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# The *Pickering* Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals

*Joseph O. Oluwole*[*]



Since *Pickering v. Board of Education*[1]—the seminal case on public employment-free speech jurisprudence—the United States Supreme Court and the various federal circuit courts of appeals have struggled to navigate and clarify the nuances of the *Pickering* balancing test. This test requires the balancing of the employee's free speech rights against the public employer's interest in operational efficiency in employment retaliation cases.

In this article, I will first examine some of the cases decided by the United States Supreme Court dealing with the free speech rights of public employees, including teachers, who criticize their employers. As renowned constitutional law scholar Gerald Gunther notes, in interpreting and applying balancing tests, "the single most important trait for responsible balancing [is] the capacity to identify . . . each analytically distinct ingredient of the contend-

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1. 391 U.S. 563 (1968).

ing interests."[2] In this article, I will attempt to highlight the various approaches utilized by the circuit courts of appeals to identify a framework for applying the *Pickering* balancing test and the ingredients of the contending interests under the test—employees' free speech rights and employers' operational efficiency.

The review will reveal inconsistencies in the approaches of the circuit courts of appeals. To provide greater consistency in the framework and application of the *Pickering* balancing test across circuits, I conclude this article with a framework that should reflect greater harmony with the United States Supreme Court's intent with respect to *Pickering* and its progeny.

## I. THE UNITED STATES SUPREME COURT'S ANALYSIS OF PUBLIC EMPLOYEE-FREE SPEECH

*Pickering v. Board of Education*[3] is the first case in which the United States Supreme Court defined the *scope* of public employees' free speech rights. In that case, Marvin Pickering, a public school teacher, was terminated by a local school board for criticizing his employers in a letter to a local newspaper.[4] The school board had put a proposal on the ballot to raise funds through bond issues to build new schools, and proposed a tax rate hike for educational purposes.[5] The voters rejected both proposals.[6] Prior to the voting date on one of the proposals, a number of articles by the teachers' union and one by the superintendent were published in the local paper petitioning voters to support the proposal in order to avoid a deterioration of education in the school district.[7] Seeking to be part of the conversation about the funding initiatives, Pickering wrote a letter to the newspaper, critiquing, inter alia, the board and the superintendent for their handling of the various proposals to raise revenues for the schools and the allocation of school finances to athletics over education.[8] The board terminated Pickering, citing his writing and publication of the letter in justifi-

2. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 7 (1972) (internal quotation marks omitted).

3. *Pickering*, 391 U.S. 563.

4. *Id.* at 564.

5. *Id.* at 565-66.

6. *Id.*

7. *Id.* at 566.

8. *Pickering*, 391 U.S. at 566.

cation.[9] Pickering challenged his termination as a violation of his First Amendment right to free speech.[10]

The Illinois state courts rejected his free speech claim, stating that, even though as a citizen he would have the right of free speech under the facts of the case, as a public school teacher he was obligated not to speak out about the operation of his school.[11] The United States Supreme Court, however, agreed with Pickering.[12] Specifically, the Court held that the Constitution does not allow public school teachers to be coerced into giving up free speech rights to which they are entitled as citizens in speaking out on matters of public interest involving the operation of the schools where they work.[13]

The Supreme Court then laid out what has since become known as the *Pickering* balancing test for adjudicating public employees' claims that their termination or other disciplinary action against them violates their free speech rights. As stated by the Supreme Court, the *Pickering* balancing test provides: "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 employer, in promoting the efficiency of the public services it performs through its employees."[14] A diagrammatic representation of aspects of the Pickering balancing test can be found at the end of this article.

The Court identified certain general factors or ingredients to be considered in applying the test; these factors are known as the *Pickering* calculus factors. They include: (a) whether the speech would impact harmony among coworkers or the employee's immediate superior's ability to maintain discipline;[15] (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work;[16] (c) whether the nature of the employment relationship between the employee and the person toward whom the speech is directed is so close that personal loyalty and confidence are critical to their proper functioning;[17] (d) whether the employee's speech (which may be false)

9. *Id.* at 566-67.
10. *Id.* at 565.
11. *Id.* at 567.
12. *Id.* at 574-75.
13. *Pickering*, 391 U.S. at 568.
14. *Id.*
15. *Id.* at 569-70.
16. *Id.*
17. *Id.* at 570.

was based on inside information accessible to the employee;[18] (e) flexibility for employers to terminate an employee whose speech hampers the effective performance of such an employee;[19] (f) the employee's interest in commenting on matters of public concern and the public's interest in free and unhindered debate on matters of public importance;[20] (g) the fact that public employees are more likely than the general citizenry to have informed and definite opinions about the matter in question;[21] (h) the ease with which the employer could rebut the content of the employee's statement if false;[22] and (i) whether there is evidence that the speech actually had an adverse impact on the employer's proper functioning.[23]

Even though some of Pickering's statements turned out to be false, such as his accusation that too much funding was devoted to athletics at the expense of education,[24] the Court characterized his ostensibly false statements as "a mere difference of opinion" about the best way to operate the school district.[25] Furthermore, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[26] Additionally, the Court held that the board could have easily rebutted Pickering's statements by sending a letter to the same or another newspaper[27] and that Pickering had no greater access to accurate information than did the board.[28] The Court assumed, without explaining, that the funding of the school district was an issue of public interest and, consequently, an issue entitled to free and open debate in order to ensure informed decision-making by the citizenry.[29]

Nine years later, in *Mount Healthy City School District Board of Education v. Doyle*,[30] the Court attempted to further define the parameters of the *Pickering* balancing test. In this case, Fred Doyle, a public school teacher, called a radio station to disclose a

18. *Pickering*, 391 U.S. at 572.
19. *Id.* at 573.
20. *Id.* at 572-73.
21. *Id.* at 572.
22. *Id.*
23. *Pickering*, 391 U.S. at 569-71. The Court made various references to "no evidence," affirming that mere speculation was not adequate. *Id.*
24. *Id.* at 572.
25. *Id.* at 571.
26. *Id.* at 574.
27. *Id.* at 572.
28. *Pickering*, 391 U.S. at 572.
29. *Id.* at 571-72.
30. 429 U.S. 274 (1977).

memorandum from his principal to teachers instituting a mandatory dress code for teachers.[31] The dress code was adopted because some of the administrators believed that teacher appearance was related to public support for bond issues.[32] Following the radio broadcast, the board decided not to rehire Doyle.[33]

Doyle's background at the school prior to the radio station incident included engaging in an altercation with a colleague,[34] swearing at students in relation to a disciplinary complaint,[35] and making obscene gestures to female students who failed to obey him.[36] These incidents, in addition to the speech to the radio station, were cited by the board in justification of Doyle's nonrenewal.[37] Doyle challenged the board's decision not to rehire him as a violation of his constitutional right to free speech.[38]

*Mount Healthy* was the first case in which the Supreme Court addressed the role of "mixed motives" in the *Pickering* balancing test. "Mixed motives" arise in cases where a public employer terminates an employee ostensibly for the employee's speech, yet other potential justifications exist for terminating the employee. In such cases, courts then have to sort out the actual motives of the employer from the pretextual. Essentially, "mixed motives" analysis involves an attempt to determine cause and effect: what was the actual cause of the employee's termination? Doyle's background, coupled with his communication to the radio station, presented "mixed motives" for his termination.[39] While agreeing with Doyle that his communication to the radio station was constitutionally protected, the Court, as a result of its "mixed motives" analysis, refused to order his reinstatement.[40]

In its effort to resolve intricacies of the "mixed motives" aspect of the *Pickering* balancing test analysis, the Court decided that a burden-of-proof allocation between the parties in public employment-free speech cases would provide greater clarity for the judiciary.[41] This allocation of the burden is as follows:

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31. *Mount Healthy*, 429 U.S. at 282.
32. *Id.*
33. *Id.*
34. *Id.* at 281.
35. *Id.* at 281-82.
36. *Mount Healthy*, 429 U.S. at 282.
37. *Id.* at 282-83.
38. *Id.* at 276.
39. *Id.* at 285.
40. *Id.*
41. *Mount Healthy*, 429 U.S. at 287. The entire *Mount Healthy* "mixed motives" framework is sometimes referred to as the "balance of burdens." *See* Price Waterhouse v.

1. The initial burden of proof in public employment-free speech cases is on the employee to show that: (a) his or her conduct is protected by the First and Fourteenth Amendments;[42] and (b) the conduct was "a substantial factor" or a "motivating factor" in the employer's decision to terminate or not rehire him or her. The "substantial factor" or "motivating factor" language represents the Court's causation test in "mixed motives" analysis.[43] If the employee is unable to carry this burden, the constitutional question is to be resolved in favor of the employer.[44]

2. After the employee successfully carries the burden of proof, the employer must then show by a preponderance of the evidence that it would have reached the same decision about the employee's termination or nonrenewal had the employee not engaged in the protected speech.[45] This is the "same decision anyway" defense in the burden-of-proof allocation in "mixed motives" analysis, an affirmative defense for employers.[46]

*Pickering* and *Mount Healthy* involved employee speech in public forums.[47] In *Pickering*, the employee speech was a letter sent to a local newspaper,[48] and in *Mount Healthy* it was communication with a radio station.[49] The Court had never decided if private communications between employers and employees or employer-employee communications in private forums were entitled to First Amendment protection. The Court finally made this determination two years after *Mount Healthy*, in *Givhan v. Western Line Consolidated School District.*[50] Bessie Givhan, a public school teacher, was terminated for complaining to her principal about policies and practices of the school district which she perceived to be discriminatory in purpose and effect.[51] At the time of her termination, the school district was under a desegregation order.[52] Givhan intervened in the desegregation action, challenging her

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Hopkins, 490 U.S. 228 (1989); Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205, 17 F.3d 1059, 1068 (7th Cir. 1994).

42. *Mount Healthy*, 429 U.S. at 287.

43. *Id.*

44. *Id.*

45. *Id.*

46. The *Mount Healthy* "same decision anyway" defense is also known as the *Mount Healthy* defense.

47. *See Pickering*, 391 U.S. at 564; *Mount Healthy*, 429 U.S. at 274.

48. *Pickering*, 391 U.S. at 564.

49. *Mount Healthy*, 429 U.S. at 282.

50. 439 U.S. 410 (1979).

51. *Givhan*, 439 U.S. at 412-13.

52. *Id.* at 411.

termination as a violation of her First Amendment free speech right.[53] The Court held that

> [t]he First Amendment forbids abridgement of the freedom of speech. Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.[54]

*Givhan* thus established that employees who criticize their employers in private communications or settings are entitled to First Amendment protection. The scope of the protection, however, is dependent on a *Pickering* balancing test analysis in the pertinent case.[55]

In 1983, in *Connick v. Myers*,[56] the Court attempted to give substance to the "matter of public concern" portion of the *Pickering* balancing test. *Connick* was the first case in which the United States Supreme Court applied the *Pickering* balancing test to public employees other than teachers. In *Connick*, Sheila Myers, an Assistant District Attorney in New Orleans, was terminated after she prepared and distributed to her coworkers a questionnaire soliciting their opinions about office morale, the need for a grievance committee, the office transfer policy, their level of confidence in supervisors, and pressures to work in political campaigns.[57]

Myers prepared the questionnaire after she was advised that she was being transferred to another section of the criminal court. She expressed her objections to her supervisors and the District Attorney.[58] They urged Myers to accept the transfer but she refused.[59] Following discussions with the first assistant district attorney, Myers developed the questionnaire.[60] The District Attorney then terminated Myers,[61] citing the following in justification: insubordination by distributing the questionnaire and refusal to

53. *Id.* at 411-12.
54. *Id.* at 415-16.
55. *See id.* at 410.
56. 461 U.S. 138 (1983).
57. *Connick*, 461 U.S. at 140-41.
58. *Id.*
59. *Id.* at 141.
60. *Id.*
61. *Id.*

accept the transfer.[62] Myers challenged her termination as a violation of her First Amendment freedom of speech rights.[63]

The Court established that, as a threshold issue, before the *Pickering* balancing test is applied in any case, a determination must be made as to whether the subject matter of the speech is merely an employment dispute or a matter of public concern.[64] If the matter is merely an employment dispute, deference is given to the employer's termination decision, unless some statutory or constitutional ground, other than the First Amendment, is presented.[65] If, however, the speech is a matter of public concern, then—and only then—is the *Pickering* balancing test triggered.[66]

In *Connick*, the Court revealed the test for determining whether public employee speech constitutes speech on a matter of public concern: "Whether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement."[67] The content, form, and context of the statement must be examined to determine whether the employee speech "relat[es] to *any matter of political, social, or other concern to the community*."[68] This test (also known as the *Connick* test) is *Connick*'s contribution to the development of the Court's public employment-free speech jurisprudence. However, the Court failed to define the parameters of content, form, or context.

With respect to speech that does not constitute a matter of public concern pursuant to the test above, the Supreme Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[69]

Besides, the Court added, "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a pub-

62. *Connick*, 461 U.S. at 141.
63. *Id.*
64. *Id.* at 146-47.
65. *Id.*; *see also id.* at 146, 147, 151-52.
66. *Id.* at 146-47.
67. *Connick*, 461 U.S. at 147-48 (emphasis added).
68. *Id.* at 146 (emphasis added).
69. *Id.* at 147.

lic office to be run as a roundtable for employee complaints over internal office affairs."[70]

The Supreme Court found that only one of Myers' questions to her coworkers, the question about pressures to work on political campaigns, constituted a matter of public concern.[71] Its reasoning, consequent to application of the *Connick* test, relied on the fact that speech about political pressure to work in campaigns might reveal unconstitutional official coercion of belief and embodies the historical value this country places on government employment being a function of meritorious, rather than political, service.[72] The Court found the other questions to be *mere extensions* of Myers' employment dispute with her employer.[73]

In what is ostensibly a countermand of one of the *Pickering* calculus factors, the Court held: "[w]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[74] In *Pickering*, that factor required public employers to provide evidence demonstrating that the employee's speech actually had an adverse impact on the employer's proper functioning; the Court made clear in *Pickering* that conjecture would not suffice.[75]

The latest Supreme Court case dealing with the free speech rights of public employees who criticize their employers is *Garcetti v. Ceballos*.[76] In this case, Richard Ceballos, a supervisory deputy district attorney, claimed that his employer subjected him to several retaliatory employment actions following the exercise of his right to free speech.[77]

The incidents that formed the basis of the action arose after a defense attorney asked Ceballos to review a pending criminal case and an affidavit used to obtain a search warrant in the case because the affidavit contained inaccuracies.[78] After his investigation, Ceballos concluded that the affidavit contained serious misrepresentations. Ceballos discussed his concerns about the affidavit, criticized the handling of the case, and recommended dis-

70. *Id.* at 149.
71. *Id.* at 148-49.
72. *Connick*, 461 U.S. at 149.
73. *Id.* at 148 (emphasis added).
74. *Id.* at 152.
75. *Pickering*, 391 U.S. at 569-71.
76. 126 S. Ct. 1951 (2006).
77. *Garcetti*, 126 S. Ct. at 1956.
78. *Id.* at 1955.

missal in a disposition memorandum presented to one of his supervisors.[79] The supervisor refused to dismiss the case.[80]

Ceballos alleged that the retaliatory employment actions began after all these incidents transpired and were based on his speech in the memorandum.[81] The actions which he challenged as a violation of his First Amendment right included: reassignment from his position as calendar deputy to a trial deputy position, denial of a promotion, and transfer to a different courthouse.[82] Ceballos' supervisors denied taking any retaliatory actions against him, contending that these actions were not retaliatory but rather based on staffing needs.[83] In the alternative, the supervisors alleged that the memorandum was not protected speech.[84]

*Garcetti* required the Court to clarify what it means to speak "as a citizen" versus "as an employee" under the *Pickering* balancing test. In *Pickering*, the Court noted that the balancing test only applies to an employee who speaks as a citizen on a matter of public concern. The test for determining whether employee speech was made "as a citizen" versus "as an employee" provides: "when public employees make statements *pursuant to* their *official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[85] This is the "pursuant to official duties" test, or the *Garcetti* test, and it is the most important contribution of the *Garcetti* case to the Court's public employment-free speech jurisprudence.

Indicating how the *Garcetti* test will play out in its application, the Court noted that the statements and complaints by employees in *Pickering* and *Connick* were not made pursuant to official duties, but were made outside the scope of employment duties.[86] In both cases, the employer did not authorize the speech, and the employees did not speak out because it was a part of their job requirement to speak out.[87] Applying the "pursuant to official duties" test, the Court stated that

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79. *Id.* at 1955-56.
80. *Id.* at 1956.
81. *Id.*
82. *Garcetti*, 126 S. Ct. at 1956.
83. *Id.*
84. *Id.*
85. *Id.* at 1960 (emphasis added).
86. *Id.* at 1961.
87. *Garcetti*, 126 S. Ct. at 1961.

> [t]he controlling factor in Ceballos' case is that his expressions were made *pursuant to* his duties as a calendar deputy. . . . That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline.[88]

The Court reasoned that the official duties Ceballos was employed to perform in his capacity as a calendar deputy included writing disposition memos, and that was his reason for preparing the memo in this case.[89] Since "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings . . . he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[90] Further, the Court noted, "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance."[91]

The *Garcetti* test could have a chilling effect on teachers, causing them not to speak out on matters of academic scholarship or classroom teaching when such speech could be considered part of their official duties and thus unprotected by the First Amendment. The Court refused to address this, stating only that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[92]

## II. THE APPROACH OF FEDERAL CIRCUIT COURTS OF APPEALS TO *PICKERING*

The circuit courts of appeals have applied the *Pickering* balancing test since its formulation in 1968 to decide cases involving

88. *Id.* at 1959-60 (emphasis added).
89. *Id.* at 1960.
90. *Id.*
91. *Id.*
92. *Garcetti*, 126 S. Ct. at 1962.

public employee whistleblowing. This section presents some of the highlights of the approaches used by the courts of appeals.[93]

In general, as best described in a Fourth Circuit Court of Appeals case, the courts of appeals usually use a three-part inquiry, set forth below, in analyzing a public employment-free speech case.[94] The general position of the circuit courts is that "[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment."[95] The circuit courts generally accept the principle that "[e]xcept as qualified by the special exigencies of the employment relationship, public employees retain the full panoply of first amendment rights enjoyed by all citizens."[96]

As the Eleventh Circuit Court of Appeals pointed out:

> The question of whether the employee's speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee's right of freedom of speech. . . . [W]e [have] recognized this distinction between speech to which no constitutional right attaches [and] speech that, while protected, is . . . outweighed by the government's interest.[97]

In addressing the rights of public employees who whistleblow, the circuit courts of appeals generally rely on the *Pickering* balancing test, using a three-pronged inquiry:[98] (i) whether the speech is about a legitimate matter of public concern; (ii) if the speech is about a matter of public concern, whether the employee

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93. The circuit courts of appeals have interpreted the "substantial factor" requirement in the plaintiff's burden of proof set forth in *Mount Healthy* as a "but for" causation test (*See, e.g.*, Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183 (4th Cir. 1994); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982)).

94. According to the Fourth Circuit Court of Appeals, the order of the inquiries could vary with the facts of a particular case. Daniels v. Quinn, 801 F.2d 687, 689 (4th Cir. 1986). It appears that courts are not always rigid as to the order in which the inquiries take place. *See, e.g.*, Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984). Unless specifically mentioned otherwise below with respect to a particular circuit court of appeals, it should be assumed that the three-part inquiry is followed. As reflected below, some circuit courts of appeals have had relatively more judicial activity with respect to the interpretation and application of aspects of *Pickering* and its progeny.

95. Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 155-56 (4th Cir. 1992).

96. Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985).

97. Ferrara v. Mills, 781 F.2d 1508, 1513 (11th Cir. 1986) (internal quotation marks omitted).

98. See *Holley v. Seminole County School District*, 755 F.2d 1492 (11th Cir. 1985), for an excellent explication of the three-pronged inquiry.

would have been dismissed "but for" the protected speech;[99] and (iii) if the employee successfully shows that the speech was the "but for" cause of the dismissal, whether the degree of public interest in the employee's statement was nonetheless outweighed by the employer's responsibility to manage its internal affairs and provide "effective and efficient" service to the public. If so, then the employer will not be liable.[100]

The first step of the three-pronged inquiry determines whether the employee's speech is protected by the First Amendment pursuant to the first part of the employee's burden of proof as set forth in *Mount Healthy*. Whereas the first two steps of the inquiry determine whether the employee has established a prima facie case of constitutional protection,[101] the third step—the *Pickering* balancing—determines whether the employer has *violated* the employee's right of protected speech.[102] In establishing that speech is constitutionally protected in the heritage of *Pickering* and its progeny, the United States Supreme Court has held that the employee must speak "as a citizen";[103] the circuit courts have seldom applied this aspect of the *Pickering* balancing test in the three-pronged inquiry, so it is difficult to determine which part of the three-prong inquiry they will fit this requirement under. However, as *Garcetti* emphasized, this is a critical part of First

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99. In this step, the employee shows the causal link between the protected speech and the retaliatory government action. It is also in this step that the employer defends itself using the "same decision anyway" defense from *Mount Healthy*; the same preponderance of the evidence burden of proof standard laid out in *Mount Healthy* is applicable.

100. *Daniels*, 801 F.2d at 690. *See also* Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004); Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998); Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996); Holder v. City of Allentown, 987 F.2d 188 (3d Cir. 1993); Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988 (5th Cir. 1992); Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992); Johnsen v. Indep. Sch. Dist. No. 3 of Tulsa County, Okla., 891 F.2d 1485 (10th Cir. 1989); Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988); Conaway v. Smith, 853 F.2d 789 (10th Cir. 1988); Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701 (1989); Saye v. St. Vrain Valley Sch. Dist. RE-1J, 785 F.2d 862 (10th Cir. 1986); *Ferrara*, 781 F.2d 1508; Brasslett v. Cota, 761 F.2d. 827 (1st Cir. 1985); Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640 (8th Cir. 1983); Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983).

101. *Mount Healthy*, 429 U.S. 274.

102. *See, e.g.*, *Ferrara*, 781 F.2d 1508; *Holley*, 755 F.2d 1492. The Eighth Circuit Court of Appeals has a different approach. This circuit holds that for speech to be *protected*, both the *Pickering* balancing test as well as the *Connick* test must be satisfied. After this step of showing the speech is constitutionally protected, the next steps include the employee proving causation and finally the employer establishing the "same decision anyway" defense. Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310 (8th Cir. 1986).

103. *Pickering*, 391 U.S. at 586 (the *Pickering* balancing test); *Garcetti*, 126 S. Ct. at 1960 (the *Garcetti* test).

Amendment analysis of public employment-free speech cases.[104] It seems, however, that since only "citizen" status and not "employee" status is protected, it is likely to fall under the first inquiry along with the inquiry about "matter of public concern," as part of the employee's prima facie case. This would be consistent with the reading of *Pickering*, *Mount Healthy*, and *Garcetti*, because the Supreme Court has expressly extended protection only to speech of employees as "citizens on matters of public concern."[105]

The first[106] and third[107] inquiries in the three-pronged inquiry are questions of law for courts, not jurors, to decide. The second inquiry is what the Fourth Circuit refers to as the "classic motivational question [which] is one of fact"[108] for the jury or trier-of-fact to determine.[109] The ultimate question as to whether employee speech is protected is, however, a question of law for the courts: [110] "the extent of protection afforded by the first amendment to expression is ultimately a question of law for the courts, but . . . the jury's function is to find the underlying facts to which the legal standard is ultimately applied."[111] As part of the *Pickering* calcu-

104. *Garcetti*, 126 S. Ct. at 1960.

105. *Accord Pickering* and its progeny.

106. *See* Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998); Vojvodich v. Lopez, 48 F.3d 879 (5th Cir. 1995); Acevedo-Diaz v. Aponte, 1 F.3d 62 (1st Cir. 1993); Stever v. Indep. Sch. Dist. 625, 943 F.2d 845 (8th Cir. 1991); Wulf v. Wichita, 883 F.2d 842 (10th Cir. 1989); Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701 (1989).

107. *See Acevedo-Diaz*, 1 F.3d 62; *Wulf*, 883 F.2d 842; *Daniels*, 801 F.2d 687; *Jett*, 798 F.2d 748; Brown v. Dep't of Transp., Fed. Aviation Admin., 735 F.2d 543 (D.C. Cir. 1984).

108. *Daniels*, 801 F.2d at 689 (citing *Mount Healthy*, 429 U.S. at 287).

109. *See Brady*, 145 F.3d 691; *Acevedo-Diaz*, 1 F.3d 62; *Wulf*, 883 F.2d 842; Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988); *Jett*, 798 F.2d 748.

110. While this aptly captures the general view of the circuit courts of appeals, the Fourth Circuit has since disavowed the position it held in *Kim v. Coppin State College*, 662 F.2d 1055, 1062 (4th Cir. 1981), instead choosing to hold that "the entire *Pickering* balancing process is an inquiry of law for the court . . . the advisory jury had no role to play." Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987). Thus, for the Fourth Circuit, while the second inquiry is still a question of fact, the first and third inquiries are completely questions of law. Therefore, judges, not jurors, weigh the operational efficiency *Pickering* calculus factors of disruption of operations, disharmony among coworkers, or breach of a confidential working relationship, and the underlying facts applicable to these factors. See J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483 (1985), for an extensive discussion of the role of juries in First Amendment cases.

111. *Kim*, 662 F.2d at 1062; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); McGee v. S. Pemiscot Sch. Dist. R-V, 712 F.2d 339 (8th Cir. 1983).

lus factors, the circuit courts of appeals also consider the time, place, and manner of the speech.[112]

The District of Columbia Circuit Court of Appeals considers the following as part of the *Pickering* calculus factors:

> [t]he sensitivity and confidential nature of the employee's position and the government's consequently legitimate need for secrecy; the nature of the subject on which the employee speaks out; the truth or falsity of the employee's statement; any interference with the performance of his job resulting from the speech; the context of the speech and accompanying conduct; [and] its anticipated effect on agency morale and upon working relationships with immediate superiors.[113]

Of the above factors, the following are additional District of Columbia Circuit Court of Appeals factors not articulated by other circuits as part of the *Pickering* calculus factors: (i) the government's legitimate need for secrecy; (ii) the nature of the subject on which the employee speaks out; (iii) the context of the conduct accompanying the speech; and (iv) the anticipated effect on agency morale.

In applying the *Pickering* balancing test, the District of Columbia Circuit Court of Appeals makes "an individualized and searching review of the factors asserted by the employer to justify the discharge."[114] According to the court, "the *Pickering* cause of action has four elements."[115] First, the public employee has to show that his or her speech was on a matter of public concern: "[i]f the speech is not of public concern . . . it is unnecessary . . . to scrutinize the reasons for [the] discharge . . . at least absent the most unusual circumstances";[116] "[b]ut neither does a topic otherwise of public concern *lose* its importance merely because it arises in an employee dispute."[117] If the employee meets step number one, the second step is the court's application of the *Pickering* balancing test, weighing the interest of the employee, as a citizen, in commenting upon matters of public interest against the interest of the State, as an employer, in its operational efficiency.[118] At the third

112. *See, e.g.*, Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925 (11th Cir. 1993); *Bowman*, 723 F.2d 640; *Lewis*, 805 F.2d at 314; *Ferrara*, 81 F.2d at 1513.

113. Hanson v. Hoffman, 628 F.2d 42, 50 (D.C. Cir. 1980).

114. Tygrett v. Barry, 627 F.2d 1279, 1283 (D.C. Cir. 1980).

115. *See Hall*, 856 F.2d at 258.

116. *Id.* (internal quotation marks omitted).

117. *Id.* at 260 .

118. *Id.* at 258.

step, the employee must prove that his or her speech was a substantial or motivating factor for the alleged retaliatory act of the employer. In the fourth step, the employer is afforded the opportunity to establish the "same decision anyway" defense.[119]

Like the District of Columbia Circuit Court of Appeals, the First Circuit Court of Appeals added a new dimension to the *Pickering* calculus factors, noting that

> [i]n undertaking this [*Pickering*] balancing procedure, both the character and effect of the public employee's speech are relevant considerations. Thus an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods. The government also has a more legitimate concern for speech which actually impairs its functions than for that which does not. Correspondingly, an employee's interest in making public statements is heightened according to their veracity and innocuity.[120]

The First Circuit considers the veracity of the content of the employee's speech as one of the *Pickering* calculus factors.

According to the First Circuit Court of Appeals, there are "three elements a public employee must show to prevail on a First Amendment claim against his or her employer."[121] First, the court must determine if the employee's speech involves a matter of public concern. "If it does not, then its First Amendment value is low, and a federal court is not the appropriate forum in which to review the wisdom of internal decisions arising therefrom."[122] Also, the First Circuit has held that "[w]here a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression."[123] If the court finds that the employee's speech involved a matter of public concern, the next step is the application of the *Pickering* balancing test.[124] At the third step, the employee must establish causation: that his or her protected speech was a

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119. *Id.*
120. Brasslett v. Cota, 761 F.2d 827, 839 (1st Cir. 1985).
121. Fabiano v. Hopkins, 352 F.3d 447, 453 (1st Cir. 2003); O'Connor v. Steeves, 994 F.2d 905, 912 (1st Cir. 1993).
122. *Fabiano*, 352 F.3d at 453 (citations omitted).
123. *O'Connor*, 994 F.2d at 913-14.
124. *Fabiano*, 352 F.3d at 455.

substantial or motivating factor in the alleged retaliatory act of the employer.[125] Though not articulated as a distinct step, the employer then has the opportunity to establish the "same decision anyway" defense.[126]

While not unique to the Second Circuit Court of Appeals, other circuit courts have not clearly articulated, as has the Second Circuit, that a whistleblowing employee "may not base her claim of retaliation upon complained-of-acts that predated her speaking out."[127]

The Second Circuit Court of Appeals' approach to determining if a public employee prevails in a First Amendment claim of retaliation can be summarized succinctly. The employee must show:

> [i] [that] the speech at issue was protected, [ii] that he suffered an adverse employment action, and [iii] that there was a causal connection between the protected speech and the adverse employment action. In particular, the causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action.[128]

The determination of whether speech is protected is pursuant to the *Connick* "matter of public concern" test.[129] However, "the fact that an employee's speech touches on matters of public concern will not render that speech protected where the employee's motive for the speech is private and personal."[130] Additionally, the court has held that

> [v]irtually every citizen has a personal interest in matters of public concern; after all, each citizen is a member of the public and is, in some way, impacted by the resolution of societal problems. The determinative question is whether that interest arises from the speaker's status as a public citizen or from the speaker's status as a public employee.[131]

According to the Third Circuit Court of Appeals, employee testimony before an official government fact-finding or adjudicatory

125. *Id.* at 457.
126. *O'Connor*, 994 F.2d at 913.
127. Bernheim v. Litt, 79 F.3d 318, 325 (2d Cir. 1996).
128. Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994) (citations omitted).
129. *Blum*, 18 F.3d at 1010.
130. *Id.* at 1012.
131. *Id.*

body is inherently a matter of public concern, regardless of its content.[132] For example, an employee's voluntary testimony at a bail hearing is inherently a matter of public concern.[133] In addition, a "public employee's appearance as a witness, even in the absence of actual testimony, is 'speech' under *Pickering*"[134] as "the context of a courtroom appearance raises speech to a level of public concern"[135] which could effectively confer First Amendment protection to speech that is otherwise unprotected.[136] However, even then, the *Pickering* balancing test needs to be applied to such speech.[137] The employee's testimony does not have to be pursuant to a subpoena; voluntary testimonies are also inherently matters of public concern.[138]

With respect to the content, form, and context elements of the *Connick* test, the Third Circuit's position is that

> [t]he content of the speech may help to characterize it as relating to a matter of social or political concern of the community if, for example, the speaker seeks to "bring to light actual or potential wrongdoing or breach of public trust" on the part of government officials. The form and context of the speech may help to characterize it as relating to a matter of social or political concern to the community if, for example, the forum where the speech activity takes place is not confined merely to the public office where the speaker is employed.[139]

Unlike the Fourth Circuit Court, which has held that content is more important than form and context in the *Connick* test,[140] the Third Circuit holds that content, form, and context all play important roles in the test.[141]

The Third Circuit uses the three-step inquiry mentioned earlier.[142] As part of the *Pickering* calculus factors, the Third Circuit considers the extent to which the employee used the speech to resolve what is essentially a private grievance of the employee, as

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132. Pro v. Donatucci, 81 F.3d 1283, 1290 (3d Cir. 1996).
133. Green v. Philadelphia Hous. Auth., 105 F.3d 882 (3d Cir. 1997).
134. *Pro*, 81 F.3d at 1291.
135. *Green*, 105 F.3d at 887.
136. *Pro*, 81 F.3d at 1291 n.4.
137. *Id.* at 1291.
138. *Green*, 81 F.3d at 887.
139. *Holder*, 987 F.2d at 195.
140. Jackson v. Bair, 851 F.2d 714, 720 (4th Cir. 1988).
141. *Holder*, 987 F.2d at 195; *Pro*, 81 F.3d at 1291.
142. *See Holder*, 987 F.2d at 195.

well as the extent to which the employee threatens the authority of the employer.[143]

In making the inquiry as to whether employee speech is about a matter of public concern pursuant to *Connick*, the Fourth Circuit looks at the content, form, and context of the speech.[144] The critical inquiry in this determination as to whether the speech deals with a matter of public concern, according to the Fourth Circuit, is "whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee."[145] As part of context under the *Connick* test, nonexclusive and non-dispositive indicia considered by the Fourth Circuit Court include whether the speech was at a public meeting.[146]

*Piver* is one of a limited number of cases in the circuit courts of appeals where "form" (an element of the *Connick* test) has truly been applied, as opposed to just summarily mentioned (or not mentioned) as applicable, which is the tradition in the cases.[147] Any of the cases cited in this article from the circuit courts would adequately illustrate their tendency to summarily find "form" in existence without actually providing real substance as to how this conclusion came about in the application process.

The Fourth Circuit distinguished between its findings about context, form, and content in *Jurgensen v. Fairfax County*[148] and *Piver*. In *Jurgensen*, a police officer was demoted for clandestinely releasing an internal audit report about working conditions to a newspaper reporter.[149] In *Piver*, a high school teacher was terminated for speaking out in support of his principal getting tenure.[150] The court noted that the content of speech in *Jurgensen* was working conditions at the department, while in *Piver* the content of the speech was focused on the adequacy of the principal's

143. *Id.*

144. *See, e.g.*, Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1079 (4th Cir. 1987).

145. *Piver*, 835 F.2d at 1079-80 (internal quotation marks omitted).

146. *Love-Lane*, 355 F.3d at 777.

147. *See, e.g.*, Gilder-Lucas v. Elmore County Bd. of Educ., 399 F. Supp. 2d 1267 (M.D. Ala. 2005), *aff'd*, 186 F. App'x 885 (11th Cir. 2006); *Love-Lane*, 355 F.3d 767; Sharp v. Lindsey, 285 F.3d 479 (6th Cir. 2002), cases where "form," an element of the *Connick* test, was merely summarily mentioned (or not even mentioned) in application of the *Connick* test.

148. 745 F.2d 868 (4th Cir. 1984).

149. *Jurgensen*, 745 F.2d at 871.

150. *Piver*, 835 F.2d 1076.

performance.[151] The court distinguished the "form" of speech in both cases as follows:

> The form of the speech in *Jurgensen* involved the handing over of a report . . . to a journalist at a private dinner meeting. The forms of Piver's speech included an oral presentation of his own thoughts at a public school board meeting, the guiding of class discussion and participation in his social studies class, and private conversations with the chairman of the school board and with other teachers.[152]

With respect to the context, the court stated:

> The context of the speech in *Jurgensen* included a departmental regulation forbidding the release of information by employees . . . without specific prior authorization. The context of Piver's speech was fundamentally different. The speech took place primarily in a public meeting called for the purpose of discussing Jourdan's [the principal's] tenure. The speech delivered information uniquely available to Piver; as a teacher under Jourdan, Piver had important insights into Jourdan's performance on the job. The speech was directed to a small community in which the speaker and the subjects were personally known by almost everyone.[153]

In *Jurgensen*, the Fourth Circuit held that the speech was not a matter of public concern,[154] whereas in *Piver* it held that the speech was a matter of public concern.[155]

The Fourth Circuit points out a crucial problem with application of the *Connick* test: "*Connick* [makes] it plain that the 'public concern' or 'community interest' inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is."[156] Taking into account this challenge in applying the *Connick* test, the Fourth Circuit held:

> The principle that emerges [in application of the *Connick* test] is that *all* public employee speech that by content is within

151. *Id.* at 1080.
152. *Id.*
153. *Id.*
154. *Jurgensen*, 745 F.2d at 888.
155. *Piver*, 835 F.2d at 1080.
156. *Id.* at 1079 (internal quotation marks omitted).

> the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely personal concern to the employee—most typically, a private personnel grievance.[157]

Cases where the employee speaks out about his or her own employment situation are likely to be rejected as personal grievances when "that employment situation holds little or no interest for the public at large."[158]

The Fourth Circuit has found that "disharmony is not a per se defense to dismissal."[159] Moreover, the court has held that the content portion of the *Connick* test is the most important of "content, form, and context."[160] The court has also affirmed that the negative definition of "matter of public concern" is not consequential to the determination of what constitutes matter of public concern: "[i]n deciding that a statement falls within the realm of public concern, it is not sufficient to determine that it does not fall on the 'private grievance' end of the spectrum."[161]

The Fifth Circuit Court's framework for determining whether an employee's speech constitutes protected speech under the First Amendment is as follows:

> First, the speech must have involved a matter of public concern. . . . Second, the public employee's interest in commenting on matters of public concern must outweigh the public employer's interest in promoting efficiency. . . . The third prong of the test is based on causation; the employee's speech must have motivated the decision to discharge the employee.[162]

According to the Fifth Circuit Court of Appeals, the *Pickering* calculus includes:

> (1) the degree to which the employee's activity involved a matter of public concern; (2) the time, place, and manner of the employee's activity; (3) whether close working relation-

157. *Id.* (internal quotation marks omitted).
158. *Id.* at 1080; *see* Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985).
159. *See* Daulton v. Affeldt, 678 F.2d 487, 491 (4th Cir. 1982).
160. Jackson v. Bair, 851 F.2d 714, 720 (4th Cir. 1988).
161. Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75, 79 (4th Cir. 1988).
162. Fowler v. Smith, 68 F.3d 124, 126 (5th Cir. 1995) (citing Thompson v. Starkville, 901 F.2d 456, 460 (5th Cir. 1990)).

> ships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's activity on those relationships; (4) whether the employee's activity may be characterized as hostile, abusive, or insubordinate; [and] (5) whether the activity impairs discipline by superiors or harmony among coworkers.[163]

The inclusion of factors number one and four as part of the *Pickering* calculus factors is unique to the Fifth Circuit.[164] Also considered is whether the speech is "likely to generate controversy."[165]

Like the Fourth Circuit, the Fifth Circuit has held that in the *Pickering* balancing test, disharmony (one of the factors from the *Pickering* calculus) is not a per se defense to termination of whistleblowing employees.[166] Moreover, an employee's speech may contain both private concerns and public concerns and still constitute speech on a matter of public concern.[167]

With respect to the employee's burden of proof in a First Amendment whistleblowing case, the Fifth Circuit requires a fac-

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163. Brady v. Fort Bend County, 145 F.3d 691, 707 (5th Cir. 1998); Click v. Copeland, 970 F.2d 106 (5th Cir. 1992); Matherne v. Wilson, 851 F.2d 752, 760 (5th Cir. 1988).

164. Although there is a reference to the matter of public concern in one of the *Pickering* calculus factors as set forth by the United States Supreme Court in *Pickering*, that factor deals with the *employee's interest* in commenting on the matter of public concern. Therefore, before the *Pickering* calculus factors are applied, the employee's speech must already be determined to be a matter of public concern. Viewed one way, what the Fifth Circuit Court of Appeals in essence has done by including this factor ("the degree to which the employee's activity involved a matter of public concern," *Brady*, 145 F.3d at 707) as one of the *Pickering* calculus factors is include the threshold determination in the calculus—a redundant inclusion, since the United States Supreme Court held in *Connick* that the determination of whether speech touches on a matter of public concern is a threshold requirement for cases in the public employment-free speech jurisprudence under the First Amendment.

Viewed another way, the Fifth Circuit Court's inclusion of this factor as part of the *Pickering* calculus might only be a way for the court to look at the *degree* to which the employee's speech—already determined to touch on a matter of public concern—involves a matter of public concern. If so, this might be a *Pickering* calculus factor that helps determine the degree to which speech that is a matter of public concern involves (i) matters of public concern; (ii) *substantial* matters of public concern; or (iii) *inherent* matters of public concern. Often, however, as part of the threshold requirement, courts have already determined what degree of public concern the speech involves as part of the process inherent in proving that the speech constitutes a matter of public concern in the first place. So this factor in the *Pickering* calculus as set forth by the Fifth Circuit could actually be the step for *applying* the determination, made earlier in a case by a court, of the degree to which the speech involves matter of public concern.

165. Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 223 (5th Cir. 1999).

166. Williams v. Bd. of Regents, 629 F.2d 993, 1004 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981).

167. Benningfield v. City of Houston, 157 F.3d 369, 375 (5th Cir. 1998); *Thompson*, 901 F.2d at 463-65.

tor assumed but not explicitly stated as a requirement in the framework used by most of the other courts of appeals: proof that the employee suffered adverse action.[168] In addition, the Fifth Circuit requires proof from the employee that his or her interest in commenting on matters of public concern outweighs the employer's interest in operational efficiency.[169]

The Fifth Circuit has held that employee testimony before an official government fact-finding or adjudicatory body is inherently a matter of public concern, regardless of its content.[170] This includes testimony before a grand jury, as well as testimony in a civil or criminal proceeding.[171] The reasoning is thus: "[t]he goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in these contexts speech of public concern."[172] With respect to "citizen" status versus "employee" status, the court has held that "public employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as citizens and not as employees."[173]

In determining what constitutes a matter of public concern, the Fifth Circuit has stated that "[a]nother factor considered in determining whether speech is on a matter of public concern is whether the comments were made against a backdrop of widespread debate in the community."[174]

> [I]ssues do not rise to a level of public concern by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by

168. *See Harris*, 168 F.3d at 220; *see also* Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000); Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994).

169. *Harris*, 168 F.3d at 220.

170. *Id.* at 222; Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989); *see also Pro*, 81 F.3d 1283.

171. *See* Reeves v. Clairborne County Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987). The Seventh Circuit Court of Appeals has refused to adopt the position taken by the Third and Fifth Circuit Courts of Appeals, Wright v. Ill. Dept. of Children and Family Servs., 40 F.3d 1492, 1505 (7th Cir. 1994); so has the Fourth Circuit Court of Appeals, noting that adoption of such a position would be elevating context over content, since a court appearance or other appearance before a fact-finding or adjudicatory body deals with context; according to the Fourth Circuit, content is more important than context and form in the *Connick* test, Jackson v. Bair, 851 F.2d 714 (4th Cir. 1988); *see generally Arvinger*, 862 F.2d at 79.

172. *Johnston*, 869 F.2d at 1565 (internal quotation marks omitted).

173. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 (5th Cir. 1989) (internal quotation marks omitted).

174. *Harris*, 168 F.3d at 223.

> the teacher in his role *as a citizen* and not in his role *as an employee* of the school district.[175]

Accordingly, for the Fifth Circuit, a determination of whether the employee spoke as a citizen versus as an employee is dispositive of whether speech is about a matter of public concern.[176]

The framework used by the Sixth Circuit Court of Appeals in analyzing cases of First Amendment retaliation claims by public employees is as follows—the employee must show that: (i) his or her speech is constitutionally protected speech under the First Amendment; (ii) the employer's adverse action caused the employee to suffer injury that is likely to chill a person of ordinary firmness from continuing to engage in the protected speech;[177] and (iii) the adverse action was motivated at least in part as a response to the employee's exercise of his or her right to free speech.[178] If the employee meets each of these three steps of his or her burden, only then does the burden of persuasion shift to the employer to establish the "same decision anyway" defense by a preponderance of the evidence.[179]

The Sixth Circuit Court of Appeals uses a two-part test to determine if speech is constitutionally protected under the first prong of the plaintiff's burden of proof under the *Mount Healthy* "balance of burdens."[180] The first step is a determination of whether the speech is about a matter of public concern; if so, the employee must show in the second step that the employee's interest, as a citizen, in commenting upon a matter of public concern outweighs the State's interest, as an employer, in the efficiency of the services it performs.[181] Thus, it is in this second step of the

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175. *Kirkland*, 890 F.2d at 798-99 (internal quotation marks omitted).

176. *See, e.g.*, Dodds v. Childers, 933 F.2d 271, 273, 279 (5th Cir. 1991); Dorsett v. Bd. of Trs. for State Colls. & Univs., 940 F.2d 121, 129 (5th Cir. 1991); *see generally Kirkland*, 890 F.2d 794.

177. Retaliatory acts could be the basis for an employee to establish adverse action that caused the employee injury that would chill a person of ordinary firmness from continuing to engage in the speech—e.g., termination, Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1055 (6th Cir. 2001); involuntary transfer, *Leary*, 228 F.3d at 738.

178. *Leary*, 228 F.3d at 737; *see Cockrel*, 270 F.3d at 1048.

179. *Id.* This is the very same framework the Fifth Circuit Court of Appeals uses. *See, e.g.*, Fowler v. Smith, 68 F.3d 124 (5th Cir. 1995).

180. Recall, the entire *Mount Healthy* "mixed motives" framework is sometimes referred to as the "balance of burdens." *See supra* note 41. Also, recall that the first prong of the plaintiff's burden of proof under the *Mount Healthy* "balance of burdens" is a determination of whether the employee's speech is protected under the First Amendment.

181. Vanessa A. Wernicke, *Teachers' Speech Rights in the Classroom: An Analysis of* Cockrel v. Shelby County Sch. Dist., 71 U. CIN. L. REV. 1471, 1482 (2003); *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135 (6th Cir. 1997).

determination of whether employee speech is constitutionally protected that the Sixth Circuit applies the *Pickering* balancing test. The Sixth Circuit has rejected the approach of the Fourth and Fifth Circuits which holds that, in the analysis of whether speech touches on a matter of public concern, the role of the employee as citizen or employee in speaking is determinative.[182] Instead, the Sixth Circuit gives the greatest relative determinative importance to the content of the speech.[183]

In addition, it is the position of the Sixth Circuit that

> even if a public employee were acting out of a private motive with no intent to air her speech publicly . . . so long as the speech relates to matters of political, social, or other concern to the community, as opposed to matters only of personal interest, it shall be considered as touching upon matters of public concern.[184]

Likewise, in applying the *Pickering* calculus factors, the court "give[s] substantial weight to the government employer's concerns of workplace efficiency, harmony, and discipline."[185] An exception is "when the disruptive employee speech can be traced back to when the government's express decision permitted the employee to engage in that speech."[186] Moreover, an employee's

> decision to speak cannot immunize her from an adverse employment decision arising out of inappropriate workplace behavior unrelated to her protected speech. Similarly, an employer is not immunized from its decision to terminate an employee based on her speech simply because that employee has engaged in other conduct that could have constituted legitimate grounds for discharge.[187]

The Seventh Circuit looks at the three-pronged inquiry as a two-step process. The first step is a determination of whether the speech involves a matter of public concern pursuant to the *Connick* test; if so, the next step is the application of the *Pickering*

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182. *See* Wernicke, *supra* note 181. *See generally Cockrel*, 270 F.3d at 1055; Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 366-67 (4th Cir. 1998); *Kirkland*, 890 F.2d 794.

183. *See* Wernicke, *supra note* 181; *Cockrel*, 270 F.3d at 1052.

184. *Cockrel*, 270 F.3d at 1052 (internal quotation marks omitted).

185. *Id.* at 1054.

186. *Id.* at 1054-55.

187. *Id.* at 1059.

balancing test, a part of which is the application of the *Pickering* calculus factors including context, time, place, and manner; the employee's motives in voicing the concerns; and the gravity of the matter of public concern expressed.[188] The employer "does not have to prove a legitimate reason for taking adverse action against the plaintiff until the plaintiff has come forth with sufficient evidence to support a prima facie case of *substantial* motivation."[189]

In the Seventh Circuit Court of Appeals, public employee speech is protected by the First Amendment if: (i) it will be protected if uttered by a private citizen; (ii) it involves more than a personal employee grievance; and (iii) the employer does not show a convincing reason to prohibit the speech.[190] Once the employee establishes that the speech is on a matter of public concern, he "place[s] his speech, prima facie, within the protection of the First Amendment."[191] The Seventh Circuit uses the term "prima facie" protection to distinguish the fact that when a public employee—as opposed to a nonpublic employee citizen—speaks and proves that the speech was protected by the First Amendment, that is not the end of the case, as the employer has the benefit of the *Mount Healthy* defense to avoid liability. In other words, the employee who meets his or her burden of proof pursuant to *Mount Healthy* only has "prima facie" First Amendment protection.[192]

In enunciating the "matter of public concern," the Seventh Circuit has stated that

> when the Supreme Court in its cases establishing and bounding the rights of public employees to exercise free speech limited those rights to speech on matters of public concern, they did not mean matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy.[193]

Building on this, the court has held that the mere fact that "the public was not large, the issues were not of global significance,

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188. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Yoggerst v. Hedges, 739 F.2d 293, 295 (7th Cir. 1984); Zook v. Brown, 748 F.2d 1161 (7th Cir. 1984).

189. Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205, 17 F.3d 1059, 1068 (7th Cir. 1994) (emphasis added).

190. Hulbert v. Wilhelm, 120 F.3d 648 (7th Cir. 1997); Brown v. Disciplinary Comm. of Edgerton, 97 F.3d 969, 972 (7th Cir. 1996); Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996).

191. *See Dishnow*, 77 F.3d at 197.

192. *Id.*

193. *Id.*

and . . . [the employee's] participation was not (we mean no disrespect) vital to the survival of Western civilization"[194] was not enough to place the speech "outside the orbit of protection."[195]

With respect to private communication to superiors, the Seventh Circuit has held that

> [a]lthough the [F]irst [A]mendment is not limited to speech that is broadcast to the world . . . an employee's decision to deliver the message in private supports an inference that the real concern is the employment relation—and a school district *as employer* may react to speech about the workplace in ways a government *as regulator* may not.[196]

However, the court recognizes that "[F]irst [A]mendment protection extends to public employees who express their opinions during working hours as well as those who engage in speech while off-duty."[197]

Like the Sixth Circuit, the Seventh Circuit has held that employee speech will constitute protected speech if two requirements are met:

> [T]o be protected by the First Amendment, (1) the speech by a government employee must be on a matter of public concern, and (2) the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state, as employer, in promoting efficient and effective public service.[198]

In this circuit, these two elements are essential to satisfying the first part of the burden of the employee under *Mount Healthy*: that the employee's speech is protected by the First and Fourteenth Amendments.

In essence, what the Seventh Circuit does in real terms, like the Sixth Circuit, is collapse the balancing aspect of *Pickering* into the employee's portion of the burden-of-proof allocation set forth in *Mount Healthy*, so that the employee is required to show that the employee's interest in speaking is not outweighed by the interests of the state, as employer, in promoting effective and efficient ser-

194. *Id.*
195. *Id.*
196. Wales v. Bd. of Educ. of Comm. Unit Sch. Dist. 300, 120 F.3d 82, 84 (7th Cir. 1997) (emphasis added).
197. Conner v. Reinhard, 847 F.2d 384, 392 (7th Cir. 1988).
198. Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1014 (7th Cir. 1997).

vice.[199] Unclear and unarticulated is why the court takes this approach, since in the very same case it stated: "even termination because of *protected* speech may be justified when legitimate countervailing government interests are sufficiently strong."[200] In other words, the Seventh Circuit distinguishes (i) protected speech on the one hand, and (ii) countervailing government interests on the other hand—a distinction more in line with the United States Supreme Court's holdings in *Pickering* and its progeny than the approach the Seventh Circuit Court takes.

Making this distinction clearly contradicts the Seventh Circuit's own approach of collapsing into the "protected speech" determination a burden on the employee to show that the speech was not outweighed by the countervailing interests of the employer.[201] It is also inconsistent with the Seventh Circuit's statement that "[w]hen an employee speaks out about actual wrongdoing or breach of public trust . . . the *government* must make a more substantial showing that the speech is, in fact, likely to be disruptive."[202] If the *government* is to bear the burden of proving that speech is disruptive—a *Pickering* calculus factor and, consequently, an integral part of the *Pickering* test—does the speech not have to first be shown to constitute protected speech under the First Amendment?

For if the speech is not yet determined to be protected speech, why would a court go through the entire process of applying the *Pickering* balancing test and require the government to bear the burden of proof with respect to some of the *Pickering* calculus factors, without yet moving beyond the employee's part of the burden of proof enunciated in *Mount Healthy*? Proceeding in such a manner would be in contravention of *Mount Healthy*'s burden-of-proof framework, the very notion of judicial economy, and the principle of fairness to the parties. It is unfair to the parties to go through the entire balancing test before the employee has met the first part of the *Mount Healthy* balance of burdens—that the employee prove that the speech is protected by the First and Fourteenth Amendments.

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199. Keep in mind, however, that while taking this approach, the Seventh Circuit Court of Appeals in the very same case acknowledged the muffled nature of the *Pickering* balancing test. *See Khuans*, 123 F.3d at 1014.

200. *Id.* (emphasis added).

201. This very same inconsistency is evident in the Sixth Circuit Court of Appeals' approach.

202. *Khuans*, 123 F.3d at 1018 (emphasis added).

With respect to the *Connick* test for a matter of public concern, the Seventh Circuit has held that content is more important than form and context.[203] In this circuit, indicia of a matter of public concern under the *Connick* test include whether the employee "issue[d] a public call to change."[204] The Seventh Circuit adds the following to the *Pickering* calculus factors: (i) the context in which the underlying dispute began;[205] (ii) whether the subject matter of the speech was one on which debate was crucial to informed decision-making;[206] (iii) "whether the speaker should be regarded as a member of the general public";[207] and (iv) "the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"[208]

The third factor above seems very similar to the "citizen" versus "employee" status determination, which is vital to the determination of whether the employee's speech is protected speech under the First Amendment pursuant to *Pickering*, a factor not recognized by the Seventh Circuit. While inclusion of this factor as part of the *Pickering* calculus factors is consistent with the Seventh Circuit's approach—that to be protected speech under the First Amendment a determination that the employee's interest in speaking is not outweighed by the countervailing interests of the public employer must be made[209]—it is inconsistent with the very language of *Pickering* and its progeny. This approach subsumes the *Pickering* calculus factors within the employee's *Mount Healthy* burden of proof.[210]

The Eighth Circuit Court of Appeals adds the following factors to the *Pickering* calculus factors: (i) the context in which the dispute arose;[211] and (ii) the degree of public interest in the speech.[212]

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203. *Id.* at 1014.
204. *Id.* at 1016.
205. *Id.* at 1015.
206. *Id.*
207. *Khuans*, 123 F.3d at 1015.
208. *Id.* (quoting Smith v. Fruin, 28 F.3d 646, 651 (7th Cir. 1994); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985) (emphasis added)).
209. *See generally Khuans*, 123 F.3d 1010.
210. The *Mount Healthy* burden of proof is discussed *supra* pp. 137-38.
211. *See* Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 315 (8th Cir. 1986); Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640, 644 (8th Cir. 1983).
212. While the "degree of public interest in speech" is considered by the Eighth Circuit Court of Appeals as one of the *Pickering* calculus factors, in determining whether the speech involves a "matter of public concern" pursuant to the *Connick* test, the Eighth Circuit does not consider the degree of public interest in speech. Instead, as the Eighth Circuit

Thus, context is not merely considered when applying the *Connick* test; it is also considered as part of the *Pickering* balancing test.

The Eighth Circuit holds that "courts must also accord to the government the wide degree of discretion necessary for the proper management of internal affairs and personnel decisions. The degree of discretion allowed varies with the nature of the employee's duties and the legitimate needs of the government."[213] With respect to the "degree of public interest in speech," indicia used by the Eighth Circuit include media attention and parent involvement.[214] In addition, with respect to public school employees, the court gives weight to the fact that "[t]he question of what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum."[215]

As pointed out earlier, the Eighth Circuit approaches the three-pronged inquiry differently from the other courts of appeals. This approach is summarized thus:

> First Amendment decisions in the public-employee-firing context require application of a three-step process. . . . The first step is to determine whether the speech was "protected" under the Constitution. Under *Connick*, only speech addressing a "matter of public concern" is protected. . . . Even then, *Pickering* instructs the court to balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. . . . To be protected, speech must pass both the *Connick* and *Pickering* tests. The second and third steps involve causation. The employee must show that the speech was a substantial or motivating factor in the adverse employment decision. . . . Finally, the defendant may show that the employment action would have been taken even in the absence of the protected conduct.[216]

With respect to private communication to supervisors, the approach of the Eighth Circuit is that "[a] teacher has a constitu-

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has noted, the "focus [is] on the employee's role in conveying the speech rather than the public's interest in the speech's topic." Bausworth v. Hazelwood Sch. Dist., 986 F.2d 1197, 1198 (8th Cir. 1993).

213. *Bowman*, 723 F.2d at 644.

214. *Id.*; *see also* Roberts v. Van Buren Pub. Schs., 773 F.2d 949 (8th Cir. 1985).

215. *Bowman*, 723 F.2d at 644.

216. *Lewis*, 805 F.2d at 313 (citing *Roberts*, 773 F.2d at 953-54 ) (internal quotation marks omitted).

tional right . . . to privately express to his superiors, in a reasonable manner, his criticism of . . . educational or disciplinary policies."[217] The first inquiry is to determine if a matter of public concern is involved.[218] If so, pursuant to *Givhan*, the time, place, and manner of the speech, as well as its content, must then be examined in order to determine if operational efficiency is threatened.[219]

The Eighth Circuit defines the focus of whether speech is a matter of public concern as

> the role that the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with the internal policies or practices which are of relevance only to the employees of that institution.[220]

"When focusing on the employee's role, we consider whether the employee attempted to communicate the speech to the public at large and the employee's motivation in speaking";[221] as part of this examination of the employee's role, the Eighth Circuit looks at whether, when speaking, the employee was in the role of a citizen.[222]

The Ninth Circuit uses the same three-pronged inquiry as generally used by the other courts of appeals.[223] Due to the inherent challenges in figuring out what constitutes a "matter of public concern," the Ninth Circuit Court has defined the concept in the negative: "[s]peech by public employees may be characterized as not of public concern when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of the governmental agencies."[224]

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217. *Roberts*, 773 F.2d at 956 (citing Derrickson v. Bd. of Educ., 703 F.2d 309, 316 (8th Cir. 1983)).

218. *Id.* at 954.

219. *Id.* at 956.

220. Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 672 (8th Cir. 1986).

221. Bausworth v. Hazelwood Sch. Dist., 986 F.2d 1197, 1198 (8th Cir. 1993).

222. *Bausworth*, 986 F.2d at 1198.

223. *Lewis*, 805 F.2d at 313 (citing Roberts, 773 F.2d at 953-54) (internal quotation marks omitted).

224. *See* McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983).

The Tenth Circuit has added the truth or falsity of speech to the *Pickering* calculus factors and assigned non-specific weights to this factor[225] and to the value of the employee's speech to the public.[226] According to the Tenth Circuit,

> the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under *Pickering*. It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern. Nonetheless, a merely erroneous statement *may* be of public concern.[227]

Like the other courts of appeals, the Tenth Circuit looks to content, form, and context in determining what constitutes a matter of public concern. In examining content, the court will examine "the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties."[228] In *Wulf*, the court held that an employee who wrote to the Attorney General asking for an investigation into the practices of the department spoke on a matter of public concern.[229] The court noted that the "form" of speech in that case was the letter to the Attorney General.[230]

The following four-step process represents the Tenth Circuit Court's framework for reviewing public employees' First Amendment retaliation claims:

> First, the court must determine whether the employee's speech can be fairly characterized as constituting speech on a matter of public concern. . . . If so, the court must then proceed to the second step and balance the employee's interest, as a citizen, in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its em-

225. *See* Westbrook v. Teton County Sch. Dist. No. 1, 918 F. Supp. 1475, 1483 (D. Wyo. 1996); *see also* Ware v. Unified Sch. Dist. No. 492, 881 F.2d 906, 910 (10th Cir. 1989).

226. Wulf v. Wichita, 883 F.2d 842, 858 (10th Cir. 1989).

227. *Wulf*, 883 F.2d at 858 n.24. Despite assertions that various statements in the case were false and trivial, the court found those statements in *Wulf* to be matters of public concern, noting that only knowingly or recklessly false statements may not be matters of public concern. *Id.* at 857.

228. Koch v. City of Hutchinson, 847 F.2d 1436, 1445-46 (10th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 909 (1988) (citations omitted).

229. *Wulf*, 883 F.2d at 857.

230. *Id.* at 860 n.26.

> ployees. . . . Assuming that the *Pickering* balancing test tips in favor of the employee, the employee, under the third step, must prove that the protected speech was a substantial factor or a motivating factor in the detrimental employment decision. . . . Finally, if the employee makes this showing, the burden then shifts to the employer to show by a preponderance of evidence that it would have reached the same decision . . . even in the absence of the protected conduct. Steps one and two concern whether the expression at issue is subject to the protection of the First Amendment. Thus, they present legal questions to be resolved by the court. In contrast, the third and fourth steps concern causation and involve questions of fact to be resolved by the jury.[231]

Moreover, the Tenth Circuit considers the motive of the speaker, particularly whether the employee "spoke out based on the same motivation that would move the public to speak out"[232] as an indicium of whether speech constitutes a matter of public concern. According to the court, "the controversial character of a statement is irrelevant to the question [of] whether it deals with a matter of public concern . . . because the focus is on the motive of the speaker."[233]

The Eleventh Circuit's approach to public employment-free speech cases can be gleaned from the following:

> [T]he fact that an employee is retaliated against for exercising constitutionally protected speech does not *automatically* render the disciplinary action unconstitutional. A public employee's free speech rights are not absolute. The employee's interest must be weighed against that of the state to determine which is more compelling in a given situation.[234]

Moreover, in the Eleventh Circuit, "[t]he *Pickering* balance is not triggered unless it is first determined that the employee's speech is constitutionally protected."[235]

Like the Eighth and Tenth Circuits, the Eleventh Circuit has added the degree of public interest in the employee's speech to the

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231. Gardetto v. Mason, 100 F.3d 803, 811 (10th Cir. 1996) (internal quotation marks omitted).

232. *Gardetto*, 100 F.3d at 812; *see also* Michael T. Jilka, *Free Speech Rights of Public Employees*, 71-JAN J. KAN. B. ASS'N 30 (2002).

233. *Gardetto*, 100 F.3d at 814 (internal quotation marks omitted).

234. Ferrara v. Mills, 781 F.2d 1508, 1513 (11th Cir. 1986).

235. *Ferrara*, 781 F.2d at 1513-14.

*Pickering* calculus factors.[236] However, it has also held that the degree of public interest in the subject of speech must not be equated with whether the speech is a matter of public concern: "[t]he First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy."[237]

The Eleventh Circuit has a different order to the three-pronged inquiry:

> First, the court must determine whether the expression addressed a matter of public concern. . . . Second, the court must consider whether the employee's first amendment interest outweighs the interests of the government, as an employer, in the efficiency of public services. . . . If the public employee prevails on the balancing test, the district court must determine whether the employee's speech played a substantial part in the government's decision to demote or discharge her. . . . If the public employee prevails on these issues, the government has the opportunity to show . . . that it would have reached the same employment decision in the absence of the protected conduct.[238]

The Eleventh Circuit considers whether the employee spoke in the role of a citizen or primarily as an employee, in analyzing the context portion of the *Connick* test.[239] In addition, this circuit recently held that "[w]hile speech already determined to discuss a matter of public concern does not lose its public character solely because it is privately expressed, a failure to make the public aware of a grievance can undermine its public nature."[240]

A theme evident in the discussions *supra* of the various circuit courts of appeals approaches to *Pickering* and its progeny is that, just like with the United States Supreme Court's development of the public employment-free speech jurisprudence, the circuit courts' jurisprudence has been hazy, at variance intra- as well as inter-circuit, and often indeterminate.

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236. *Id.* at 1514.
237. *Id.* (quoting *Connick*, 461 U.S. at 160 (Brennan, J., dissenting)).
238. Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925, 928 (11th Cir. 1993).
239. Gilder-Lucas v. Elmore County Bd. of Educ., 399 F. Supp. 2d 1267, 1271 (M.D. Ala. 2005), *aff'd*, 186 F. App'x 885 (11th Cir. 2006).
240. *Gilder-Lucas*, 399 F. Supp. 2d at 1272 (quoting *Connick*, 461 U.S. at 148 n.8).

## III. MATTER OF PUBLIC CONCERN

In *Connick*, the Supreme Court revealed the test for determining whether public employee speech constitutes speech on a matter of public concern: "[w]hether an employee's speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement."[241] The content, form, and context of the statement must be examined to determine whether employee speech "relat[es] to *any matter of political, social, or other concern to the community*."[242]

There are three levels of matter of public concern: (i) matter of public concern;[243] (ii) substantial matter of public concern;[244] and (iii) inherent matter of public concern.[245] The difference between speech about a matter of public concern and that which is about a substantial matter of public concern is thus: "a *stronger* showing may be necessary if the employee's speech more substantially involved matters of public concern."[246] The Supreme Court has never articulated a test for determining what constitutes an "inherent matter of public concern."

With respect to inherent matters of public concern, the Fifth Circuit, for example, has held that employee testimony before an official government fact-finding or adjudicatory body is inherently a matter of public concern.[247] In *Givhan*, the United States Supreme Court held that an employee's speech about the racially discriminatory nature of her employer's policies in purpose and effect was inherently a matter of public concern. "[C]ourts have had some difficulty deciding when speech deals with an issue of public concern"[248] because "[t]he definition of matters of public concern is imprecise";[249] in fact, the "matter of public concern" has

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241. *Connick*, 461 U.S. at 147-48 (emphasis added).

242. *Id.* at 146 (emphasis added).

243. *See, e.g.*, *Connick*, 461 U.S. 138.

244. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983).

245. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410; *accord Connick*, 461 U.S. at 148 n.8.

246. *See Connick*, 461 U.S. at 152 (emphasis added).

247. *See, e.g.*, Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989); *see also* Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 222 (5th Cir. 1999).

248. *See McKinley*, 705 F.2d at 1113 (internal quotation marks omitted).

249. *See* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 (5th Cir. 1989) (internal quotation marks omitted); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990); Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413 (2002).

been described[250] as having many faces in the circuit courts of appeals.[251] In this section, I briefly point out various examples of subject matter that have been found by various federal courts to constitute "matters of public concern."

In a case where the teacher's speech took the form of several articles written to various newspapers alleging the school board's mismanagement of taxpayer funds, Freedom of Information Act (FOIA) public requests for salaries and travel expenses of board members, and distribution of questionnaires to her colleagues about how teachers are treated or not treated as professionals by the school district, the Fourth Circuit held that the teacher's speech involved substantial matters of public concern.[252]

Speech expressing concern about lack of responsiveness to students' needs and that of the community has been recognized as speech about a matter of public concern.[253] Speech about salaries and other employment benefits has also been found to constitute a matter of public concern.[254] In addition, speech about maternity leave has been specifically held to be a matter of public concern.[255] It has also been determined that when teachers speak out about factors interfering with the education of students, their speech is on a matter of public concern.[256]

A memorandum criticizing the employee's immediate supervisor for unprofessional conduct and use of various epithets has been held to be of public concern;[257] criticism of the superintendent at a public meeting for lack of professionalism and for the transfer of a

250. *See* D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 257-58 (1990).

251. Sharp v. Lindsey, 285 F.3d 479 (6th Cir. 2002). In fact, faced with the confusion surrounding the *Connick* test for matter of public concern and its application, the Sixth Circuit Court of Appeals stated "application of the *Connick* test can be difficult. In the case before us, *happily*, the nettle is one we need not grasp." *Id.* at 485 (emphasis added). Continuing on an assumption without further ferreting out the intricacies of the *Connick* test, the circuit court added: "[p]retermitting this particular issue [of whether plaintiff's speech constituted a matter of public concern under the *Connick* test], we shall *assume* for purposes of analysis, without so deciding," that the plaintiff's speech constituted speech on a matter of public concern. *Id.*

252. Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 193, 195 (4th Cir. 1994).

253. Daulton v. Affeldt, 678 F.2d 487, 491 (4th Cir. 1982).

254. *See, e.g.*, Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1978); *see generally* Hanson v. Hoffman, 628 F.2d 42, 50 (D.C. Cir. 1980); *McKinley*, 705 F.2d at 1114.

255. *See generally Hanson*, 628 F.2d at 50.

256. *See, e.g.*, Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977); *Daulton*, 678 F.2d 487.

257. *See* Collins v. Robinson, 568 F. Supp. 1464 (E.D. Ark. 1983), *aff'd*, 734 F.2d 1321 (8th Cir. 1984).

teacher constitutes a matter of public concern.[258] A teacher's letter asking for the investigation of a principal for harassing and intimidating her and interfering with her classroom performance constitutes a matter of public concern.[259] Likewise, a matter of public concern is involved when a public employee writes to the Attorney General requesting the investigation of events within the department.[260] Advocacy of a method for use in determining whether racial equity exists in a school district and submission of equity report has been held to constitute a matter of public concern.[261]

Speech at a public meeting accusing a state agency of inefficiency, waste, and fraud constitutes speech on a matter of significant public concern;[262] so does speech critical of a school district's medication policy which permitted nurses, with only parental permission, to give prescription and nonprescription drugs to students.[263] "[G]enerally, speech by a public school employee about a policy or practice which can substantially and detrimentally affect the welfare of the children attending the school constitutes speech on a matter of public concern."[264]

Other examples of a "matter of public concern" include: a teacher's letter to a school board about the district's athletic program, where the program had become a matter of public debate;[265] comments to parents about a school coach's inappropriate use of corporal punishment;[266] a letter to a newspaper about a school board's decision to get rid of junior high track;[267] statements about the quality of education with respect to achievement test scores and students' yearly academic deterioration;[268] statements about a principal's publication of false student test scores;[269] statements about a principal's misrepresentation of student achievements;[270]

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258. Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310 (8th Cir. 1986).
259. *See* Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).
260. *See* Wulf v. Wichita, 883 F.2d 842, 857 (10th Cir. 1989).
261. Curtis v. Okla. City Pub. Schs. Bd. of Educ., 147 F.3d 1200 (10th Cir. 1998).
262. Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983).
263. Johnsen v. Indep. Sch. Dist. No. 3 of Tulsa County, Okla., 891 F.2d 1485 (10th Cir. 1989).
264. Morfin v. Albuquerque Pub. Schs., 906 F.2d 1434, 1437-38 (10th Cir. 1990).
265. Anderson v. Cent. Point Sch. Dist. No. 6, 746 F.2d 505 (9th Cir. 1984).
266. Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640, 645 (8th Cir. 1983).
267. McGee v. S. Pemiscot Sch. Dist. R-V, 712 F.2d 339, 342 (8th Cir. 1983).
268. Bernheim v. Litt, 79 F.3d 318, 325 (2d Cir. 1996).
269. *Bernheim*, 79 F.3d at 325.
270. *Id.*

statements about the administration of the educational process;[271] speech about racially discriminatory policies and practices;[272] communication about inequitable mileage allowances;[273] statements about the inadequacy of the liability insurance provided by school district to coaches and parent volunteers who transport students to school events;[274] speech about the impact of the failure to have programs specifically for emotionally and behaviorally impaired students;[275] revelations of a special education director's threats to overrule the consensus of teams of teachers, social workers, and other professionals about the placement of students in violation of law;[276] disclosures of sexual misconduct against students to the Department of Children and Family Services;[277] speech about school placement of special education students in violation of state and federal regulations;[278] statements to a reporter about a supervisor "holding himself out as a doctor when he did not have a Ph.D. or other doctoral degree";[279] and statements concerning potential dangers to the community's citizens.[280]

The following have also been found to constitute "matters of public concern": statements about mismanagement of public funds;[281] statements about favoritism in grading athletes;[282] speech about exchange of grades for sex;[283] speech about the inefficiencies in a school's implementation of the Right to Read program—a federally funded program to fight illiteracy;[284] speech about failures to notify parents about educational planning meetings which they have a right to attend under the Individuals with Disabilities Education Act (IDEA);[285] speech about predeterminations of the classifications of certain children prior to a diagnostic

271. Roberts v. Van Buren Pub. Schs., 773 F.2d 949, 955 (8th Cir. 1985).
272. Leonard v. City of Columbus, 705 F.2d 1299, 1303 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).
273. Knapp v. Whitaker, 757 F.2d 827, 840 (7th Cir. 1985).
274. *Knapp*, 757 F.2d at 841.
275. Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 170 (1st Cir. 1995).
276. *Wytrwal*, 70 F.3d at 170.
277. Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205, 17 F.3d 1059, 1067 (7th Cir. 1994).
278. *Wytrwal*, 70 F.3d at 171.
279. Gardetto v. Mason, 100 F.3d 803, 812 (10th Cir. 1996).
280. Kincade v. City of Blue Springs, Mo., 64 F.3d 389, 396 (8th Cir. 1995).
281. Hamer v. Brown, 831 F.2d 1398, 1403 (8th Cir. 1987).
282. Coats v. Pierre, 890 F.2d 728, 732 (5th Cir. 1989), *cert. denied*, 498 U.S. 821 (1990).
283. *Coats*, 890 F.2d at 732.
284. Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 249 (5th Cir. 1984), *cert. dismissed*, 473 U.S. 901 (1985).
285. Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1016 (7th Cir. 1997).

team's input, in contravention of the IDEA;[286] statements about the change of special education students' placements and services without diagnostic team input or parental notification, in contravention of the IDEA;[287] statements about disregarding individualized educational programs (IEP) of special education children, in violation of the IDEA;[288] speech about illegal use of retirement funds to balance a budget;[289] speech about the implementation of a reduction-in-force plan and the overly subjective procedures in the implementation process;[290] statements about the "integrity, qualifications, and misrepresentations of a highly visible public official";[291] speech endorsing or opposing candidates in an electoral process;[292] statements advocating the legalization of marijuana;[293] speech criticizing national drug control policy;[294] and speech debating civil disobedience.[295]

According to the Fourth Circuit: "a complaint published in a school newspaper that a public school discriminates on the basis of sex raises a question of public concern."[296] Also, the Seventh Circuit has held that speech about "educational improvement and fiscal responsibility in public schools clearly are matters of public concern."[297] The Sixth Circuit Court of Appeals has held that the "subjects of student discipline and the appropriate educational program to be implemented are undoubtedly matters of concern to the community at large."[298]

In *McKinley v. City of Eloy*,[299] the Ninth Circuit Court of Appeals held that "speech [which] dealt with the rate of compensation for members of the city's police force and, more generally, with the working relationship between the police union and

286. *Khuans*, 123 F.3d at 1016.
287. *Id.*
288. *Id.*
289. Patrick v. Miller, 953 F.2d 1240, 1247 (10th Cir. 1992).
290. *Gardetto*, 100 F.3d at 814.
291. *Id.* at 812.
292. *Id.*; Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988 (5th Cir. 1992).
293. Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994).
294. *Blum*, 18 F.3d at 1012.
295. *Id.* Note that the Second Circuit Court of Appeals found that speech about the "legalization of marijuana, criticizing national drug control policy, and debating civil disobedience *on its face* implicates matters of public concern . . . [because] the abuse of and traffic in controlled substances is a major societal problem." *Id.* (emphasis added). It is unclear whether this reference to "on its face" is a determination of substantial matters of public concern or inherent matters of public concern.
296. Muller v. Fairfax County Sch. Bd., 878 F.2d 1578, 1583 (4th Cir. 1989).
297. Klug v. Chicago Sch. Reform Bd. of Tr., 197 F.3d 853, 858 (7th Cir. 1999).
298. Leary v. Daeschner, 228 F.3d 729, 737 (6th Cir. 2000).
299. 705 F.2d 1110, 1114 (9th Cir. 1983).

elected city officials" [300] involved *substantial* matters of public concern.[301] The Fourth Circuit has found speech about an employer's widespread discriminatory policies and practices to constitute speech on substantial matters of public concern.[302] The Sixth Circuit has found that speech about industrial hemp, made as part of public debate, is speech involving substantial matters of public concern.[303] Additionally, the Seventh Circuit has held that speech involves substantial matters of public concern "[w]hen an employee speaks out about actual wrongdoing or breach of public trust on the part of her superiors";[304] the Sixth Circuit agrees.[305]

## IV. ARTICULATING THE CURRENT PUBLIC EMPLOYMENT-FREE SPEECH FRAMEWORK CONSISTENTLY WITH *PICKERING* AND ITS PROGENY

What has been lost in the approaches of the various circuit courts of appeals is a clear and consistent articulation of the steps for employees and employers involved in a First Amendment retaliation whistleblowing case.[306] The United States Supreme Court articulated the applicable framework within which courts must analyze First Amendment retaliation cases in *Mount Healthy*.[307] As previously stated, the framework consists of the following:

1. The initial burden of proof is on the employee to show that: (a) his or her conduct is protected by the First and Fourteenth Amendments;[308] and (b) the conduct was "a substantial factor" or a "motivating factor" in the employer's decision to terminate or not rehire him or her (or retaliate against the employee).[309] If the employee is unable to carry this burden, the case is to be resolved in favor of the employer.[310]

2. After the employee successfully carries the burden of proof, the employer must then show by a preponderance of the evidence

300. *McKinley*, 705 F.2d at 1114.
301. *Id.*
302. Love-Lane v. Martin, 355 F.3d 766, 779 (4th Cir. 2004).
303. Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1053 (6th Cir. 2001).
304. *Khuans*, 123 F.3d at 1018.
305. *Leary*, 228 F.3d at 737.
306. As the Seventh Circuit Court of Appeals noted, "*Pickering* is fuzzy at best regarding how the balancing of interests is to be done." *Khuans*, 123 F.3d at 1014.
307. 429 U.S. 274, 287 (1977).
308. *Mt. Healthy*, 429 U.S. at 287.
309. *Id.*
310. *Id.*

that it would have reached the same decision about the employee's termination or nonrenewal (or other alleged retaliatory act) had the employee not engaged in the protected speech.[311] This is the "same decision anyway" defense.

As the Eleventh Circuit points out: "[t]he question of whether the employee's speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee's right of freedom of speech."[312] Thus, these two legal questions must be treated as distinct. In other words, even though speech is constitutionally protected by the First Amendment, retaliatory acts might be constitutionally permissible against such protected speech, making the employer not liable for the alleged retaliatory acts. Working within this *Mount Healthy* framework and working pursuant to the language of *Pickering* is very important. In doing so, it is important to literally work from left to right within the very language of the *Pickering* balancing test and to be aware that the cases in the United States Supreme Court's public employment-free speech jurisprudence since *Pickering* have interpreted or elaborated on aspects of the *Pickering* balancing test. Significantly, the language of the *Pickering* balancing test provides that "[t]he 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 employer, in promoting the efficiency of the public services it performs through its employees."[313]

Keeping all these points in mind, pursuant to *Mount Healthy*, employees who come to court alleging retaliation for speech must first show that the speech is protected. An examination of *Pickering* and its progeny reveals that the complete framework is thus:

1. The initial burden of proof is on the employee to show that:

(a) his or her conduct is protected by the First and Fourteenth Amendments.

To prove this, the employee has to show, pursuant to *Pickering*, that:

(i) the employee is a "public employee";

(ii) the employee suffered an "adverse government action";[314]

311. *Id.*
312. Ferrara v. Mills, 781 F.2d 1508, 1513 (11th Cir. 1986).
313. *Pickering*, 391 U.S. at 568.
314. Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir. 1999).

(iii) the employee's conduct constituted "speech" under the First Amendment;
(iv) the employee spoke "as a citizen," and not merely as an employee (the *Garcetti* test);
(v) the employee's speech was on a "matter of public concern" (pursuant to the *Connick* test of content, form, and context); and
(vi) the employee has "interests in commenting" on matters of public concern.

(b) the employee's speech was "a substantial factor" or a "motivating factor" in the employer's decision to terminate or not rehire him or her.

If the employee is unable to carry this burden, the case is to be resolved in favor of the employer.

All of the steps listed in (1) (a) and (b) above determine whether the employee has a prima facie case that speech is constitutionally protected. If the employee carries the burden and thus establishes a prima facie case, the burden then shifts to the employer portion of the *Pickering* balancing test. The employer must prove:

2. (a) "employer status";[315]
(b) the "same decision anyway" defense;[316]
(c) the existence of "operational efficiency concerns";[317] and
(d) that operational efficiency concerns outweigh interests of the employee in commenting as a citizen on matters of public concern.[318]

The employer should also rebut (if applicable) any of the employee's proof under 1 (a) and (b) above. Similarly, the employee has a chance to rebut any of the employer's steps 2 (a) through (d) proof. Steps 2 (a) through (d) would help the court in determining

315. The employer might have to show that it acted in its role as employer toward the employee and not merely as government. In other words, the relationship with respect to the plaintiff is a public employer-public employee relationship, as opposed to a government-citizen relationship. In *Pickering* and its progeny, the United States Supreme Court has held that the status of a public employer as an employer (as opposed to its status as sovereign when dealing with the general citizenry) makes it imperative that public employers have some control over their employees' speech.

316. The employer has to show by a preponderance of the evidence that it would have reached the same decision about the employee's termination or nonrenewal (or other alleged retaliatory act) had the employee not engaged in the protected speech.

317. The employer should then argue, pursuant to the *Pickering* calculus factors, that it has an interest as an employer in promoting the efficiency of the public services it performs through its employees. The employer could rely on the *Pickering* calculus factors in making this argument.

318. The employer should also show that its operational efficiency concerns outweigh the interest of the employee in commenting as a citizen on matters of public concern.

whether the employer has *violated* the employee's protected speech.[319]

As noted earlier, "the extent of protection afforded by the first amendment to expression is ultimately a question of law for the courts, but . . . the jury's function is to find the underlying facts to which the legal standard is ultimately applied."[320] Step 1(b) above is also a question of fact for the fact finder.[321] The court weighs all the evidence and in so doing, the *court* then balances, within the *Pickering* balancing test, the interest of the employee in speech on matters of public concern against the interest of the employer in operational efficiency. The result of this entire process would be the determination as to whether the employer who has *violated* the employee's constitutionally protected speech is liable.

319. *See generally Ferrara*, 781 F.2d at 1508; Holley v. Seminole County Sch. Dist., 755 F.2d 1492 (11th Cir. 1985).

320. Kim v. Coppin State Coll., 662 F.2d 1055, 1062 (4th Cir. 1981). *See also Connick*, 461 U.S. at 148; Brockell v. Norton, 732 F.2d 664, 667 (8th Cir. 1984); McGee v. S. Pemiscot Sch. Dist. R-V, 712 F.2d 339, 342 (8th Cir. 1983).

321. Acevedo-Diaz v. Aponte, 1 F.3d 62, 67 (1st Cir. 1993).

Figure 1: Diagrammatic Representation of Aspects of the *Pickering* Balancing Test:

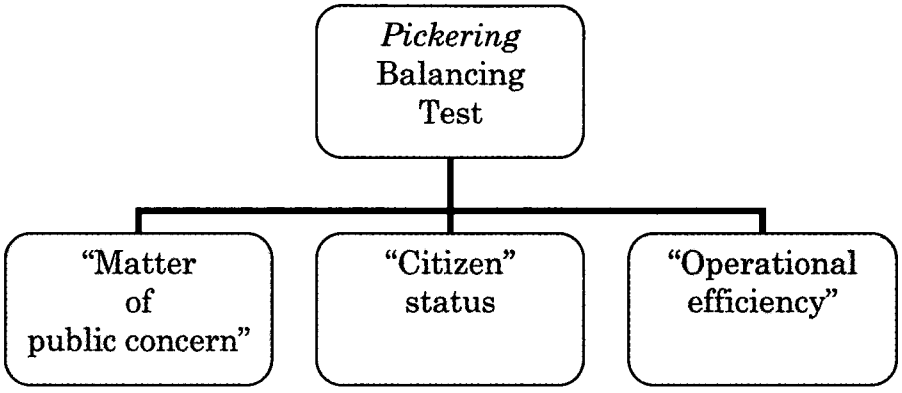


Figure 2: Diagrammatic Representation of Aspects of the Matter of Public Concern: