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INTRODUCTION

Nothing signifies office camaraderie quite like a store-bought sheet cake in the office lunchroom on one's birthday or perhaps even a celebratory company happy hour at the local sports eatery. These are a few of the many benefits of gainful employment. Beyond salary, employment benefits take many forms and depend on the context of the job. Public employment is no different. Public employees face the same pressures and office politicking that private employees face. The unique nature of the employer adds a constitutional element to even mundane[1] administrative actions ranging from employee get-togethers to selection of choice cubicle space.

Employees constitutionalize public employment when an employer terminates an employee for exercising her First Amendment rights. The Constitution protects an employee from retaliatory action when she speaks on a matter of public concern and her interest in speaking outweighs the government's interest in running an efficient office. Academic literature thoroughly discusses the Supreme Court's test[2] on this issue, commonly focusing on the public concern requirement.[3] The question of what is sufficient under the First Amendment

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1 Is there another kind?

2 This Note will refer to this test as the *Connick-Pickering* test. *See infra* Part I. For an alternative approach to the question of First Amendment public employee speech that rejects the Court's current take, see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) (arguing for a quasi-Holmsean model).

3 *See, e.g.*, Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121 (1996); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); Lawrence Rosenthal, *Permissible Content*

to amount to an adverse employment action is a less discussed aspect of the test.

Circuits split on what constitutes an adverse employment action under *Connick-Pickering*.[4] Some courts choose to limit adjudicative relief to those claims involving major employment decisions, like hiring, firing, promotion, and wage increases.[5] Other courts, however, are open to any adverse action that chills speech, including arguably minor wrongs like the refusal to give an employee a birthday party.[6] Courts on both sides of the split turn to their Title VII jurisprudence to help define the contours of adverse employment actions. This is because Title VII includes a prohibition on employer retaliatory acts against employees.[7] However, Title VII is a poor guide in the First Amendment context because Title VII's retaliation provisions protect employees from any retaliatory acts, regardless of the actor. In contrast, the First Amendment is a restraint on the government's actions as the public employer.

This Note attempts to resolve the current circuit split over what constitutes an adverse employment action in the First Amendment context by critiquing the courts' reliance on Title VII standards. Part I lays out the Supreme Court's jurisprudence on First Amendment public employer/employee rights. Part II discusses the various standards that lower courts have applied to determine what constitutes an adverse employment action, with a particular focus on the application of Title VII standards. Part III critiques this approach as both too expansive and too limiting in the First Amendment arena through the example of the hostile work environment. Part IV uses this critique and draws a distinction between Title VII retaliation claims and First Amendment retaliation claims in order to formulate a standard that accurately reflects the First Amendment purposes iden-

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Discrimination Under the First Amendment: The Strange Case of the Public Employee, 25 HASTINGS CONST. L.Q. 529 (1998); Rodric S. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5 (1999); Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109 (1988).

4 *See* Maestas v. Segura, 416 F.3d 1182, 1187–88 (10th Cir. 2005) (laying out the competing views, but declining to pick a side).

5 *See* cases cited *infra* notes 58–67 and accompanying text.

6 *See, e.g.*, Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989) ("[E]ven an act of retaliation as trivial as failing to hold a birthday party for a public employee could be actionable when intended to punish her for exercising her free speech rights." (citing Bart v. Telford, 677 F.2d 622 (1982))), *aff'd in part, rev'd in part*, 497 U.S. 62 (1990).

7 *See* 42 U.S.C. § 2000e-3(a) (2000). This Note discusses only the retaliation provision of Title VII.

tified by the Court in cases like *Pickering v. Board of Education*[8] and *Rutan v. Republican Party of Illinois*.[9]

I. The Development of Current Public Employee Free Speech Rights

Modern jurisprudence regarding the First Amendment rights of public employees begins with *Pickering v. Board of Education*.[10] *Pickering* involved a public school teacher who was terminated after writing a letter to a local newspaper criticizing the manner in which the board handled a proposed tax increase.[11]

The Court laid out a balancing approach to determine questions of free speech in the employment context. Recognizing that public employees do not completely waive their First Amendment rights for their employment, the Court also emphasized the need for the government to have some greater authority to regulate the speech of its employees.[12] The Court laid out the following approach: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13] The *Pickering* balance test is the approach the Court uses today.[14]

The *Pickering* Court emphasized the petitioner's position to speak with knowledge and expertise on the matter in question, the public's interest in his thoughts and opinions, and the letter's lack of relation to his job performance.[15] The Court found that "the *threat of dismissal* from public employment is . . . a potent means of inhibiting speech."[16] From early on, the Court focused on a specific action (termination) taken to inhibit public employee speech. In the wake of *Pickering*, the Court elaborated on other facets of the public employment free speech question.[17]

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8 391 U.S. 563 (1968).

9 497 U.S. 62.

10 391 U.S. 563.

11 *Id.* at 566–67.

12 *Id.* at 568.

13 *Id.*

14 *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 81–83 (2004).

15 391 U.S. at 572–73.

16 *Id.* at 574 (emphasis added).

17 *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) (ruling that the First Amendment protects a public employee who voices her views on a matter of public concern in private with her supervisor); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (ruling that a public employer can

The Court next looked at a discharged public employee (although not a teacher) in *Connick v. Myers*.[18] The Court reaffirmed the *Pickering* balancing test, holding that a discharged public employee speaking on a matter of public concern has a First Amendment claim if her interest in the speech outweighs the employer's efficiency interest.[19] Referencing *Pickering*, the Court stated that the relevant inquiry was "whether government employees could be prevented or '*chilled*' by the *fear of discharge*."[20] The protection of public employee speech ensures an open debate that the public values in making informed decisions on governance.[21] At the same time, however, the government "should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[22] Near the end of the opinion, the Court said, "the First Amendment's primary aim is *the full protection* of speech upon issues of public concern, as well as the *practical realities* involved in the administration of a government office."[23] The Court again focuses both on the fear of chilling free speech *and* that discharge or termination is an action sufficient to bring on this chilling effect.

The Court elaborated on its reasons for the *Connick-Pickering* approach in later public employee termination cases like *Rankin v. McPherson*.[24] Stating that public employers must be concerned with operative efficiency, the Court continued: "[R]eview of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, 'the threat of *dismissal* from public employment is . . . a potent means of inhibiting speech.'"[25] The Court recognized that public debate will

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escape a constitutional violation if it can show that the same adverse action would have been taken absent the protected speech).

18 461 U.S. 138 (1983).

19 *Id.* at 142, 147; *see also id.* at 150–51 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. . . . '[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974))).

20 *Id.* at 145 (emphasis added).

21 *Id.*

22 *Id.* at 146.

23 *Id.* at 154 (emphasis added).

24 483 U.S. 378 (1987). *McPherson* involved a clerical employee in the county constable's office who, after hearing of a presidential assassination attempt, expressed her desire to see the President successfully killed the next time. *Id.* at 380.

25 *Id.* at 384 (emphasis added) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968)).

be "robust" and "unpleasantly sharp."[26] Here again, the Court weighs the value of the speech against a specific focus on termination.[27]

The Court reinforced the basic rationale for the *Connick-Pickering* analysis in later cases,[28] although largely through situations involving the termination or discharge of the employee.[29] However, the Court extended *Connick-Pickering* to independent contractors.[30] While doing so, the Court cited approvingly from cases focusing on the chilling or deterrent effect governmental actions can have on free speech.[31] However, the Court also relied on the similarity between the termination of a contract and the termination of employment.[32] Throughout the *Connick-Pickering* cases, the Court referenced both the necessity of avoiding deterring speech alongside a repeated focus on termination, dismissal, and discharge.

Meanwhile, the Court addressed First Amendment issues affecting government employees in other contexts. The patronage cases, starting with *Elrod v. Burns*,[33] discussed terminating public employees because of their political affiliation.[34] The *Elrod* Court dealt only with cases of dismissal based on political party,[35] but *Rutan v. Republican Party of Illinois*[36] contained language going much farther. The Seventh Circuit extended the scope of impermissible actions in political

26 *Id.* at 387.

27 Justice Scalia's dissent, however, argued that the Court's ruling would have an impact on a larger array of employment decisions. *Id.* at 399 (Scalia, J., dissenting) ("We are asked to determine whether, given the interests of this [government] office, McPherson had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally *reprimanded* for it . . . ." (second emphasis added)). In any case, the Court balances the adverse action in these cases (termination) consistently in light of the value of the speech and the necessity of deference to the public employer to make personnel decisions based on efficiency concerns.

28 *See generally* City of San Diego v. Roe, 543 U.S. 77 (2004) (applying the *Connick-Pickering* test to a case where a police officer sold videos of himself stripping out of his uniform on the Internet); Waters v. Churchill, 511 U.S. 661 (1994) (discussing the principles of employee speech rights, matters of public concern, and the need of efficiency in government offices).

29 *Roe*, 543 U.S. at 79; *Waters*, 511 U.S. at 667.

30 Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996).

31 *Id.* at 674 (citing Laird v. Tatum, 408 U.S. 1 (1972)).

32 *Id.* at 677.

33 427 U.S. 347 (1976).

34 *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

35 427 U.S. at 359 ("The threat of *dismissal* for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise." (emphasis added)); *id.* at 372 ("[P]atronage *dismissals* severely restrict political belief and association." (emphasis added)).

36 497 U.S. 62.

patronage cases to anything substantially equivalent to dismissal.[37] The Court found that in political patronage cases, promotions, recalls, transfers, and other hiring decisions based on party affiliation are impermissible.[38] Unlike the *Connick-Pickering* analysis, *Rutan* specifically applies some sort of strict scrutiny to political patronage.[39] However, political patronage cases receive a different treatment by the Court than the traditional public employee free speech cases.[40] In fact, lower courts have recognized that the two types of speech cases are not treated the same for purposes of First Amendment analysis.[41] *Connick-Pickering* and *Rutan* deal with two different situations; however, they both involve punishment of public employees for exercising certain First Amendment rights. It is clear that in cases like *Rutan* the Court has signaled a willingness to extend adverse actions beyond termination or dismissal.

The Supreme Court decisions following *Connick-Pickering* have dealt only with employee discharge and termination; the Court has not explicitly stretched adverse action to all four corners of the cubicle. However, it is also clear that in *Rutan* and other cases the Court has been willing to address nondismissal actions that have a chilling affect on free speech. The Court has not articulated a clear standard, leaving the lower courts in disagreement. This split is the subject of Part II.

II. Differing Approaches to the Definition of Adverse Action in First Amendment Cases

In the wake of the *Connick-Pickering* line of cases and *Rutan*, circuit courts disagree over the proper standard for adverse employment actions against public employees in the First Amendment context. Several courts, including the Sixth, Seventh, and Ninth Circuits, adopt a broad approach where any act that is likely to chill free speech con-

37 Rutan v. Republican Party of Ill., 868 F.2d 943, 955 (7th Cir. 1989), *aff'd in part, rev'd in part*, 497 U.S. 62.

38 *Rutan*, 497 U.S. at 79.

39 *Id.* at 74. Applying strict scrutiny instead of the balancing test in and of itself does not mean that the definition of adverse employment action would change, of course.

40 *Compare id.* at 70 n.4 (discussing the level of scrutiny involved), *with id.* at 101 n.3 (Scalia, J., dissenting) (drawing distinctions between the present case and the *Connick-Pickering* line of cases).

41 *See* Mendozo Toro v. Gil, 110 F. Supp. 2d 28, 34 (D.P.R. 2000).

stitutes an adverse employment action.[42] The Fifth, Eighth, and Eleventh Circuits limit the range of actions that constitute adverse employment actions to those that are important or material to the public employee's employment.[43]

Courts that apply a broad chilling effect standard emphasize the Supreme Court's language in *Rutan*, highlighting the First Amendment's concern with acts that "chill the exercise of protected belief and association by public employees."[44] The Ninth Circuit in *Coszalter v. City of Salem*[45] explicitly relied on this language when it fashioned a test for adverse actions in retaliation claims.[46] Rejecting a test that relies on whether an employee has been denied a privilege or benefit by the government, the *Coszalter* court said that the nature of the retaliation was not essential to First Amendment claims.[47] For the Ninth Circuit, the relevant question is whether the adverse action was likely to deter the employee's exercise of free speech.[48] At the same time, however, mere "bad-mouthing" and other minor acts that do not deter the exercise of free speech rights do not rise to the level of an adverse employment action in the free speech context.[49]

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42 *See, e.g.*, Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004); Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003); Farmer v. Cleveland Pub. Power, 295 F.3d 593, 602 (6th Cir. 2002).

43 *See, e.g.*, Stavropoulos v. Firestone, 361 F.3d 610, 616 (11th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005); Myers v. Neb. Health & Human Servs., 324 F.3d 655, 660 (8th Cir. 2003); Bickel v. Burkhart, 632 F.2d 1251, 1255 (5th Cir. 1980). *But see* Philips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002) (recognizing that retaliation situations beyond the "classic examples" are cognizable if minor incidents coalesce into a retaliatory act).

Some circuits remain undecided over the question. The Tenth Circuit, for example, has recognized the circuit split but declined to rule on the issue. *See* Maestas v. Segura, 416 F.3d 1182, 1188 n.5 (10th Cir. 2005). The Tenth Circuit has, however, recognized that First Amendment retaliation action could be broader than a Title VII retaliation action, but explicitly noted that the circuit has "never held [that] employment action which may tend to chill free speech is necessarily adverse." *Id.* For a discussion of Title VII's relevance to the issue in question, see *infra* notes 75–91 and accompanying text.

44 *Rutan*, 497 U.S. at 73 (majority opinion).

45 320 F.3d 968.

46 *See id.* at 974–75.

47 *Id.*

48 *Id.* at 975.

49 *Id.* In *Coszalter*, the Ninth Circuit said that adverse employment action would include "transfer to new duties[,] . . . an unwarranted disciplinary investigation[,] . . . an unwarranted assignment of blame[,] . . . a reprimand containing a false accusation[,] . . . a criminal investigation[,] . . . repeated and ongoing verbal harassment and humiliation[,] . . . a . . . suspension from work[,] . . . a threat of disciplinary

Other circuits agree with the Ninth Circuit. The Sixth and Seventh Circuits adopt chilling effect approaches.[50] *Farmer v. Cleveland Public Power*[51] involved an employee of Cleveland Public Power.[52] Her claims included allegations that her supervisor changed her work responsibilities as a result of her accusation that an employer violated employment laws and her decision to file a discrimination claim with the Equal Opportunity Employment Commission.[53] The court found that the employer's acts in phasing out Farmer's responsibilities for payroll and other personnel matters were an adverse action because it "would dissuade an ordinary person from continuing to engage in speech."[54] The Seventh Circuit has recognized that, among other things, an officer placed on a sham surveillance assignment,[55] a reprimand letter to an employee,[56] or a correctional officer transferred to a less skilled post and less desirable shift[57] all constitute sufficient adverse employment actions for the purpose of First Amendment public employee retaliation claims.

The chilling effect approach is simple and the Supreme Court has supported it in many cases. The chilling effect approach identifies employment actions that might deter the exercise of free speech, which the courts use as the cornerstone of determining whether the retaliatory action amounts to a constitutional violation. Other courts, however, define what comprises a retaliatory action more strictly.

The Fifth, Eighth, and Eleventh Circuits do recognize that *Connick-Pickering* claims extend beyond termination of employment. "Where . . . important conditions of employment are involved, a public employee will not be foreclosed from . . . relief merely because the impermissible retaliation did not result in the termination of his employment."[58] For example, the Fifth Circuit recognizes that failure to promote constitutes an adverse employment action.[59] However, this does not mean that any action is automatically sufficiently adverse. The Fifth Circuit limits adverse actions to dismissals, demotions, repri-

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action[,] . . . an unpleasant work assignment[,] . . . [and] an unwarranted disciplinary action." *Id.* at 976.

50 *See* Farmer v. Cleveland Pub. Power, 295 F.3d. 593, 602 (6th Cir. 2002) (citing Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994)).

51 *Id.*

52 *Id.* at 597.

53 *Id.* at 598.

54 *Id.* at 602.

55 *Smith*, 28 F.3d at 649.

56 Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993).

57 Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004).

58 Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th Cir. 1980).

59 *Id.* at 1256.

mands, refusals to promote, and refusals to hire,[60] and does not include criticism, investigations, or even false accusations.[61]

Other circuits agree with the Fifth Circuit, although word choice varies. The Eighth Circuit limits the definition of adverse employment actions to those actions that "materially" affect employment or conditions of employment.[62] This means the action must involve a change in working conditions that constitutes a "material disadvantage."[63] For example, reduction in pay is a material disadvantage, but mere transfer or reassignment is not.[64] Unhappiness on the part of the employee for loss of status or prestige alone would not rise to this standard.[65] The Eleventh Circuit turns to *Bickel*'s phrase "important conditions of employment."[66] Like the Fifth Circuit, this would include things like discharges, demotions, reprimands, and refusals to hire.[67]

These Circuits do not follow the chilling effect approach, and at least one outright rejects it.[68] The Fifth Circuit specifically notes that some actions that might in fact chill free speech do not rise to the level of "actionable actions."[69] According to the court in *Pierce v. Texas Department of Criminal Justice*,[70] merely being investigated or having one's job assignment changed does not necessarily on its own constitute an adverse employment action.[71] Further, the Eleventh Circuit notes that the chilling effect of the action is different from the nature of the action itself. "While it is true that a claimant must show a chilling effect on her protected speech, she must *also* show that this effect resulted from an adverse employment action."[72]

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60 Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000).

61 *Id.*; *see also id.* at 158 n.14 ("Stigma by itself, without an impact on one's employment, does not constitute an adverse employment action.").

62 Jones v. Fitzgerald, 285 F.3d 705, 713 (8th Cir. 2002) ("To constitute an adverse employment action, the complained of action must have an adverse impact on the employee and must effectuate 'a material change in the terms or conditions of . . . employment.'" (quoting Bechtel v. City of Belton, 250 F.3d 1157, 1160 (8th Cir. 2001))).

63 *Id.*

64 *Id.* at 714. Neither does negative memoranda in a personnel file or the mere existence of warranted internal investigations. *Id.*

65 Myers v. Neb. Health & Human Servs., 324 F.3d 655, 659–60 (8th Cir. 2003).

66 Stavropoulos v. Firestone, 361 F.3d 610, 619 (11th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005).

67 *Id.*

68 *See* Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000).

69 *Id.*

70 37 F.3d 1146 (5th Cir. 1994).

71 *Id.* at 1146, 1150.

72 *Stavropoulos*, 361 F.3d at 618–19 (emphasis added).

In other words, the concept of chilling effect plays different roles in the different circuits. Those courts adopting a broad approach use chilling effect definitionally in determining whether something is an adverse employment action.[73] In contrast, other courts merely use it as a necessary but insufficient guidepost in a separate inquiry over whether the nature of the action constitutes an adverse employment action. While the Fifth, Eighth, and Eleventh Circuits do not use a particular phrase (using both "materiality" or "important conditions") to describe their definition of adverse action, they all refer to adverse employment actions as only those involving employment decisions like hiring, firing, promotions, reprimands, and other major employment actions like those explicitly delineated in *Rutan*. Examples of similar employment actions being treated differently under the competing standards are numerous.[74]

Like the Eleventh Circuit, some courts—particularly those applying the materiality/important conditions standard—have looked to Title VII jurisprudence to determine what constitutes an adverse employment action in the First Amendment context.[75] Title VII prevents private employers from "discriminat[ing] against any of [their] employees . . . because he has opposed any practice made an unlawful employment practice."[76] The question of what constitutes an adverse action by a private employer comes before courts with some frequency. Similar to the First Amendment context, circuits have split over what constitutes an adverse action, and the split roughly mirrors that of the issue at hand.[77]

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73 *See, e.g.*, Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994) ("If employees who exercise free speech find themselves facing more burdensome promotion requirements than those employees who remain silent, they are unlikely to speak freely on matters of public concern.").

74 For example, transfer and change in duties are actionable under a chilling effect inquiry, but not under an important conditions/materiality scheme. *Compare* Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004) ("[W]e cannot hold as a matter of law that transfer to a more physically demanding and less skilled post and an unfavorable change in schedule . . . are insufficient to deter the exercise of free speech."), *with* Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994) (noting that change of duties is a sufficiently adverse employment action).

75 *Stavropoulos*, 361 F.3d at 619.

76 42 U.S.C. § 2000e-3(a) (2000).

77 *See* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 688–89 (2005); *see also* Shannon Vincent, Comment, *The Unbalanced Responses to Employers Getting Even: The Circuit Split over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. PA. J. LAB. & EMP. L. 991, 1012 (2005) (proposing a solution to the split by premising employer liability on the employer's fault and knowledge); Matthew J. Wiles, Comment, *Defining Adverse Employ-*

Commentators identify different approaches taken by courts in defining adverse employment in the Title VII context.[78] The most expansive approach "defin[es] adverse employment action broadly to include any action that is reasonably likely to deter alleged victims or others from engaging in future protected activity."[79] This is similar to the chilling effect standard followed in First Amendment retaliation claims, where "'[a]ny [action] . . . that is likely to deter the exercise of free speech . . . is actionable.'"[80] The intermediate approach reads adverse employment actions in Title VII to cover the terms and conditions of employment,[81] and the most restrictive approach is limited to ultimate employment decisions like terminations, promotions, and reprimands.[82] These latter Title VII standards closely resemble the materiality or important conditions definitions of adverse actions in First Amendment public employment cases.

Both Title VII and First Amendment cases identify what employer actions will deter the employee from the questioned act (speaking out about Title VII violations or generally exercising one's right to free speech). As it happens, those circuits that take a more broad approach to adverse employment actions under Title VII take a broad approach under First Amendment public employee speech claims,[83] and vice versa.[84]

Courts give various reasons for the comparison to the Title VII requirements. The Eleventh Circuit, adopting an important conditions approach, noted that the two standards aim for a similar goal.

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ment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard, 27 U. DAYTON L. REV. 217, 243 (2001) (advocating a flexible balancing approach that limits courts to adverse actions that have a "significant" effect on the employee's status). *See generally* Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313 (2005) (laying out three different approaches to adverse actions in the Title VII context).

78 Riddell & Bales, *supra* note 77, at 313.

79 *Id.* (citing Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000)).

80 Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004) (quoting Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000) (emphasis omitted)).

81 Riddell & Bales, *supra* note 77, at 313.

82 *Id.* at 314.

83 *See, e.g.*, Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003) (adopting a "reasonably likely to deter" test from the circuit's Title VII cases to the First Amendment context). *But see* Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 580 (5th Cir. 2003) ("We recognize that [the definition in First Amendment contexts] may be broader than Title VII's definition, which limits the meaning of adverse employment action to ultimate employment decisions.").

84 *See, e.g.*, Stavropoulos v. Firestone, 361 F.3d 610, 619 (11th Cir. 2004) (noting the similarities in the test for First Amendment retaliation claims and Title VII claims), *cert. denied*, 544 U.S. 976 (2005).

"While we have not explicitly equated this element with Title VII's adverse employment action requirement, we regularly draw cases applying this rule to inform our analysis of Title VII retaliation claims. . . . This is because the standards are consonant."[85] The court in *Stavropoulos v. Firestone*[86] noted that the standards were similar because both attempted to ensure that federal justiciability law was met.[87] The court rejected chilling effect standard because it hinges solely on the subjective belief of the employee; the important conditions test, like that in Title VII, is an objective benchmark.[88]

Other courts that adopt a stricter First Amendment standard for adverse employment action also reference Title VII.[89] As the Fifth Circuit explained, "Title VII does not . . . address 'every decision made by employers that arguably might have some tangential effect upon . . . ultimate decisions.'"[90] However, the court also noted that the definition under the First Amendment question might be broader than the Title VII standard when it comes to reprimands and other disciplinary records.[91]

Courts on both sides of the adverse employment question turn their respective unblinking gazes to Title VII jurisprudence. It reflects a difference in thought over the role of adverse actions in both contexts. While the split under the First Amendment public employee question is not coextensive with the split under Title VII, the divergent views reflect a circuit's broader views on the matter. One view states that both the First Amendment and Title VII require a definition of adverse action that focuses on the chilling effect of the behavior. The other view assumes that both Title VII and the First Amendment definitions for adverse action hinge on the severity or type of action taken by the employer. Courts should not use their Title VII jurisprudence to define adverse action in the employment context, however. The Title VII standard is both too broad and too narrow for the purposes of the *Connick-Pickering* protections of employee speech. This breadth and narrowness is the subject of Part III.

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85 *Id.*

86 361 F.3d 610.

87 *Id.* at 620.

88 *See id.*

89 *See, e.g.*, Jones v. Fitzgerald, 285 F.3d 705, 714 (8th Cir. 2002) ("[W]e have consistently held a change in non-tangible working conditions, no matter how unpleasant, fails to constitute a 'material employment disadvantage' necessary to establish an adverse employment action under either Title VII or [First Amendment cases]." (quoting Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997))).

90 Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 (5th Cir. 2003) (quoting Burger v. Cent. Apartment Mgmt., 168 F.3d 875, 878 (5th Cir. 1999)).

91 *Id.* at 580.

III. TITLE VII IS A POOR MODEL FOR DEFINING ADVERSE ACTION IN THE FIRST AMENDMENT CONTEXT

Courts either explicitly rely on their Title VII jurisprudence to fashion the contours of adverse action under the First Amendment, or their Title VII and First Amendment adverse action definitions closely track one another. Title VII, however, is a poor standard to follow for three reasons. Title VII is too narrow: certain actions can chill free speech that are not actionable under Title VII. It is too broad: some circuits extend Title VII to coworker retaliatory harassment claims. Finally, the purposes of Title VII and *Connick-Pickering* First Amendment protections in the public employee context are different.

Adverse action under Title VII that limits retaliatory action to those affecting only a discrete set of employment actions is too narrow because it fails to cover acts by employers that might otherwise chill free speech.[92] As some commentators have noted, a narrow view of retaliation in the First Amendment context (one that emphasizes ultimate employer actions or material terms and conditions of employment) ignores the purpose of protecting speech:

> [S]uperimposing Title VII requirements on First Amendment litigants simply means that some retaliation claims will be rejected even though the conduct in question would chill the exercise of protected speech, contrary to the purposes and goals of that Amendment. . . . [The narrow view] sends a dangerous message to employers that they can penalize and thus deter speech with impunity—a message that clearly affects employee morale and cuts off debate that could improve the efficacy of government.[93]

Focusing only on certain employment actions arbitrarily limits First Amendment protection by requiring a sufficient showing of severity to satisfy a constitutional violation.[94]

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92 See *supra* Part I for a discussion on how a narrow approach does not apply to *all* conduct that chills speech.

93 Levinson, *supra* note 77, at 697.

94 *See id.* at 693 ("Once it is recognized that the adverse employment action would chill a reasonable employee from engaging in protected speech, the severity of the retaliatory conduct may affect damages, but it should not affect liability."). Professor Levinson's objections to the use of narrow Title VII standards in the First Amendment context stems substantially from a desire to protect governmental whistleblowers, *id.* at 671, although the First Amendment covers speech wholly unrelated to this concern, *see* Rankin v. McPherson, 483 U.S. 378, 383–84 (1987). In addressing the circuit split over adverse actions in public employee free speech cases, Professor Levinson rejects the restrictive Title VII definition and advocates a chilling effect approach. Levinson, *supra* note 77, at 699–700. While this Note agrees that defining adverse action restrictively is undesirable, Title VII is a poor standard to follow for other reasons as well. *See infra* notes 101–121 and accompanying text.

The Eleventh Circuit defends the restrictive approach along more practical lines: it ensures that the employee has suffered an actual injury.[95] Restricting retaliatory actions along these lines shows that the injury goes beyond a "subjective belief that the employer's action was likely to chill her speech; [the employee] must show that the action had an impact on an important aspect of her employment."[96]

Material conditions of employment may work well as a proxy for actions that objectively chill free speech. As the court in *Stavropoulos v. Firestone*[97] noted, the Supreme Court requires more than merely a subjective belief that speech has been chilled.[98] Perhaps limiting retaliatory action to a set of specific instances of termination, failure to promote, or disciplinary action is easier than a case-by-case inquiry into the chilling effect of the speech in question.

The relevant Supreme Court cases, however, strongly suggest otherwise.[99] In *Rutan* the Court indicated in dicta that constitutional violations arise outside of limited, discrete employment actions: "[T]he First Amendment . . . already protects state employees . . . from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish for exercising her free speech rights.'"[100] If callously ignoring the anniversary of an employee's birth is sufficient to constitute an adverse employment action, then using important conditions as an inexact proxy will not satisfy the requirements of the First Amendment. Courts should not define adverse action in *Connick-Pickering* cases by referencing limited and specific adverse actions.

At the same time, Title VII cases recognize acts that extend beyond the protection of the First Amendment. Courts adopting a broad definition of adverse action also sometimes recognize coworker

95 *See* Stavropoulos v. Firestone, 361 F.3d 610, 620 (2005) ("Requiring the First Amendment retaliation claimant to show that the actions she complains of not only was likely to chill her speech but also altered an important condition of employment insures that she satisfies the injury-in-fact requirement of federal justiciability law."), *cert. denied*, 544 U.S. 976 (2005).

96 *Id.*

97 361 F.3d 610.

98 *See id.* at 620 ("'[A]llegations of a subjective "chill" are not an adequate substitute for a claim of a specific present objective harm or a threat of specific future harm.'" (quoting Laird v. Tatum, 408 U.S. 1, 13–14 (1972))).

99 *See supra* notes 33–40 and accompanying text.

100 Rutan v. Republican Party of Ill., 497 U.S. 62, 75 n.8 (1990) (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989), *aff'd in part, rev'd in part*, 497 U.S. 62).

retaliation and harassment as relevant adverse action.[101] For example, the Ninth Circuit[102] recognizes that hostile coworker actions fall under the purview of Title VII's retaliation provision,[103] although mere shunning alone probably is not enough to rise to the level of a violation.[104] The Tenth Circuit agrees that "sufficiently severe" coworker harassment or hostility constitutes Title VII adverse employment action, at least when the employer has knowledge of and acquiesces in the retaliatory harassment.[105]

The Second Circuit does not adopt a chilling effect standard for *Connick-Pickering* retaliation claims, but it does recognize coworker harassment under Title VII. "[U]nchecked retaliatory co-worker harassment" is a Title VII adverse action in the Second Circuit because "[a]n employee could suffer a materially adverse change in the terms and conditions of her employment if her employer knew about but failed to take action to abate retaliatory harassment inflicted by coworkers."[106] This approach requires that the employer have knowledge of harassment and fail to stop it.[107]

While courts look to Title VII to define First Amendment adverse actions, applying a Title VII hostile work environment claim to the First Amendment is problematic. It does not fit with the purposes of First Amendment *Connick-Pickering* public employee protection, even

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101 The split is over whether coworker harassment (sometimes referred to as hostile work environment) constitutes *retaliation* in the Title VII context. *See* Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place To Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 236 (2001). However, the courts all agree that coworker harassment is actionable under the *harassment* provision of Title VII. *See* Kari Jahnke, *Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment*, 19 LAW & INEQ. 101, 102 (2001).

102 The Ninth Circuit adopts a broad chilling effect approach of adverse employment action in the First Amendment context. *See supra* notes 46–49 and accompanying text.

103 Fielder v. UAL Corp., 218 F.3d 973, 985 (9th Cir. 2000), *vacated*, 536 U.S. 919 (2002) (vacating on a point of law unrelated to the proposition that coworker harassment is cognizable under Title VII).

104 *See* Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) ("Because an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action."). *But see* Howard Zimmerle, Note, *Common Sense v. The EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, 30 J. CORP. L. 627, 631 (2005) ("[A]ctions as benign as shunning or ostracism could fall within Title VII's purview simply because they involve employees 'punishing' a fellow employee for asserting his or her rights.").

105 Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264–65 (10th Cir. 1998).

106 Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999).

107 One commentator calls it negligence on the part of the employee. Jahnke, *supra* note 101, at 117. In at least the Tenth Circuit, the requirement is knowledge and acquiescence. *See Gunnell*, 152 F.3d at 1265.

if an employer must know of the actions by coworkers. Title VII's recognition of hostile coworker harassment as an actionable adverse action under its retaliation provision protects an employee from his or her coworkers. The protection afforded to public employers by *Connick-Pickering*, however, necessarily is limited only to the retaliatory actions of a public employer. This is yet another reason not to rely on Title VII's definitions of adverse action in the public employer free speech context.

Instead of being terminated, imagine that Ardith McPherson was allowed to continue working in the Constable's office.[108] Her coworkers, offended by her comments tacitly endorsing political assassination,[109] not only refuse to be civil but actively spew hateful rhetoric back at her. Even if the Constable knows about the actions taken by the coworkers and does not stop it, the actions of the coworkers do not violate McPherson's First Amendment protections. As the Court in *McPherson* noted, "[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[110] Though her coworkers' personal attacks on her might not be against a public official, the Constable has no obligation to suppress one form of employee speech to protect other forms. He might be free to do so in administering his office (so long as the speech is not of public concern),[111] but the coworker reaction is the marketplace of ideas responding negatively to Ardith's views on presidential murdering.

Unlike Title VII, the public employer has to avoid interfering with the constitutional rights of *all* of her employees. Therefore, the Title VII approval of hostile work environment claims—logical and permissible under Title VII[112]—does not hold water in *Connick-Picker-*

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

109 *Id.* at 381.

110 *Id.* at 387 (internal quotation marks omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

111 It is not necessarily true that he has the ability. First Amendment free association claims might come into play. *See* Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) ("[H]olding an employer liable because its employees refuse to associate with each other might well be unconstitutional . . . .").

112 There are competing reasons for recognizing hostile work environment claims in the Title VII retaliatory area. *Compare* Courts, *supra* note 101, at 260 (recognizing hostile work environments "supports a plain-meaning interpretation of the antiretaliation provision and furthers the purpose of Title VII"), *with* Zimmerle, *supra* note 104, at 645 ("While there is a logical path that would lead some to the conclusion that such action could properly be the basis for a Title VII retaliation suit, prudential considerations should prevent courts from holding employers liable for this conduct.").

ing cases, unless the employer intentionally orchestrates such a coworker response to chill the employee's speech.[113]

Relying heavily on Title VII standards because the statute addresses the question of adverse action generally leads to results in the public employee speech context that do not comport with the purposes of the First Amendment and employee speech protection. The purpose of First Amendment protection and Title VII protection are very different.[114] Title VII protects employees from retaliation for attempting to enforce rights under the relevant statute.[115] On the other hand, the First Amendment restrains public employers from retaliating against their employees for exercising speech rights protected under the Constitution.[116]

Title VII's restriction on retaliatory conduct is an enforcement mechanism to allow employees to report discrimination prohibited elsewhere in the statute.[117] "The purpose of the antiretaliation provisions is to foster an environment in which employees who have been harassed or discriminated against feel safe enough to expose retaliatory behavior."[118] The retaliation provision effectuates the primary goals of the Title.[119] The primary harassment and discrimination actions in Title VII are coextensive with the retaliatory actions.[120] The retaliation provision enforces Title VII's substantive protections.

Prohibiting impermissible governmental interference with a public employee's free speech rights is the primary purpose of First

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113 In such a situation, the coworker actions are no longer the actions of the coworker; rather, they have become the actions of the employer. The standard advocated in this Note would cover such cases.

114 Among these differences, of course, is the fact that Title VII applies to private and public employers alike, while the First Amendment constrains only the latter.

115 *See* Riddell & Bales, *supra* note 77, at 315; Wiles, *supra* note 77, at 218.

116 *See supra* text accompanying notes 20–23.

117 *See* Courts, *supra* note 101, at 237–38.

118 *Id.* at 257.

119 *See* Jahnke, *supra* note 101, at 101–02 ("The two primary purposes of Title VII are to ensure equal opportunities in employment by preventing discrimination, and to make persons whole for injuries suffered due to unlawful employment discrimination.").

120 This interpretation is based on an effects-based approach to the issue:

> There is no rationale supporting an interpretation of Title VII that affords less protection against retaliatory discrimination than against discrimination protected under the substantive anti-discrimination provision. The individual and collective effects of discrimination are similar, independent of whether they are motivated by discrimination against a protected characteristic or protected activity.

Id. at 124.

Amendment public employee protections.[121] To the extent that the government cannot interfere with the employee's right to report discriminatory conduct and the employee's right to speak on matters of public concern, the requirements are similar.

However, Title VII's retaliation provision enforces rights granted by the statute, whereas the First Amendment is a constraint on the government. Title VII's retaliation standard is not concerned only with employer action; it encourages employees to report instances of discrimination. The actions of fellow employees are relevant because their chilling effect is the same as a hostile employer action. However, spontaneous employee action against another employee's speech is not a concern of the First Amendment unless it involves the public employer taking actions to chill free speech.

While Title VII's retaliation provision requires active measures on the part of employers to quell certain coworker actions, the First Amendment does not require similar action. Title VII's purpose is very different than that of the First Amendment, and the two definitions of retaliatory action should be treated differently. The Supreme Court's discussion on free speech for public employees suggests protection against any action that chills their free speech rights, but some courts read Title VII more narrowly. In this way Title VII is both too broad and too narrow. It is ill equipped for dealing with the demands of the First Amendment and should not be used in developing a standard for adverse employment actions in *Connick-Pickering* cases. The appropriate standard to apply is the subject of the Part IV.

IV. DEFINING ADVERSE ACTION IN THE FIRST AMENDMENT CONTEXT

The standard for adverse employment action in the public employee context best tailored to satisfy *Connick-Pickering* limits its scope to employer actions but does not limit itself to a discrete list of employment actions. *Rutan* recognized that actions such as termination and dismissal are not the only coercive actions that chill free speech.[122] The *Rutan* Court suggested that failure to promote, denial of transfers, and pay increases all are coercive adverse actions under the First Amendment.[123] "These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment."[124] On the other hand, value of counterspeech in a public debate means that "debate on public issues should be uninhibited,

121 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 573–74 (1968).

122 *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 73 (1990).

123 *See id.* at 73–74.

124 *Id.* at 74.

robust and wide-open."[125] The public employer can allow for "verbal tumult, discord, and even offensive utterance"[126] as counterspeech by coworkers. Given the purpose of *Connick-Pickering* and the Court's opinions addressing employee speech, the best approach to the question of adverse action permits any kind of action that is intended to punish the employee for exercising his free speech rights so long as said action is a clear act of the employer and not of fellow employees.

This approach is advantageous because it does not draw an arbitrary line at certain employment acts like termination or dismissal. It recognizes that anything—even that denied birthday party—can count as a constitutional violation, because the free speech of employees is chilled whenever they (or similarly situated, reasonable persons) think the government takes an action intending to punish their behavior.[127] This approach eliminates the threat that unconstitutional government acts do not escape judicial scrutiny simply because they do not fit predetermined molds of impermissible actions. Tying the act to the intent of the employer's action and the impact of the act on the employee closely tracks the Court's chief concern that speech not be inhibited by the government employer.[128] On the other hand, this approach might inhibit public employers from exercising legitimate disciplinary authority, might be too unwieldy, and might be too impractical for courts to follow.

By setting the threshold too low, legitimate employer acts might be questioned too easily. Mere workplace "aggravations and inconveniences"[129] threaten to clog the courts with complaints that are unrelated to a free speech claim. Minor complaints "could all too easily, and incorrectly, be ascribed to partisan political motivation."[130] While it is simply unfathomable to think that government offices devolve into petty battles over minor benefits—let alone make a federal case out of them—by not limiting adverse actions to certain discrete ac-

125 Waters v. Churchill, 511 U.S. 661, 672 (1994) (internal quotation marks omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

126 *Id.* (internal quotation marks omitted) (quoting Cohen v. California, 403 U.S. 15, 24–25 (1971)).

127 For a brief definition of chilling effect as used by courts in the First Amendment context, see Adam S. Tanenbaum, Comment, Day v. Holahan*: Crossroads in Campaign Finance Jurisprudence*, 84 GEO. L.J. 151, 161 (1995) ("As the Court has used the concept . . . [chilling effect] stem[s] from a fear of punishment or penalty against the speaker, and that fear had to be more than just speculative.").

128 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

129 Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1216 (1st Cir. 1989).

130 *Id.* at 1217 (discussing the appropriate standard for adverse action in political patronage cases).

tions, innocuous employment actions threatened to be too easily viewed with a constitutional tint.

Such an open standard involves the court in "relatively trivial matters" that it does not wish to involve itself.[131] A stricter approach ensures that the employee claims a direct harm resulting from the action, as opposed to mere speculative injury.[132] By restricting the spectrum of adverse actions, courts are safer in assuming that the public employer's action chilled free speech.[133] This argument suggests that a restrictive approach is best because it prevents the courts from being clogged with exceedingly minor injuries and succeeds in ensuring that the injury suffered actually chilled free speech.

Another criticism of the broad approach implicates the government's interests as the employer. The government has more discretion in the employment context because it has a legitimate interest in operating the government efficiently.[134] This argument is closely related to the above one, in that it says that limiting adverse employment actions gives the government the freedom necessary to manage its own activities.[135] The public employer will be unable to effectively discipline employees if it does not have a concrete list of material actions that limit the realm of actionable First Amendment claims. This criticism states that a broad approach is too vague to be of use to the public employer.

However, the requirement that the adverse action be an act by the employer will ensure that courts takes some review of the action in question. Limiting *Connick-Pickering* situations to those involving an act that is clearly an employer act will eliminate some acts that are not the result of employer actions. Nevertheless, there still remains a broad category of minor acts done by an employer that arguably should not be subject to any review under *Connick-Pickering*.

Other requirements of an employee's § 1983 claim generally subsume these criticisms, as well. An employee alleging that the government employer infringed on his free speech rights must show he has suffered an adverse employment decision, the speech involved a matter of public concern, his interest in the speech outweighed the em-

131 Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000) (internal quotation marks omitted) (quoting Dorsett v. Bd. of Trs., 940 F.2d 121, 123 (5th Cir. 1991)).

132 *See* Stavropoulos v. Firestone, 361 F.3d 610, 620 (11th Cir. 2004), *cert. denied*, 544 U.S. 976 (2005); *supra* note 95 and accompanying text.

133 *Stavropoulos*, 361 F.3d at 618–19.

134 Connick v. Myers, 461 U.S. 138, 146 (1983).

135 This interest speaks directly to one of the fundamental concerns surrounding *Connick-Pickering* analysis. *See supra* text accompanying notes 11–14.

ployer's efficiency interest, and the speech caused the employer's action.[136]

The causation requirement allays fears that minor incidents will be brought to the attention of courts that do not actually interfere with speech activities. By including the causation requirement, courts require any plaintiff to prove that the action taken actually was caused by their speech.[137] It is unnecessary to screen for unwarranted claims that do not actually involve constitutional infringements at one particular point of entry (the question of adverse action) when it is sufficiently addressed under another requirement.

The severity of the act informs the question of causation. A minor action taken by an employer requires a tighter causal connection than termination or dismissal because the normal day-to-day operations of an employer will color a court's view of the situation. Minor changes in conditions of employment occur with greater frequency than ultimate employment acts, so the employee likely would face a larger burden of satisfying the causation element.

The four-part requirement for satisfying a § 1983 claim answers arguments about limiting the adverse action in the name of an efficiency interest, as well. The efficiency interest already is balanced against the employee's interest under the heart of the *Connick-Pickering* test.[138] There is little reason to apply the government's interest in efficiency at the outset and again when balancing the action against the speech of the employee. A minor act will have a harder time surviving the balancing part of the test because the employer's interest is more easily accepted with minor acts than with ultimate employment acts. The employer's interest can be considered in light of the action taken when the court reaches to the balancing inquiry; it should not be used as a bar to potential claims.[139]

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136 *See, e.g.*, *Breaux*, 205 F.3d at 156.

137 *Cf.* Lorene Feuerbach Schaefer, Comment, *Abused Children and State-Created Protection Agencies: A Proposed Section 1983 Standard*, 57 U. CIN. L. REV. 1419, 1438 (1989) ("[T]he elements of causation and culpability are relatively difficult hurdles to clear in section 1983 claims. However, they are not insurmountable."). The causation requirement in § 1983 claims is sometimes deemphasized, at least in other contexts. *See* Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 948 (1991) (discussing how courts assume causation in cases dealing with municipality policy); *see also* Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure To Act*, 53 U. CHI. L. REV. 1048, 1058 (1986) (arguing that overemphasis on causation can be underinclusive of legitimate claims in the context of government obligations to act).

138 *See supra* text accompanying notes 11–14.

139 On the other hand, Professor Levinson argues that courts should not consider the nature of the adverse action when engaging in *Connick-Pickering* cases. *See* Levin-

As a practical matter, there is good reason to doubt that a generous adverse employment definition will lead to a deluge of frivolous claims. Employees generally will be uninterested in litigating minor incidents, unless those minor incidents added up to a repeated pattern of unfavorable treatment. To the extent that a strict reading of adverse action would not allow such claims, it is merely another reason to reject it—multiple incidents over a lengthy period of time geared towards punishing an employee for his speech are worthy of redress in the court system.

In the end, the best approach to the adverse employment action question is one that recognizes the primary goal of *Connick-Pickering* analysis—preventing the *employer* from engaging in activity that chills speech beyond the permissible bounds of the government's role as employer. A broad reading that is mindful of the necessity of the government acting as employer will best ensure that this goal is accomplished.

CONCLUSION

The First Amendment prevents a public employer from inhibiting an employee's free speech rights. Title VII protects employees in order to encourage them to speak out on workplace discrimination. The purposes are different, and the respective definitions of adverse actions should reflect this difference. The Supreme Court's decisions in both the *Connick-Pickering* line of cases and the political patronage line of cases emphasize the chilling effect of governmental actions. This concern—and not Title VII's protection of employees in furtherance of different policy goals—should guide lower courts in defining adverse action in First Amendment cases. *Connick-Pickering* analysis protects public employees from retaliation by *employers* for exercising their constitutional rights; courts should recognize that a chilling effect occurs even when the employer action is unrelated to termination or dismissal. The advantage of a permissive standard is clear: a public employee will not be deprived of constitutional redress simply because his public employer used means less drastic than termination or dismissal to punish the employee for exercising his free speech rights.

A more permissive standard comes at the price of predictability and governmental flexibility. Under the advocated standard, a public employer's acts will not be per se safe from judicial scrutiny because it

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son, *supra* note 77, at 697 ("Once a court has determined that the government employer intended to punish speech . . . and that he has subjected the employee to adverse action that chills speech . . . , the question of how severely an employer has harmed the employee should play no role in the *Pickering-Connick* balance.").

does not fall into a delineated set of employer acts. This threatens to inhibit the government's efficient operation of its offices. However, this efficiency already is taken into account under the *Connick-Pickering* test. A rule that disregards discrete employment action in favor of an approach anchored in the effect of the action would best encapsulate constitutional protections, so long as the rule is limited to acts by the public *employer.* The emphasis on employer acts helps a court focus its inquiry to a limited realm of adverse actions without limiting the specific actions that occupy that realm.

Some employer actions are more minor than others. Firing a public employee for voicing an unpopular view has a greater chilling effect than reassigning their cubicle space or saddling them with more work. The message in either case, however, can be loud and clear: express an unpopular view and you will be punished. This is precisely the action the First Amendment protects, and a broad understanding of adverse action divorced from Title VII's own is in keeping with *Pickering, Connick,* and *Rutan.* Adopting the definition that best embraces the Supreme Court's stated purpose of First Amendment protection against government inhibition of private speech allows a court to hear diverse cases and prevents employer retaliation in all its forms. Free from the tyranny of employer-deprived birthday amusements, employees finally will be free to speak their minds.