see* Comment, *Private Expression is Subject to Constitutional Protection*, 30 MERCER L. REV. 1079 (1979); Comment, *First Amendment Rights—Public Employees May Speak a Little Evil*, 3 W. NEW ENG. L. REV. 289 (1980).

41. Tenure is defined as the status afforded to a teacher or professor upon completion of a specified trial period, thus protecting him from summary dismissal. BLACK'S LAW DICTIONARY (rev. 5th ed. 1979).

most significant employment decisions a school board is empowered to make. Consequently, although the tenure/non-tenure distinction should be irrelevant to a teacher's first amendment claim, courts are reluctant to tread upon a board's decision-making authority in cases where a teacher alleges that exercising freedom of speech has deprived him or her of tenure. Teachers with tenure are often afforded an extra but unspoken measure of protection.[42] Furthermore, the discharge of a tenured teacher would normally require proof by the administration that the teacher broke his or her continuing contract obligations. As a practical matter, it is much more difficult under those circumstances for the administration to demonstrate that the teacher's first amendment activity has so disrupted his or her employment responsibilities as to warrant discharge.

In contrast, non-tenured teachers are often given short shrift in the balancing process. In non-tenure cases, the courts often rely on *Board of Regents v. Roth*[43] for the proposition that a teacher must have a legitimate claim of entitlement to his position (i.e. tenure or a current employment contract which is violated by dismissal during its term) in order to be afforded the complete range of procedural due process protections.[44] Without a property interest such as tenure, the non-tenured teacher has no right to a statement of reasons for non-renewal or a hearing on a decision not to rehire. A non-tenured teacher is generally not claiming violation of a contractual right since the contract has expired. Therefore, it is considerably easier in such a situation for a school administration to assert, or for a court to hold, that the decision not to renew is within the administration's prerogative to reduce friction among the faculty.

An analysis of the tenure/non-tenure distinction in the cases discussed in this note supports the preceding observations. Five recent decisions involving the dismissal of tenured teachers—three in the appellate court and two in the district court—resulted in the teacher's reinstatement.[45] In only two cases did the courts uphold the discharges.[46]

42. *See infra* text accompanying notes 45-54.

43. 408 U.S. 564 (1972).

44. *Id.* at 577. Procedural due process protections which flow from such an entitlement include a statement of reasons for the action being taken, an opportunity to be heard, usually at a formal hearing, and a right to be represented by counsel.

45. Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983); Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3d Cir. 1980), *cert. denied* 451 U.S. 986 (1981); D'Andrea v. Adams, 626 F.2d 469 (5th Cir. 1980), *cert. denied* 405 U.S. 1036 (1981); Simcox v. Shabat, No. 78 C 3094, slip op. (N.D. Ill. 1980); Eckerd v. Indian River School District, 475 F. Supp. 1350 (D.C. Del. 1979).

46. Mahaffey v. Kansas Board of Regents, 562 F. Supp. 887 (D. Kan. 1983); Shaw v. Board

In the first case the court held the teacher's speech concerned items of individual rather than public concern, and in the second the court held that the two teachers failed to perform the duties imposed on them as a condition of their employment. By contrast, the courts seem to require an almost overwhelming showing of a first amendment violation before interjecting themselves in non-tenure/nonrenewal situations. For example, in *Megill v. Board of Regents of the State of Florida*,[47] the court went so far as to state: "This Court does not sit as a reviewing body of the correctness or incorrectness of the Board of Regents' decision in granting or withholding tenure. This is founded on the policy that federal courts should be loathe to intrude into internal school affairs."[48] Of the twenty non-tenure cases reviewed in this note, nine discharges were upheld, several for seemingly specious reasons;[49] five were remanded—three for *Mt. Healthy* "but for" considerations[50] and two, prior to *Mt. Healthy*, for further first amendment considerations.[51] Finally, in only six cases were teachers reinstated or awarded money damages in lieu of reinstatement.[52] Two of these reinstatement decisions were pre-*Mt. Healthy*.[53] In the remaining four, the *Mt. Healthy*

of Trustees of Frederick Community College, 396 F. Supp. 872 (D.Md. 1975) (faculty members refused to attend faculty workshops or march in academic regalia at commencement exercises).

47. 541 F.2d 1073 (5th Cir. 1976).

48. *Id.* at 1077.

49. *Id.*; Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981); Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981) (even though there was considerable evidence that resentment of the non-tenured majority on a faculty committee led to a unanimous vote by the tenured staff not to approve Hildebrand for tenure, the court found the vote overrode the protected speech, although the court *assumed without deciding* that the conduct was protected); Roseman v. Indiana University of Pennsylvania, 520 F.2d 1364 (3d Cir. 1975) (*Roseman* was pre-*Givhan*, therefore the private nature of the communication resulted, *inter alia*, in her non-renewal); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) (the court held that the teacher's criticism of the proper content of a required health course was *not* a matter of public concern); Landrum v. Eastern Kentucky Univ., 578 F. Supp. 241 (E.D. Ky 1984) (the court granted defendant's motion for summary judgment on first amendment grounds but ordered that the case stand for trial on the due process issue); Russ v. White, 541 F. Supp. 888 (W.D. Ark. 1981) (because Dr. Russ was Dean of Instruction, the court deemed him less protected than a classroom teacher); Press v. Board of Regents of the University System of Georgia, 489 F. Supp. 150 (M.D. Ga. 1980); Barbre v. Garland Independent School District, 474 F. Supp. 687 (N.D. Tex. 1979).

50. Swilley v. Alexander, 629 F.2d 1018 (5th Cir. 1980); Eichmann v. Indiana State University Board of Trustees, 597 F.2d 1104 (7th Cir. 1979); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977).

51. Kaprelian v. Texas Woman's University, 509 F.2d 133 (5th Cir. 1975); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

52. McGee v. South Pemiscot School District R-V, 712 F.2d 339 (8th Cir. 1983); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); Brown v. Bullard Independent School District, 640 F.2d 651 (5th Cir. 1981); Lindsey v. Board of Regents of the University System of Georgia, 607 F.2d 672 (5th Cir. 1980); Gieringer v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973); Lusk v. Estes, 361 F. Supp. 653 (N.D. Tex. 1973).

53. Gieringer v. Center School District No. 58, 447 F.2d 1164 (8th Cir. 1973); Lusk v. Estes, 361 F. Supp. 653 (N.D. Tex. 1973).

standard was applied, but the school boards were clearly unable to show that "but for" the protected activity their decision would have been the same.[54]

THE *PICKERING* CONSIDERATIONS

In *Pickering*, the Supreme Court articulated five situations wherein certain legitimate interests of the state might limit a teacher's right to speak freely on any subject,[55] and two situations which would weigh heavily in favor of a teacher's right to freely criticize his employer or institution.[56] District and circuit courts have examined one or more of these considerations as the facts of each case so demanded, but uniformity of application is sorely lacking.

1. The Need To Maintain Discipline And Harmony Among Superiors and Co-Workers

To date, the Seventh Circuit has expressed the greatest degree of tolerance for disruptive conduct on the part of a teacher. In *McGill v. Board of Education of Pekin Elementary School*,[57] a teacher alleged that she was involuntarily transferred to another school in retaliation for her complaints about school procedures. The teacher had privately disagreed with some of her principal's decisions and brought those disagreements to his attention.[58] After noting that the teacher's critical statements in no way impeded her classroom duties or interfered with the regular operation of the schools generally,[59] the court discussed whether the teacher was a source of friction and lack of cooperation among faculty members, as the Board had alleged.[60] McGill rebutted the allegations with testimony from faculty members that such tension did not exist and that she was a respected and valued colleague.

The Seventh Circuit read *Pickering* as limiting a teacher's right to speak out only when that speech is "so disruptive" as to impede the

54. McGee v. South Pemiscot School District R-V, 712 F.2d 339 (8th Cir. 1983); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); Brown v. Bullard Independent School District, 640 F.2d 651 (5th Cir. 1981); Lindsey v. Board of Regents of the Univ. System of Ga., 607 F.2d 672 (5th Cir. 1980).

55. *See supra* text accompanying notes 15-19.

56. *See supra* text accompanying notes 20-21.

57. 602 F.2d 774 (7th Cir. 1979).

58. McGill also charged that she was transferred because of her discussions with other faculty members in the teachers' lounge in which she explained why she favored a master bargaining contract. *Id.* at 776.

59. *Id.* at 777.

60. *Id.*

teacher's performance or interfere with the operations of the school.[61] At trial, the jury had been instructed that a teacher's criticism would not be protected if "the teacher's actions *materially* and *substantially* interfere with the operation of the education process in the classroom."[62] The court held that, because McGill had established that her speech was not *unduly* disruptive,[63] *Pickering* considerations did not weigh in the Board's favor. Finding that retaliation can take the form of transfer as well as discharge, the court, affirming the district court, ordered McGill reinstated to her original teaching position.[64]

The Fifth Circuit, in *Swilley v. Alexander*,[65] characterized the Supreme Court's language in *Pickering*, regarding the need for superior-subordinate discipline and harmony, as "intended to prevent public airing of obnoxious personal vendettas which are almost always detrimental to any working relationship."[66] In the *Swilley* case, Swilley, president of the teacher's union, informed the Mobile School Board, in closed session, about an unnamed school principal who allegedly exposed students to the risk of serious harm by sending them outdoors for tornado drills during lightning storms, and sent small children home alone without notifying their parents. Swilley also gave the news media a press release recapping his allegations at the Board meeting. Swilley brought action against the school board when it declared that he would not be allowed to attend any executive conference on personnel that they might have in the future. Further, the Board placed a reprimand letter in his personnel file.

The court held that Swilley's actions were protected by the first amendment.[67] Finding that the physical safety and well-being of students is perhaps even more a matter of public concern than *Pickering*'s allocation of school funds, the court determined that Swilley's remarks were directed towards the professional conduct of the unnamed principal, rather than a petty personal attack.[68]

The Ninth Circuit has also been tolerant of a teacher's right to speak critically. In *Bernasconi v. Tempe Elementary School District No.*

61. *Id.*

62. *Id.* (emphasis added).

63. *Id.*

64. *Id.* at 780. *See also*, Bowman v. Pulaski County Special School District, 723 F.2d 640, 645 (8th Cir. 1983), wherein the court held that "involuntary transfers can be as effective as discharges in chilling the exercise of first amendment rights."

65. 629 F.2d 1018 (5th Cir. 1980).

66. *Id.* at 1021.

67. *Id.* at 1019.

68. *Id.* at 1021.

3,[69] the court stated that it was willing to tolerate communications that may have the effect of "ruffling the feathers of some of the plaintiff's co-workers."[70] Bernasconi, an untenured Mexican-American teacher, was transferred when she complained about children being placed in classes for the mentally retarded because school policy required they be tested in English rather than in their native tongue. After unsuccessfully attempting to correct the problem internally through the principal and the special services division of the school district, Bernasconi advised certain parents of the children negatively affected by the policy to consult the local legal aid society.[71] The Ninth Circuit affirmed the district court's finding that the public statements made by Bernasconi were directed primarily at the general practice rather than at named individuals, tipping the balance in favor of her right to speak.[72] This decision leaves open the possibility, however, that had her statements been directed at those responsible for the decision, the result might not have been the same in view of the *Pickering* focus on discipline and harmony among superiors and co-workers.[73]

Several decisions support the observation that a court's characterization of teacher speech as "bickering" or a finding that a teacher engages in "running disputes" will weigh strongly against first amendment protection, both because such speech falls outside the scope of *Pickering*'s "matter of public concern" requirement, and because of the need for maintaining harmony among co-workers. For example, in *Roseman v. Indiana University of Pennsylvania*,[74] a non-tenured teacher who repeatedly complained to the college dean about matters concerning the foreign language department's acting chairman brought suit when her contract was not renewed. The Third Circuit held that since Roseman's attack on the dean called into question the integrity of the person immediately in charge of running a department and would have the effect of interfering with the harmonious relationship with her superiors and co-workers, her statements were outside first amendment protection.[75]

In *Barbre v. Garland Independent School District*,[76] a non-tenured

69. 548 F.2d 857 (9th Cir. 1977).
70. *Id.* at 862.
71. *Id.* at 859.
72. *Id.* at 861-62.
73. *See* Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).
74. 520 F.2d 1364 (3d Cir. 1975).
75. *Id.* at 1368. Because *Roseman* was decided pre-*Givhan*, the court's decision was also predicated on the fact that her statements to the members of the Foreign Languages Department and the Dean of the College of Arts and Sciences were essentially private communications.
76. 474 F. Supp. 687 (N.D. Tex. 1979).

teacher's aide in a school whose student body consisted primarily of trainable mentally retarded children alleged that her contract was not renewed because she sought to determine whether the school district was properly implementing a state statute regarding salary schedules. In rejecting her claim, the court first noted that Barbre's concern with the state statute was a pretext for her private concern with her own pay increase and promotion.[77] In addition, the court reasoned that because the student body was composed of trainable mentally retarded children, the requirement of harmony and co-operation among the staff to deal with the sensitive matters inherent in the employment situation militated against allowing Barbre to publicly criticize her superiors and undermine the effectiveness of the working relationship.[78]

The least degree of tolerance for dissent among co-workers may have been expressed by the Fourth Circuit in *Mayberry v. Dees*,[79] when it opined that to the extent that a professor's remarks may tend to diminish collegiality of the department, one may, without offending the constitution, base a decision not to recommend tenure on the content of remarks, although they enjoy first amendment protection.[80] Mayberry, a non-tenured language professor, had basic professional differences with the chairman of the language department about whether upper level language courses should be conducted in the language of instruction, a common university practice. He also conducted a door-to-door campaign criticizing the method of appointment to a reaccreditation steering committee, and wrote an anonymous letter about it. Despite the fact that the court found Mayberry's statements protected by the first amendment as matters of public concern, denial of his tenure was affirmed.[81] The conclusive factor in the court's determination was its recognition that the chairman of the department had concluded before the speech issue arose that Mayberry would not be recommended for tenure because he did not meet faculty tenure standards.[82]

In summary, with regard to the *Pickering* focus on discipline and harmony among superiors and co-workers, while *McGill* and *Bernasconi* indicate tolerance for speech that is not "unduly" disruptive or which might "ruffle the feathers" of co-workers, and *Swilley* appears to condone speech so long as it does not rise to the level of "an obnoxious

77. *Id.* at 698.
78. *Id.*
79. 663 F.2d 502 (4th Cir. 1981).
80. *Id.* at 516-17 n.35. *See also* Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 W. EDUC. LAW REP. 1053 (1983).
81. *Id.* at 520.
82. *Id.* at 510.

personal vendetta," other decisions have not gone so far. *Roseman*, *Barbre* and *Mayberry* afford considerably less protection in terms of acceptable speech, although *Barbre* may not have demonstrated less protection had her speech not be held to be a pretext for a pay raise. It should be noted, however, that *McGill* and *Bernasconi*[83] arose in the context of retaliatory transfers, while *Roseman*, *Barbre* and *Mayberry* concerned denial of tenure situations. This may account for the harder line taken by the latter courts.

2. *The Need for Confidentiality*

The *Pickering* concern about confidentiality[84] rarely, if ever, comes into play in isolation. It is usually either part of a concern about a personal and intimate relationship whereby a subordinate's criticism of a superior would undermine effectiveness of the working relationship, or part of the concern about the need to maintain discipline and harmony among superiors and co-workers.

In one illustrative case, *Press v. Board of Regents of the University System of Georgia*,[85] Press, a non-tenured librarian who was an assistant director of the library, brought suit challenging his transfer within the library system and the subsequent non-renewal of his contract. At the time of Press' employment, the University Libraries, beset with serious administrative and personnel problems, were trying to solve a problem concerning polarization between degreed librarians and specialists employed by the library. Dr. Press' disagreement with his superiors and co-workers[86] concerning a gradual reduction in the number of specialists culminated in a meeting between Press and the specialists who worked under him. Press read parts of a letter written by the Director of Personnel which outlined the administration's position. This letter was to have been treated as confidential.[87] The Associate Director of the library, who was present at the meeting, testified that Press focused on "arbitrary features of the new plan while ignoring the long-range overall benefits" in a "deliberate attempt to influence the [s]pecialists to take sides against management, an attempt which

83. Neither *McGill* nor *Bernasconi* consider the tenure/non-tenure distinction.

84. *See supra* text accompanying note 16.

85. 489 F. Supp. 150 (M.D. Ga. 1980).

86. All Assistant Directors except for Press agreed substantially with the Personnel Director's recommendations. *Id.* at 152.

87. *Id.* at 153 n.3. The court found that although the confidential nature of the letter was in dispute, Dr. Press' superiors had the subjective impression it was to be treated in confidence and that impression led to their decision to transfer him.

would further polarize the factions within the Library."[88]

The decision of the district court against Press consolidated three *Pickering* considerations.[89] First, the court found that Press' criticisms were personally directed toward his immediate superiors and threatened the library's efficiency both by its content and by its time, place and manner of presentation.[90] Next, the court found that Press' reading of the confidential letter and his distorted discussion with the specialists, coming at a time of great need for management solidarity to resolve personnel problems, was ill-advised.[91] Finally, because Press' criticism and resistance to management policies had alienated him from others within the management ranks, the court determined that his working relationship within the structure had been destroyed. Thus, the court granted summary judgment to the Board.[92]

The need for confidentiality was also a factor in *D'Andrea v. Adams*.[93] D'Andrea, a tenured assistant professor of geography, filed suit against four university administrators alleging that the decision to terminate the geography program at the university was in retaliation for his statements concerning university finances presented before a legislative subcommittee which was reviewing funding of state agencies. The school board alleged that D'Andrea had conveyed confidential information. The Fifth Circuit determined, however, that D'Andrea conveyed secondhand information, identified as such, concerning allegedly improper use of school funds. The court made it clear that "even when a school is seeking revenue the administration considers necessary to school operations, a school employee is free to speak openly on the question, even when he disagrees with the administration."[94] In holding for D'Andrea, the court found that his allegations to the subcommittee did not concern matters to which he had greater access to facts[95] than did the general public, although the court conceded that as a faculty member he might well have had greater access to real facts.

In short, *D'Andrea* implies that the confidentiality standard will weigh in favor of the state where those entrusted with vital information

88. *Id.* at 153.

89. The need to maintain discipline and harmony among superiors and co-workers; the need for confidentiality; and where the personal and intimate relationship between a superior and subordinate is such that criticism of a superior undermines the effectiveness of the working relationship.

90. *Id.* at 156.

91. *Id.*

92. *Id.*

93. 626 F.2d 469 (5th Cir. 1980), *cert. denied*, 450 U.S. 1036 (1981).

94. *Id.* at 475.

95. *Id.* at 476.

violate that trust. On the other hand, that same consideration might run afoul of the *Pickering* "matters of public concern" interest.

3. Undermining of the Working Relationship Between a Superior and Subordinate

In *D'Andrea v. Adams*, D'Andrea named four university administrators in his suit—the University President, the Chief Academic Dean, the Dean of the College of Arts and Sciences, and his immediate supervisor, the Chairman of the Department of History and Social Sciences. In arriving at its decision, the Fifth Circuit balanced first amendment protections for freedom of speech on matters of public concern against possible impairment of the working relationship between a superior and a subordinate. The Fifth Circuit concluded that D'Andrea's duties or position at the university were such that his statements to the legislative subcommittee implicating "higher administrative officials" with mismanagement of funds would not seriously undermine his effectiveness in any future working relationship.[96]

An even greater protection of first amendment rights was afforded a college president in *Hostrop v. Board of Junior College District No. 515*.[97] President Hostrop was hired to act as a direct agent of a school board. He was discharged by his board after a confidential memorandum he prepared for circulation among his administrative staff, critical of the college board's continuing commitment to the Ethnic Studies program, somehow became public. The Seventh Circuit assumed, without discussion, that the content of Hostrop's memorandum was a matter of public concern. The court, analyzing the facts in light of *Pickering*, concluded:

> *Pickering* should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements . . . We find that Dr. Hostrop's suggestions about the ethnic studies program . . . cannot, on their face and by themselves, be taken as a serious impairment of the effectiveness of the working relationship between him and the Board that the defendants could discharge him

96. *Id.* at 474-75. *See also*, Anderson v. Central Point School District No. 6, 554 F. Supp. 600, 606 (D. Ore. 1982), wherein the court noted that the superintendent, sued by a teacher was not that teacher's immediate supervisor and that "there were at least two administrators between [the superintendent] and [the teacher]."

97. 471 F.2d 488 (7th Cir. 1972).

merely for making the suggestions.[98]

The Seventh Circuit held that Hostrop had stated a violation of his first amendment rights and remanded to the district court for consideration of his causes of action.[99] However, on remand, the district court found that Hostrop's dismissal was not due to his expression of views in the Ethnic Studies memorandum, but was due to a series of confrontations and incidents which included the timing and concealment of the memorandum.[100]

Both *D'Andrea* and *Hostrop* suggest that the usual academic working relationship between faculty/administration or president/board can withstand a substantial amount of criticism before the *Pickering* undermining effect will outweigh the right to state one's opinions without fear of retaliation. Similarly, the extreme deference of the Third Circuit is apparent in *Trotman v. Board of Trustees of Lincoln University*,[101] where thirteen faculty members, many tenured, engaged in various activities that were critical of the university president and his policies. The genesis of the controversy was the president's efforts to increase the student-faculty ratio from 12 to 1 to 20 to 1, in line with state recommendations. This would have necessitated a significant reduction in the size of the faculty. The plaintiffs alleged that the president and the board, in order to suppress faculty criticism, discharged, failed to promote, threatened and otherwise punished them, and took action which directly infringed upon their right to freedom of speech.[102] The court held that such criticism was "core" speech, and "not deprived of the protection of the first amendment merely because it was strident."[103] Previously, the district court had dismissed the plaintiffs' claims, focusing on the content of the speech of some of the plaintiffs:

> Johnson's involvement went beyond the pale of legitimate discussion when, in a telegram to the governor of Pennsylvania seeking [the President's] removal, he accused [the President] of 'terribly irrational and destructive' conduct and characterized him as 'inhumane', 'vicious', 'vindictive' and 'arrogant' with power given him by a weak

98. *Id.* at 492.
99. *Id.* at 495.
100. Hostrop v. Board of Junior College District No. 515, 399 F. Supp. 609 (N.D. Ill. 1974). The portion of the opinion cited herein was affirmed, 523 F.2d 569 (7th Cir. 1975). The Seventh Circuit's initial opinion in *Hostrop* indicates that the Board also considered Hostrop's failure to devote his full time to his duties, his withholding of information from the Board, his failure to give attention to certain college problems, and his attempt to mislead the Board during his contract negotiations. 471 F.2d 488, 490 n.2 (1972).
101. 635 F.2d 216 (3d Cir. 1980).
102. *Id.* at 219.
103. *Id.* at 225.

Board.[104]

The Third Circuit concluded that the district court had erred in dismissing the claims: "Speech with far less claim to legitimacy than a telegram by a faculty member of a state-related institution to his Governor has been held to fall within the scope of the First Amendment."[105] Finding that such criticism is protected implies that certain courts are loathe to find that an undermining of the working relationship, even when it may legitimately be present, will override first amendment guarantees.

Finally, in 1983 the Eight Circuit addressed the issue and also found for the teacher. In *Bowman v. Pulaski County Special District*,[106] after publicly criticizing the head coach's use of corporal punishment, two assistant football coaches were transferred to distant schools. Weighing the *Pickering* factors as articulated by the court in *Connick v. Myers*,[107] the Eighth Circuit concluded that the coaches contributed to the turmoil at the school and that the close working relationship with the head coach had been severed.[108] Nevertheless, because of four factors,[109] the court ordered that the coaches be restored to either their original positions, or with their consent, to any other equally desirable assignments.[110]

Recently, however, at least three district courts have described situations wherein a teacher's criticism of his superior was found to undermine the effectiveness of the working relationship.

First, in *Landrum v. Eastern Kentucky University*,[111] Landrum claimed that he was denied tenure by reason of his pursuit of eight first amendment activities. The court held that even though some of Landrum's criticisms may have been "tangentially related to . . . matters of legitimate public concern,"[112] nevertheless, "the extensive period over which [Landrum's] verbal assualts . . . were leveled at university administration, and the intense hostility he displayed" more than out-

104. *Id.*

105. *Id.* at 225-26.

106. 723 F.2d 640 (8th Cir. 1983).

107. 103 S.Ct. 1684, 1691-92.

108. *Id.* at 644.

109. The factors favoring the appellants were: (1) public interest in the subject of physical mistreatment of students in the schools; (2) the concurrent timing of the speech with the incident and appellants' restrained and moderate manner of speech; (3) the context of the speech which arose during a public debate over the actions and conduct of the coach; and (4) that the speech did not impede appellants' ability to perform their duties. *Id.* at 644-45.

110. *Id.* at 645-46.

111. 578 F. Supp. 241 (E.D. Ky. 1984).

112. *Id.* at 246.

weighed any possible alleged first amendment activity.[113]

Second, in *Press v. Board of Regents of the University System of Georgia*,[114] the district court found that Press' relationship with his superior, as well as all other assistant Library Directors, had deteriorated to the point where his working relationship had been completely destroyed.[115] In *Russ v. White*,[116] Russ, Dean of Instruction of a local community college, alleged that he was discharged in order to stifle his criticism of the actions of the community college president in hiring certain additional personnel.[117] Noting that several incidents and confrontations between Russ and the President had produced an untenable situation for the small administration,[118] the district court held that although Dr. Russ' statements of opinion or expression on certain matters were not in and of themselves inappropriate, the manner in which they were expressed was "inappropriate for a business setting."[119] Dean Russ' belligerence, uncontrolled emotions, public expressions of anger, and physical threats toward the president and co-workers were of a character and intensity sufficient to undermine his working relationship and warrant his discharge.[120]

These decisions suggest that where an employee's criticism is leveled directly and personally at his superiors, as in *Landrum, Press* and *Russ*, the undermining of the working relationship which generally ensues will weigh against the employee's freedom of speech. However, where the focus of the criticism is directed at a practice or action of a superior, as in *Bowman, Trotman* and *Hostrop*, courts appear to be considerably more tolerant of an impairment of the working relationship and more protective of first amendment rights. It also should be noted that *Landrum, Press* and *Russ* were non-tenured employees, while *Bowman* and *Trotman* involved primarily tenured staff.

4. Proper Performance of Daily Duties in the Classroom

Substandard teaching performance, nonperformance in or out of the classroom, or using the classroom as a forum for the airing of aca-

113. *Id.*
114. Press v. Board of Regents, 489 F. Supp. 150 (M.D. Ga. 1980).
115. *Id.* at 153, 156.
116. 541 F. Supp. 888 (W.D. Ark. 1981).
117. Dr. Russ, as Dean of Instruction, objected to the President's decision to hire two additional physical education teachers who would also coach basketball, rather than add positions in other areas such as nursing or business. *Id.* at 891.
118. *Id.* at 893.
119. *Id.* at 896.
120. *Id.* at 896-97.

demic grievances has consistently vitiated first amendment protection for critical speech.

An allegation of protected first amendment activity will not save a teacher who fails to perform expected duties of employment. Findings of this nature virtually guarantee that the administration's nonrenewal or discharge action will be upheld. This view is strongly reflected in a district court decision, *Shaw v. Board of Trustees of Frederick Community College*,[121] where two faculty members were dismissed for failure to perform specified duties of employment,[122] despite the fact that those duties were *outside* the classroom setting. The court stated:

> While the plaintiffs had a constitutionally protected right under the First Amendment to disagree with the policies of the Board and the administration . . . they had no such right to evidence their disagreement by failure to perform their duties imposed upon them as a condition of their employment . . . . While a public college faculty member must be free to exercise his right to speak on issues of public importance without fear of dismissal from his employment, no similar guarantee exists to encourage actions on his part which entail failure by him to perform duties reasonably and regularly required to be performed by him as a part of the responsibilities of a faculty member.[123]

Using the classroom to criticize university administration was not protected by the first amendment in *Clark v. Holmes*.[124] The Seventh Circuit found that Clark had emphasized sex education in his health class despite the administration's admonitions to the contrary.[125] The court stated: "[W]e do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents . . . . The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations".[126]

In addition to decrying use of the classroom as a forum for the airing of academic grievances, the court in *Clark* addressed to a lesser degree the problems that arise when a teacher's own curricular philosophy is at odds with administration policy. The *Clark* court reasoned that a faculty member does not have a right to insist upon imposing his

121. 396 F. Supp. 872 (D. Md. 1975).

122. The court found that Shaw and Winn were terminated due to their failure to attend a faculty workshop and to participate in commencement exercises, as required by the Community College *Policy Manual*. Shaw and Winn had alleged that their discharges were in retaliation for their protests against the abolition of tenure. *Id.* at 875, 886.

123. *Id.* at 886.

124. 474 F.2d 928 (7th Cir. 1972).

125. *Id.* at 930.

126. *Id.* at 931.

general philosophic view as to curricular content.[127] However, in *Kaprelian v. Texas Woman's University*,[128] the Fifth Circuit held that refusal to permit a teacher to "voice and apply in his teaching academic views relevant to *assignments* actually given him" does violate the first amendment.[129]

Inadequate performance in the classroom clearly outweighs any alleged first amendment speech protection. For instance, in *Megill v. Board of Regents of State of Florida*,[130] an untenured professor brought suit alleging that the non-renewal of his contract was predicated upon a series of incidents relating to his right to speak out on matters of concern to the university.[131] The Board of Regents took into their tenure consideration the fact that Megill had combined a philosophy course he was teaching with an identical course being taught in the political science department, had given inadequate supervision to the course, and had given all but eight of the 257 students A's or B's.[132] In balancing Megill's general conduct as a teacher against his first amendment claim, the court found that his teaching deficiencies, as well as his boisterous, inaccurate public statements, warranted his dismissal.[133]

Finally, first amendment considerations could not insulate a principal with professional deficiencies from nonrenewal of his contract in *Schmidt v. Fremont County School District No. 25*.[134] Schmidt, a public school principal, criticized the school board at a board meeting and

127. The court noted that Clark had cited no sound authority for the proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members with regard to either the content of the required health course or the inadvisability of his engaging in extensive personal counselling of his students. *Id.*

128. 509 F.2d 133 (5th Cir. 1975).

129. *Id.* at 139. By way of contrast, the court prefaced its holding with a litany of impermissible teacher activities: 1) a subordinate's insistence on imposing his general policy views on his superior; 2) controlling his own teaching assignments; or 3) publicly denigrating his college.

130. 541 F.2d 1073 (5th Cir. 1976).

131. Megill spoke out controversially on at least four occasions: 1) after a meeting between the Florida legislative leaders, the President of the University, the Chancellor of the State University System, Megill and others, Megill called a press conference in which he berated university administrators for their handling of racial matters; 2) in an interview with the student newspaper, Megill referred to the university president as a dangerous man because of his alleged denial of tenure to another professor when, in fact, that denial of tenure had occurred during the president's predecessor's reign; 3) at a meeting of the Yale Club, Megill spoke from the audience in an offensive manner which disrupted the meeting and subsequently led to adjournment; and 4) at an open meeting in the aftermath of the Kent State shootings he announced that the administration's spies had arrived, referring to the university attorney and several staff members, and this was found to be misleading and incorrect. He also made inaccurate statements to the Board of Regents concerning the position of the local chapter of the American Federation of Teachers, of which he was president. This, not the public statement, was held to be the reason for his discharge. *Id.* at 1082-85. Megill alleged that his statements were protected by the first amendment.

132. *Id.* at 1082.

133. *Id.* at 1085.

134. 558 F.2d 982 (10th Cir. 1977).

expressed his views of the organization and administration of the career education program. He publicly referred to the school as a "rag tag high school."[135] Moreover, Schmidt disapproved of the Board's policy of allowing parents of the members of the athletics letters club to sell reserved seats to the high school football games. Two years later, after his contract was not renewed, Schmidt brought suit alleging that the termination was for constitutionally impermissible reasons. The court found that Schmidt had not met his burden of showing that his conduct was constitutionally protected—that his statements were not on issues of general public concern, but rather were statements relating to the internal affairs of the school system.[136] Further, the court found that Schmidt had failed to meet his *Mt. Healthy* burden. He did not show that his statements were a substantial factor in his contract nonrenewal. According to the court, the overriding factors in Schmidt's termination were his inability to stabilize a faltering school system and to improve school attendance, coupled with his improper delegation of authority on critical matters.[137]

In short, except in situations where a teacher fails to fulfill contractual obligations, disruptive speech is tolerated to varying degrees outside the classroom. However, it is evident that once the school classroom door closes, a teacher is not free to vent his criticism to the students. Courts uniformly agree that students should not suffer the consequences of teacher dissatisfaction with academic policy.

5. Freedom from Interference in the Regular Operation of the Schools

One standard for judging when the level of interference with the operation of the school outweighs protected activity is set out in *Trotman v. Board of Trustees of Lincoln University*:[138]

> In an academic environment, suppression of speech or opinion cannot be justified by an undifferentiated fear or apprehension of disturbance, nor by a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Instead, restraint on such protected activity can be sustained only upon a showing that such activity would materially and substantially interfere with the requirement of appropriate discipline in the operation

135. *Id.* at 983.
136. *Id.* at 984.
137. *Id.* at 984-5.
138. 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981). *Trotman* adopted the standard set out in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1968).

of the school.[139]

Therefore, the Third Circuit requires actual, material, substantial disruption in the operation of the school before an individual's critical speech may be suppressed. The *Trotman* court found that the faculty members "unquestionably had a disrupting effect on the University's primary mission, education and the advancement of the Arts and Sciences".[140] However, it vacated the dismissal of the teacher's suit and remanded for a *Mt. Healthy* determination as to whether the defendant could prove that the challenged retaliatory action would have occurred regardless of whether the constitutionally protected action had taken place.[141]

In *D'Andrea v. Adams*,[142] the Fifth Circuit focused on the impact on school operations of D'Andrea's statements to the state legislature budget subcommittee. The court noted that D'Andrea's statements, like Pickering's letter to the editor of a local paper, had *no actual detrimental impact* upon school operations. The *D'Andrea* court noted that Pickering's criticisms of the school board for spending too much money on athletics were made *after* the proposal for a tax increase for the schools was defeated at the polls; therefore they could have no effect on the ability of the school to raise the necessary revenue. Despite the fact that D'Andrea's statements were made at a time when his school was seeking funds from the legislature and could have an effect on the ability of the school to raise the necessary revenue, the court emphasized that whether a school needs additional funds is a matter of legitimate public concern on which the judgment of the school administration cannot be taken as conclusive:

> To accept the administrator's position that the interference that justifies dismissal of a public employee exists whenever a professor makes statements that present a substantial risk of weakening and undermining the state legislature's support for the University would be to impose on teachers in public employment a general duty of loyalty to the specific goals of the administration, a position specifically rejected by the *Pickering* court.[143]

Pickering and *D'Andrea* make it clear that even when a school is seeking revenue the administration considers necessary to maintain school operations, a school employee is free to speak openly on the subject when he is in disagreement with the administration.

139. Trotman v. Board of Trustees, 635 F.2d at 230, *quoting* Tinker, 393 U.S. at 508-09.
140. *Trotman*, 635 F.2d at 230.
141. *Id.* at 230-31.
142. 626 F.2d 469 (5th Cir. 1980). *See supra* text accompanying notes 93-96.
143. 626 F.2d at 475.

In *Simcox v. Shabat*,[144] a controversy arose between the Olive-Harvey Community College administration and the Olive-Harvey Chapter of the Cook County College Teachers Union. Simcox, president of the Union, criticized the college's method of implementing the Competency Based Instruction component of a large federal grant. As a result, Simcox was suspended for seven days without pay. Simcox filed suit alleging that his suspension was a direct result of the numerous memoranda he authored and distributed[145] in which he urged faculty members to stick by the union position and to withhold support for the federal grant program until plans for the instruction component could be satisfactorily formed. He charged that these communications were protected by the first and fourteenth amendments as matters of public concern. The administration alleged that the Simcox memoranda urging union members not to volunteer their participation in the Competency Based Instruction program was so disruptive that it interfered with the operation of the school. In fact, no faculty members volunteered to participate, although a few department chairmen indicated they would volunteer if no one else came forth.

The Seventh Circuit found that the Simcox memo was a "mere reminder" to other faculty members of the union's position not to support the administration, and that some department chairmen did, in fact, volunteer their services. Relying on its decision in *McGill*,[146] the court read *Pickering* as establishing a permissible limit on a teacher's right to speak out only when that speech is so disruptive as to interfere with the operation of the school. The court held that the Simcox memo was not that disruptive. Moreover, in *dicta*, the court read *Pickering* as requiring something more than stubborn refusal to support the school board's attempted administration and implementation of federal grant monies.

Although the Third, Fifth and Seventh Circuits have articulated an "actual", "material", "substantial" or "so disruptive" standard by which to determine whether there has been interference in the operation of the school, practically that standard seems to conflict with the

144. No. 78 C3094 slip op. (N.D. Ill. 1980).

145. Simcox either authored or was instrumental in authoring eight memoranda to the Olive-Harvey administration, the City College administration and the Grants Chief of the U.S. Office of Education setting out the union's position, or to the union membership setting out the responses or lack of responses to his inquiries. No disciplinary action was taken with respect to these memoranda. The ninth memorandum was apparently the straw that broke the camel's back and resulted in his suspension. In that memo, Simcox requested that faculty members *not volunteer* to participate in the Competency Based Instruction Program, as per the union's position.

146. *See supra* text accompanying notes 57-64.

Trotman, D'Andrea and *Simcox* decisions which were all marked by that type of interference. Whether, then, the state can prevail under any circumstance remains an open question.

APPLICATION OF THE *PICKERING/MT. HEALTHY* BALANCING TEST: BEYOND THE SCHOOL SETTING

Coincidentally, both *Pickering* and *Mt. Healthy* arose in a school setting; however, the balancing test they established is equally applicable and widely used in all areas of public employment with only minor deviations.[147] In *Muller v. Conlisk*,[148] the Seventh Circuit, distinguishing the teacher in *Pickering* from the police officers in *Muller*, with their quasi-military orientation and need for rigid departmental internal discipline, held that such considerations did not make *Pickering* inapplicable:

> Rather, their possible effect is no more than to influence that balance which *Pickering* says must be struck in each case. To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed.[149]

With respect to the balancing of a policeman's or fireman's right to criticize departmental policy against that of the department in maintaining efficiency, discipline and control of its officers, three recent decisions are particularly enlightening. In *Haurilak v. Kelley*,[150] Haurilak, a police officer, was suspended from his job because he wrote one letter to an alderman and another letter to the mayor with copies to the chief of police, the city administrative assistant, members of the board of aldermen, and the chairmen of the Democratic and Republican town committees, concerning his perceived misapplication of the police merit system.[151] The grounds for suspension were that the Police Department's *Manual of Procedure* provided that 1) members of the

147. *See, e.g.*, Finck, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering*, 7 HASTINGS CONST. L.Q. 1001 (1980), where it is noted that the extent of a police officer's right to comment freely about his or her employment is much less than that of a teacher but more than that of a soldier. While different considerations come into play with respect to type of employment, it must be remembered that the tenure/non-tenure distinction is rarely present in other areas of public employment.

148. 429 F.2d 901 (7th Cir. 1970).

149. *Id.* at 904.

150. 425 F. Supp. 626 (D. Conn. 1977).

151. *Id.* at 628-29. Although Haurilak's score was fourth highest of eighty scores on a competitive police exam, he was transferred from his position as a detective in the investigative division to the uniformed police division. Haurilak alleged that he was replaced as detective by an officer who lacked his experience and who had failed the merit exam.

department should not request aid of outsiders to the department with regard to their employment situations, and 2) members should not criticize or speak derogatorily to outsiders regarding orders or instructions issued by superior officers.[152] Applying the *Pickering* analysis, the district court held that the operation of the town's merit system was a matter of public concern, and that Haurilak's letters were not merely private communications aimed at soliciting aid to regain his position as detective.[153] The police department rules could not constitutionally be applied to prohibit letters such as Haurilak's.[154]

The district court then proceeded to apply the *Pickering* considerations, taking into account the special nature of a police officer's duties and the need to maintain police discipline. Noting that Haurilak's letters were generally couched in respectful terms and objectively expressed his opinion as to the misapplication of the merit system, the court concluded that Haurilak and the police chief did not have "such a close working relationship that such criticism of official policy could not be tolerated."[155] Further, the normal operations of the police department were in no way disrupted. The police department was enjoined from taking disciplinary action against Haurilak, and all mention of such action was ordered expunged from his file.[156]

Although certain conduct of a fireman in criticizing management of the fire department was within the general protection of the first amendment, in *Janusaitis v. Middlebury Volunteer Fire Department*[157] the Second Circuit held his dismissal was not violative of first amendment guarantees. The protected speech covered: 1) a proposed letter to the Internal Revenue Service revealing violations of generally accepted accounting principles of the department; 2) a threat to the fire chief and to the chairman of the executive committee to mail the letter if such practices were not immediately changed; 3) a letter to the chief charging that his suspension was politically motivated; 4) a letter to the First Selectman of the town charging the department and the First Selectman with lack of respect for the law and trying to "cover up"; and 5) a newspaper interview detailing his I.R.S. complaints.[158] Despite the first amendment protection for the communications themselves, the district court found that Janusaitis' abrasive and personally motivated conduct

152. *Id.* at 629.
153. *Id.* at 631.
154. *Id.*
155. *Id.*
156. *Id.* at 632.
157. 607 F.2d 17 (2d Cir. 1979).
158. *Id.* at 25.

threatened institutional efficiency.[159] In its decision, the court distinguished between Pickering, a teacher, expressing views about an institution or proposition, and Janusaitis, a fireman, verbally attacking the very persons with whom he must function in the closest coordination. The court stated, "[w]hen lives may be at stake in a fire, an espirit de corps is essential to the success of the joint endeavor. Carping criticism and abrasive conduct have no place in a small organization that depends upon loyalty—'harmony among co-workers'."[160] The court held that the functioning of the volunteer fire department would be seriously impaired if Janusaitis were reinstated. His action was dismissed.[161]

In a fact situation similar to *Haurilak*, the Fifth Circuit, in *Bickel v. Burkhart*,[162] ordered that a municipal fireman passed over for promotion to driver engineer be made "whole, monetarily and in all other ways."[163] Bickel alleged that his comments critical of the fire department and some of its equipment, made at a meeting between members of the fire department and the fire chief and the fire chief's superior, were the sole cause of the chief's decision to deny him promotion. The court determined that Bickel's criticism was aimed at the department as an institution, rather than anyone in particular.[164] Further, the court rejected the department's contention that Bickel's statements could be construed as critical of the chief, as head of the department, simply because the chief bears the ultimate responsibility for the efficient operation of the department.[165] The court contrasted Bickel's objective statements, made at a closed meeting and in a calm manner, with those of Janusaitis, and concluded that Bickel's statements in no way interfered with the operation of the fire department.[166]

The *Pickering/Mt. Healthy* test has been applied in a wide variety of public employment situations other than public safety. In *Pilkington v. Bevilacqua*,[167] a discharged mental hospital administrator who used a variety of administrative channels to air his grievances, make suggestions, and identify deficiencies in the Rhode Island Department of Pub-

159. *Id.* at 18, 26. The district judge noted that Janusaitis pursued his attack against the department "in the most provocative and divisive manner possible," had as his goal changing the operation of the department and undermining the authority of its officers, and was "more concerned with proving himself right and every one else wrong than with truly promoting the welfare and efficiency of the department."

160. *Id.* at 26.

161. *Id.* at 27.

162. 632 F.2d 1251 (5th Cir. 1980).

163. *Id.* at 1258.

164. *Id.* at 1256.

165. *Id.* at 1256 n.9.

166. *Id.* at 1257.

167. 439 F. Supp. 465 (D. R.I. 1977).

lic Health,[168] was ordered reinstated by the district court. After examining the various *Pickering* considerations and concluding that Pilkington's right to speak out on matters of public concern outweighed any justifications set out by the hospital, the court observed:

> This would be a far different case had plaintiff led his co-workers out on strike, or engaged the patients in a holy battle against the forces of bureaucracy. But at no time did the plaintiff's actions disrupt hospital care or interfere with the calm and protected environment which might be thought advisable in a mental hospital.[169]

In *Monsanto v. Quinn*,[170] an Internal Revenue officer of the Virgin Islands Department of Finance brought an action alleging that her 90-day suspension without pay was in retaliation for her having written 17 letters to the Commissioner of Finance complaining that the Tax Division was poorly managed and the employee morale was low. Further, she criticized the structure of the Division, and sought the elimination of certain employment positions.[171] Adhering to the "material and substantial disruption" standard of its earlier *Trotman* decision, the Third Circuit emphasized that the first amendment protection cannot be overridden merely by a showing that disruption did actually occur. Finding no evidence that Monsanto's 17 letters or their release to the news media amounted to any more than a small amount of disruption, the court noted that the volume of letter writing could not be equated with its content.[172] Further, the court declared that Monsanto's speech did not lose its protection merely because it was persistent or "pestiferous".[173]

Clearly, several of these circuit court decisions concerning public employment in other than an academic context have extended first amendment protections for employees who criticize departmental policy. The *Pilkington* "strike" or "holy battle" language, indicative of what would be considered unprotected activity, and the *Monsanto* 17 letters, indicative of "pestiferous" but protected activity, suggest great leeway for individuals who criticize their public employers.

On the heels of these rather liberal circuit court decisions, the

168. Pilkington, *inter alia*, wrote a letter to the Director of the Rhode Island Department of Social and Rehabilitative Services critical of department officials relative to their stand on general public assistance benefits, questioned and criticized the merits of a cash pre-accreditation program, criticized the failure of the central administration to provide supplies and repair crews necessary to maintain proper patient care and threatened to call the press if conditions were not improved, and testified on behalf of a patient at a certification hearing. *Id.* at 474.

169. *Id.* at 476.

170. 674 F.2d 990 (3d Cir. 1982).

171. *Id.* at 991.

172. *Id.* at 999.

173. *Id.*

United States Supreme Court, in a 5-4 decision in *Connick v. Myers*,[174] recently signaled its intent to strictly construe the "matters of public concern" standard of *Pickering*. Myers, an Assistant District Attorney in New Orleans for 5-1/2 years, was notified by District Attorney Connick of her impending transfer to another section of the criminal court. Myers expressed strong opposition to the transfer to several of her supervisors, including Connick. On one occasion, Myers discussed office matters with a supervisor, and again expressed displeasure concerning the transfer order. After being informed by the supervisor that others in the office did not share her concerns, Myers prepared and distributed a questionnaire soliciting the views of her fellow staff members. The questionnaire concerned office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work on political campaigns.[175] Upon becoming aware of the circulation of the questionnaire, the supervisor phoned Connick and advised him that a "mini-insurrection" was taking place in the office.[176] Connick immediately terminated Myers' employment, at which time he informed Myers that the reasons for her termination were 1) her refusal to accept the transfer, and 2) her act of insubordination in distributing the questionnaire.[177]

The district court found that the distribution of the questionnaire was the real reason for her termination.[178] Further, the court held that the subject matter of the questionnaire involved matters of public concern and that the state board had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.[179] The court ordered Myers reinstated, and the Fifth Circuit affirmed.[180]

The Supreme Court held that, with the exception of the question as to whether staff attorneys ever feel pressured to work in political campaigns on behalf of office-supported candidates, the questions in Myers' survey were not matters of public concern, but instead were "mere extensions of Myers' dispute over her transfer to another section of the criminal court."[181] With respect to the one question which was a

174. 103 S. Ct. 1684 (1983).

175. The fourteen question survey included four questions relating to departmental transfers, four relating to the effects of an office rumor mill, and one question asking whether those being questioned had confidence in and would rely on the word of five named supervisors. *Id.* at 1694.

176. *Id.* at 1687.

177. *Id.*

178. *Id.*

179. *Id.* The District Court decision is reported at 507 F.Supp. 752 (E.D. La. 1981).

180. *Id.*

181. *Id.* at 1690-91.

matter of public concern, the Court stated that the district court had erred in imposing an unduly onerous burden on the state to justify Myers' discharge (that there must be a clear demonstration of a substantial interference in the operations of the office).[182] Adhering instead to the *Pickering* balancing test, the Court stated: "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[183] By holding that it is not necessary for an employer "to allow events to unfold to the extent that the disruption of the office and destruction of working relationships is manifest before taking action,"[184] the Supreme Court has allowed an employer to discharge an employee who speaks out on matters of public concern if that employer *reasonably anticipates* that problems will arise as a result of the speech. This is a far cry from the "actual", "material", "substantial", or "so disruptive" standard required by several of the circuit courts in order to tip the balance in favor of an employer's right to discharge or take other action against an employee who criticizes his or her employer.[185]

CONCLUSION

Federal courts have extended the scope of first amendment protection in the area of teacher criticism of academic policy from the traditional teacher-administrator situation to that involving an administrator (president, principal) and his or her Board of Education or Regents. Retaliatory transfers are dealt with using the same standard as more common non-renewal or discharge cases.

In applying the *Pickering/Mt. Healthy* balancing test and applicable burdens of proof, courts appear to give additional although unspoken weight to tenured teachers in retaining their positions. However, in

182. *Id.* at 1691. The Court noted that Myers' questionnaire was not used to inform the public that the District Attorneys' office was not fulfilling its responsibilities in the investigation or prosecution of criminal cases, and did not attempt to reveal actual or potential wrongdoing or breach of trust on the part of Connick or others. *Id.* at 1690-91.

183. *Id.* at 1694.

184. *Id.* at 1692.

185. Reaction by courts adjudicating teachers' claims to the Supreme Court's narrowing of the scope of "matters of public concern" in *Connick* has been swift. *See, e.g., Landrum v. Eastern Kentucky University*, 578 F. Supp. 241, 247 (E.D. Ky. 1984), wherein the court stated that: "it reads *Connick* as deliberately intended to narrow the scope of these decisions [*Mt. Healthy and Givhan*], even though they were not expressly overruled. A careful study of all these decisions leads to the inevitable conclusion that the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation initiated by the decisions upon which plaintiff relies here."

non-tenure situations courts most often defer to the administration's position, stating a desire not to interfere in that body's professional determination.

Speech about matters of public concern is entitled to first amendment protection. If speech can be characterized as *not* of public concern, for example as "bickering", "running disputes", or a personal grievance, it will lose first amendment protection. In addition, speech or conduct which impedes a teacher in the proper performance of his or her duties in the classroom will weigh heavily in favor of the state's position upholding dismissal or suspension or not granting tenure. However, for all other *Pickering* considerations—the need to maintain discipline and harmony among superiors and co-workers, the need for confidentiality, the effect of criticism on the employee-employer relationship, and freedom from interference in the regular operation of the schools—there must be more than a mere showing of an occurrence. Serious disruption or actual, substantial, material interference must be demonstrated in order for the state's position to outweigh an employee's interest in commenting on matters of public concern. In fact, in most cases the state has been unable to demonstrate such a level of disruption or interference.

In short, once a teacher proves that his or her activity was protected by the first amendment and was a motivating factor in a board's decision to discharge, suspend, transfer, or not to rehire or grant tenure, the burden shifts to the administration to prove that its decision would have been the same "but for" the protected activity. At this juncture the administration must affirmatively demonstrate that the teacher's inadequate performance in the classroom or failure to fulfill some contractual obligation is the sole reason for its decision.[186]

186. Although the observations encompassed in this note indicate that in recent years courts have given greater leeway to teachers who criticize the policies and practices of their employers, the social and economic climate of the 1980's may signal a change in this trend. Because a declining child population has caused a lower enrollment in some school districts, and because budgetary considerations have had serious negative impacts in others, teacher cutbacks have occurred in many communities. Administrators often have some discretion, after non-tenured staff is reduced, as to how tenured staff should be further reduced. It should be apparent that in such a climate, teachers will think twice before engaging in speech which is critical of their employers.

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