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## "Riding with the Cops and Cheering for the Robbers:" Employee Speech, Doctrinal Cubbyholes, and the Duty of Loyalty

Marvin F. Hill Jr.

James A. Wright

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# **“Riding with the Cops and Cheering for the Robbers:” Employee Speech, Doctrinal Cubbyholes, and the Duty of Loyalty**

Marvin F. Hill, Jr.\*

James A. Wright\*\*

## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	723
II.	BACKGROUND: <i>PICKERING</i> AND ITS PROGENY . . . . .	729
	A. <i>Connick v. Myers: “Thresholds” and Matters of Public Concern</i> . . . . .	737
	B. <i>Waters v. Churchill: Factfinding Procedures and the First Amendment.</i> . . . . .	741
III.	RECENT COURT DECISIONS: FACTS IN SEARCH OF STANDARDS AND THEORY . . . . .	745
	A. <i>The “Avoidance” Approach</i> . . . . .	746

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\* Professor of Labor and Industrial Relations at the College of Business Administration and Adjunct Professor of Law, College of Law, Northern Illinois University, DeKalb, Illinois. J.D. (with distinction) & Ph.D., University of Iowa, Iowa City, Iowa. A member of the national Academy of Arbitrators, Hill is actively engaged in the arbitration of labor disputes in the public and private sectors and currently serves as Permanent Umpire for John Deere & Co. and the United Auto Workers (UAW), American Airlines, Inc. and the Transport Workers Union Locals 512 (Chicago) and 513 (Dallas), and numerous other employers and labor organizations throughout the United States. His latest textbook is titled *Winning Arbitration Advocacy* (BNA Books, 1997), co-authored with A.V. Sinicropi and Amy Evenson. © Copyright, Marvin F. Hill, Jr. All rights reserved.

\*\* Partner in the firm of Husch & Eppenberger, LLC. J.D. 1990, Northern Illinois University. B.S., 1983 & M.A., 1988, Western Illinois University. A member of the Illinois Bar, Wright exclusively represents management in labor and employment related issues in the public and private sectors. Wright has contributed articles to the *Northern Illinois University Law Review*, the *Missouri Law Review*. He has also co-authored (with Marvin F. Hill, Jr.), a book entitled *EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION* (BNA 1993).

B.	<i>All Speech is Protected to an Extent: "Exclusionary Analysis Approach"</i> . . . . .	748
C.	<i>Applying Connick to the evidence record: The speaker's motive as a determinative element</i> . . . . .	752
D.	<i>Coming Full Circle: Connick and "Labels of Distinction"</i> . . . . .	755
E.	<i>What is the effect of speech within the context of an ongoing labor dispute or formal grievance under a collective bargaining agreement?</i> . . . . .	757
IV.	ARBITRATION DECISIONS . . . . .	761
V.	CONCLUSION . . . . .	775

## I. INTRODUCTION

"Alas my love you do me wrong  
To cast me off discourteously."<sup>1</sup>

In *Pickering v. Board of Education*,<sup>2</sup> the Supreme Court again rejected the theory that public employment, which may be denied altogether, can be subject to any conditions, regardless of the reasonableness of such conditions.<sup>3</sup> This does not imply that public management cannot demand some semblance of loyalty from its employees by requiring them not to "air their dirty laundry" and disparage management in public, notwithstanding the First Amendment.<sup>4</sup> As stated by the *Pickering* Court:

[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>5</sup>

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1. *Greensleeves* (lyrics by King Henry VIII).

2. 391 U.S. 563 (1968).

3. *See id.* at 568 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967)). One federal court, commenting on the First Amendment rights of employees, stated that "[t]he interest in holding a job with a governmental agency is not itself a First Amendment interest." *See Rose v. Eastern Neb. Human Servs. Agency*, 510 F. Supp 1343, 1355 (D. Neb. 1981) (discussed in *Board of Regents v. Roth*, 408 U.S. 564, 575 n.14 (1971)).

Instead, the protections of the First Amendment come into play when a government employer makes the decision to deprive a public employee of the benefit of government employment on a basis that infringes his interest in freedom of speech or association, since 'if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized or inhibited.'

*Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1971)).

4. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment was applicable to the states through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

5. *Pickering*, 391 U.S. at 568.

Of special note in *Pickering* is that the employer argued that a teacher who wrote a negative letter to the editor, by virtue of his public employment, "has a duty of loyalty to support his superiors . . . and that, if he must speak out publicly, he should do so factually and accurately . . . ."<sup>6</sup> The Court stated that absent proof that false statements were made knowingly or recklessly, "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."<sup>7</sup> The Court declared that it was neither appropriate nor feasible to apply a general standard by which employees' statements may be judged.<sup>8</sup> However, the Court did point out that the employment relationships at issue did not involve "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."<sup>9</sup> In a footnote, the Court stated further:

It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.<sup>10</sup>

In a 1983 decision, *Connick v. Myers*,<sup>11</sup> the Supreme Court considered the discharge of a state employee for circulating a questionnaire concerning internal office matters.<sup>12</sup> The plaintiff, Sheila Myers, an assistant district attorney, circulated a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."<sup>13</sup> After distributing the questionnaire to fifteen assistant district attorneys, Myers was terminated.<sup>14</sup> In a 5-4 decision, the Supreme Court, reversing the district<sup>15</sup> and appellate courts,<sup>16</sup> pointed out that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in

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6. See *id.* at 568-69 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

7. See *id.* at 574.

8. See *id.* at 569.

9. See *id.* at 570.

10. *Id.* at 570 n.3.

11. 461 U.S. 138 (1983).

12. See *id.* at 140.

13. See *id.* at 141.

14. See *id.*

15. See *Myers v. Connick*, 507 F. Supp. 752 (E.D. La. 1981), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).

16. See *Myers v. Connick*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).

commenting upon matters of public concern,' was not accidental."<sup>17</sup> Justice Byron White, writing for the majority, noted that, unlike the issues that *Myers* addressed, the subject matter in *Pickering* was "a matter of legitimate public concern' upon which 'free and open debate is vital to informed decision-making by the electorate."<sup>18</sup> Justice White wrote:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>19</sup>

Justice White stated further that "[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State."<sup>20</sup>

According to the majority, only "[o]ne question in *Myers*' questionnaire . . . touch[ed] upon a matter of public concern."<sup>21</sup> The Court concluded that the survey "was most accurately characterized as an employee grievance concerning internal office policy."<sup>22</sup> Justice Brennan, writing for the dissent,<sup>23</sup> argued that the manner in which a government agency operates is a matter of public concern and that *Pickering* had

17. See *Connick*, 461 U.S. at 143.

18. See *id.* at 145 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 571-72 (1968)).

19. *Id.* at 147 (citation omitted).

20. *Id.*

21. *Id.* at 149.

22. *Id.* at 154. One commentator argued that "[i]t is difficult to understand how the Court could conclude that *Myers*' questionnaire about working conditions fell outside its definition of public concern, given other opinions in which it has stated in eloquent terms that similar concerns are 'public concerns.'" Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 29 (1987); see also *Davis v. West Community Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985) (stating that letters to superiors concerning co-workers at hospital involved "personal grievances," not matters of public concern); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984) (holding that state employee's comment, "Did you hear the good news?," upon hearing that supervisor had been dismissed, was not protected under First Amendment because it related to personal feelings); *Boehm v. Foster*, 670 F.2d 111, 113 (9th Cir. 1982) (holding that letter sent by employee to supervisor, which was parody of notice normally sent by management to employees, was not protected by First Amendment).

23. In *Connick*, Justices Brennan, Marshall, Blackmun, and Stevens dissented. See *Connick*, 461 U.S. at 156-70 (Brennan, J., dissenting).

established that discussion about how government agencies function is vital to informed decision making by the public.<sup>24</sup> According to the dissent, the majority incorrectly ignored the complexity of determining when speech is a matter of public concern and, in the process, undervalued the interest of the public in evaluating the conduct of public officials.<sup>25</sup>

\* \* \*

When does an employee's speech touch a matter of legitimate public concern? Are some topics, such as speaking out on racial discrimination, inherently of public concern even if made in a private forum?<sup>26</sup> What about sex discrimination?<sup>27</sup> Suppose an employee announced that, in her view, gays were unfairly discriminated against by the federal, state, and local governments and then stated, by the way, "as a gay person, I, too, have been the object of discrimination." Is the speech protected? What if the speech relates to nuclear safety? May an employee working for a nuclear generating station write letters to a newspaper castigating her employer's record on safety?<sup>28</sup> What if an employee helped build the

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24. *See id.* at 160 (Brennan, J., dissenting).

25. *See id.* at 163-65 (Brennan, J., dissenting).

26. *See id.* at 148 n.8 (stating that racial discrimination is "a matter inherently of public concern").

27. *See, e.g.,* *Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3d Cir. 1997) (holding that sexual harassment of employees by public official is inherently of public concern); *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993) (holding that a corrections officer's complaint was not protected even though relating to harassment of a co-worker because the "main thrust of her speech took the form of a private employee grievance"); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992) (holding that police officer's reporting of sexual harassment was protected by the First Amendment because reports of harassment are "of great public concern," and such reports were made "both as a citizen and an employee"); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) (stating in dictum that "incidences of sexual harassment in a public school district are inherently matters of public concern").

What about bisexuality? In *Rowland v. Mad River Local School District*, the Supreme Court denied a petition for writ of certiorari as to the Sixth Circuit's holding that it was permissible for a school district to refuse renewal of a high school guidance counselor's contract because she was bisexual and revealed her sexual preference to her secretary and fellow teachers in private conversations. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985); 730 F.2d 444, 449 (6th Cir. 1984). Although a jury found the employee's mention of her bisexuality did not in any way "interfere[] with the proper performance of [her or other school staff members'] duties or with the operation of the school generally," the Sixth Circuit, nevertheless, reasoned that the refusal to renew based on her workplace statements was unobjectionable under the First Amendment because, under *Connick*, her speech was not "a matter of public concern." *See Rowland*, 730 F.2d at 447-49.

28. *See, e.g.,* *San Diego Gas & Elec. Co. v. International Bhd. of Elec. Workers Local 465*, 82 Lab. Arb. (BNA) 1039, 1041 (1983) (Johnston, Arb.) (upholding written reprimand to engineer for writing article to local newspaper on safety record of sta-

facility and was writing an article to complain about faulty welds? What about a teacher who complains to the school board about the disciplinary policies of her school or her low salary? Is the speech any less protected if she complained to her principal or chairman as opposed to "outsiders?"<sup>29</sup> What if the case is a "mixed motive" case where an individual complaint is a personal grievance (her complaint of sex discrimination) that also is a matter of concern to the population at large? In such a case, does the employee lose her constitutional protection when she goes public? Are there special rules for those in the protective services where discipline and cohesion are paramount administrative considerations? How should management proceed when there is a dispute as to what the employee said? Do arbitrators' decisions in the area of employee loyalty and speech track court decisions? Does it matter whether the arbitration involves public, as opposed to private sector employees? What about speech through e-mail? Is disparaging speech at the workplace inherently more disruptive than speech during off-duty hours or speech away from the workplace?

This Article will analyze court and arbitrators' decision dealing with employees' free speech rights in relation to the employees' overall "duty of loyalty"<sup>30</sup> to their employers. Guidelines are suggested for labor and

tion).

29. *See, e.g.,* *Wales v. Board of Educ.*, 120 F.3d 82, 85 (7th Cir. 1997) (upholding school district's refusal to renew teacher's contract after teacher wrote memorandum to principal advocating tougher discipline standards for students); *see also infra* note 31 and accompanying text (discussing the public-concern test).

30. The so-called "duty of loyalty" has been discussed by numerous arbitrators, including Past President of the National Academy of Arbitrators, Edgar Jones. *See, e.g.,* *Los Angeles Herald-Examiner v. Los Angeles Newspaper Guild*, 49 Lab. Arb. (BNA) 453 (1967) (Jones, Arb.). According to Arbitrator Jones, the normal duties of any employee include "his obligation to do his best to act or refrain from acting so as to enhance rather than endanger the best interests of his employer. This is the duty of loyalty." *Id.* at 464. Jones argued:

The most obvious and common instance, shared by members of practically all nations, tribes or clans in human history, is loyalty to one's native land. Next perhaps, in terms of the number of persons affected, is probably the employer-employee relationship. Certainly this is so in the United States.

As part of the complex of rights and duties comprising the employment relationship, the duty of loyalty of an employee to an employer must certainly be reckoned as an important aspect of the common enterprise . . . . As marked out in decisions in cases in which an employee has been disciplined or terminated for allegedly violating it, it is a practical command subject to a rule of reason.

*Id.*; *see also* *Chesapeake Paper Prods. Co. v. United Paperworkers Int'l Union Local*



management practitioners who consider disciplining employees for breaches of loyalty, specifically speech regarding management of the company, its service, or its products. It is our thesis that, with selected exceptions, it is difficult to predict speech that addresses matters of "public concern" and speech that does not, especially within a collective bargaining or union context. More importantly, given that a threshold public-concern test is satisfied, as suggested by Judge Frank Easterbrook of the Seventh Circuit, such "[o]pen-ended [*Pickering*] balancing . . . create[s] unavoidable risks and costs for well-intentioned public employees, risks that the doctrine of qualified immunity reduces but not to zero."<sup>31</sup> Employees have a similar risk, although not involving *judicial* immunity. Their risk is dismissal from employment when a court or arbitrator will not immunize their speech. Under the current status of constitutional and arbitral case law, the end result for employees desiring to maximize their chances of remaining on the job is this: "Keep your criticism to yourself." More often than not, application of a *Pickering* balancing process in disloyalty cases will result in a decision for management. Despite the flaws associated with the *Pickering* test, we see no better

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647, 103 Lab. Arb. (BNA) 498, 501 (1994) (Nolan, Arb.) (upholding dismissal of employee who failed to report co-worker's theft and lied about his knowledge of incident, reasoning that "if the Grievant knew [his co-worker] was planning a theft and failed to stop him, he would, as the Company argues, have violated his duty of loyalty to the employer. One who knowingly tolerates theft from one's employer is no better than the thief"); *Sauget Sanitary Dev. & Research Ass'n v. International Union of Operating Eng'rs Local 2*, 98 Lab. Arb. (BNA) 1082, 1085 (1992) (Cipolla, Arb.) (discussing loyalty within context of employees' duty to cooperate in an investigation and stating that "[t]here is a great deal of arbitral authority which indicates that discipline is appropriate in situations where employees refuse to cooperate with a Company's investigation of an incident which interferes [sic] with the Company's ongoing business").

The primary focus of this Article concerns the employee's duty of loyalty *as it relates to speech*. "Loyalty" with respect to (1) conflicts of interest, such as "moonlighting," (2) turning in a co-worker for on-duty misconduct, (3) cooperating in an investigation, and (4) rudeness or inappropriate speech to customers is not considered in this article. See generally Steven J. Goldsmith & Louis Shuman, *Common Causes of Discipline*, in 1 LABOR AND EMPLOYMENT ARBITRATION § 16, § 16.05 (Tim Bornstein et al. eds., 2d ed. 1997) (discussing "disloyalty" by employees); MARVIN HILL & A.V. SINICROPI, *MANAGEMENT RIGHTS: A LEGAL AND ARBITRAL ANALYSIS* 235 (1989) (discussing arbitrators decisions dealing with employee disloyalty); Marvin F. Hill, Jr. & James A. Wright, *Employee Refusals to Cooperate in Internal Investigations: "Into the Woods" with Employers, Courts, and Labor Arbitrators*, 56 MO. L. REV. 869 (1991) (discussing employees who choose not to cooperate with an employer's legitimate investigation of employment-related issues); Ron Lepinkas, Comment, *The NLRA and the Duty of Loyalty: Protecting Public Disparagement*, 60 U. CHI. L. REV. 643 (1993) (discussing the NLRA's application to cases where employees defame their employers).

31. See *Wales*, 120 F.3d at 85.

alternative to a case-by-case balancing approach in employee speech cases. Whether the status of the law makes for good policy and economics is an open question.

## II. BACKGROUND: *PICKERING* AND ITS PROGENY

In 1892, unencumbered by twentieth century judicial activism, Justice Oliver Wendell Holmes noted that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>32</sup> However, this simplistic nineteenth century view of the rights of public employees did not remain static. In the latter half of the twentieth century, judicial review of the rights and protection afforded by the Constitution has evolved into what modern legal scholars term the "unconstitutional conditions" doctrine.<sup>33</sup> Clear and simple, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit."<sup>34</sup>

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32. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892) (holding public employer's rule limiting policeman's speech valid and that violation of such rule can be grounds for lawful termination). In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court noted: "For many years, Holmes' epigram expressed this Court's law." *Id.* at 144.

33. See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 & n.24 (1968).

34. *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2347 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). As noted in *Connick*, starting in the 1950s, the Supreme Court started "cast[ing] new light on the matter . . . ." See *Connick*, 461 U.S. at 144. In *Weiman v. Updegraff*, 344 U.S. 183 (1952), the Court held that a state could not require its employees to establish their loyalty by extracting an oath denying past affiliation with the Communists. See *id.* at 191-92; see also *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (recognizing that state could not deny an appointment to a public office because of refusal to declare a belief in existence of God); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (recognizing that the government could not deny employment because of previous membership in particular party); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287-88 (1961) (recognizing that state could not deny employment because of refusal to take an oath denying involvement with the Communist party); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960) (recognizing that state could not deny employment because of teacher's membership in or contribution to particular organizations). In its 1963 decision, *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court noted it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. Finally, the infrastructure was completed in 1967 in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), when the Court invalidated a New York statute barring

Justice Holmes may have correctly reasoned that a police officer has “no constitutional right to be a policeman.”<sup>35</sup> However, still bound by the First Amendment, at least according to modern constitutional doctrine, the government may not jeopardize or infringe upon an individual’s liberty to be a police officer or hold other public employment as a result of the individual’s exercise of his or her freedom of speech.<sup>36</sup>

The predominant growth of the unconstitutional conditions doctrine with respect to public employees’ freedom of speech came with the Supreme Court’s 1968 decision in *Pickering v. Board of Education*.<sup>37</sup> *Pickering* worked its way through the judiciary after a high school dismissed a teacher, Marvin Pickering, for sending a letter to a local newspaper opposing a proposed tax increase for public schools and criticizing the Board of Education and the Superintendent for their past handling of public funds.<sup>38</sup> As required by state law at the time, the School Board held a full hearing regarding Pickering’s actions and determined that the publication of the letter was “detrimental to the efficient operation and administration of the schools of the district.”<sup>39</sup> Mr. Pickering’s dismissal was thereby upheld.<sup>40</sup> He appealed the decision through the Illinois courts.<sup>41</sup>

In characteristically “Holmesian” logic, the Supreme Court of Illinois found that the issue for resolution was “not whether the board may be publicly subjected to false accusations, but whether it must continue to employ one who publishes misleading statements which are reasonably believed to be detrimental to the schools.”<sup>42</sup> In the Court’s view, Marvin Pickering was not a “mere member of the public.”<sup>43</sup> As a teacher, and under Illinois law, he was “no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction.”<sup>44</sup> According to the court, when Pickering elected to teach, he “undertook the obligation to refrain from conduct which in the absence of such position he would

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employment on the basis of membership in subversive organizations, observing that “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” *See id.* at 605-06 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

35. *See McAuliffe*, 29 N.E. at 517.

36. *See supra* note 35 and accompanying text.

37. 391 U.S. 563 (1968).

38. *See id.* at 564-65.

39. *See id.* at 564 (source of internal quote omitted in original).

40. *See id.* at 564-65.

41. *See id.* at 565.

42. *See Pickering v. Board of Educ.*, 225 N.E.2d 1, 6 (Ill. 1967).

43. *See id.*

44. *See id.*

have an undoubted right to engage in."<sup>45</sup> The tenure provisions were "not intended to preclude dismissal where the conduct is detrimental to the efficient operation of administration of the schools of the district."<sup>46</sup>

Prior to Marvin Pickering's appeal to the United States Supreme Court, earlier Supreme Court decisions laid a foundation for overturning the ruling of the Illinois Supreme Court.<sup>47</sup> In a number of decisions, starting in the early 1960s, the Supreme Court acknowledged that the right of speech should be strictly protected from governmental intrusion.<sup>48</sup> As early as 1963, in *Sherbert v. Verner*,<sup>49</sup> the Court specifically noted that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."<sup>50</sup> One year later, in *Garrison v. Louisiana*,<sup>51</sup> the Court opined that "speech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>52</sup> Similarly, in other cases decided before *Pickering's* appeal, the Court addressed the procedural protection of the Due Process Clause concerning public speech and freedom of affiliation rights.<sup>53</sup>

Perhaps the most persuasive pre-*Pickering* authority, however, was the Court's decision in *Keyishian v. Board of Regents*.<sup>54</sup> In *Keyishian*, the Supreme Court clearly articulated the foundations of the modern unconstitutional conditions doctrine.<sup>55</sup> There, the Court, in no uncertain terms, declared: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."<sup>56</sup> Thus, by 1968, the Court was

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45. *See id.*

46. *See id.*

47. *See infra* notes 49-58 and accompanying text.

48. *See id.*

49. 374 U.S. 398 (1963).

50. *Id.* at 404.

51. 379 U.S. 64 (1964).

52. *Id.* at 74-75.

53. *See, e.g.,* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894-99 (1961) (discussing due process violations for governmental denials of employment based upon political affiliation); Shelton v. Tucker, 364 U.S. 479, 487-90 (1960) (discussing due process violations found in state requirements for teacher loyalty oaths); Wieman v. Updergraff, 344 U.S. 183, 191-92 (1952) (finding due process violations in loyalty oaths requiring denials of past Communist affiliations).

54. 385 U.S. 589 (1967).

55. *See id.* at 607-10.

56. *Id.* at 605-06 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

ready to apply the *Keyishian* unconstitutional conditions doctrine to Marvin Pickering's First Amendment challenge.<sup>57</sup> Justice Marshall directly challenged the reasoning of the Illinois Supreme Court by stating that if the Illinois Supreme Court was suggesting "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, . . . numerous prior [Supreme Court] decisions" have already ruled on this question and rejected it.<sup>58</sup>

However, in *Pickering*, the Supreme Court was not prepared to completely ignore the Board of Education's interest in the duty of loyalty expected from its employees.<sup>59</sup> The Court specifically recognized that the state, as an employer, has interests in regulating the speech of its workforce "that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."<sup>60</sup> The Court acknowledged two competing and parallel interests in the speech of public employees.<sup>61</sup> According to the Court, under cases such as *Keyishian*, public employees have a recognized First Amendment right to comment on matters of public interest and, to some extent, should not be compelled to waive that right in order to hold public employment.<sup>62</sup> On the other hand, public entities acting as employers have an acknowledged interest in promoting the efficiency of the public service they perform through their employees.<sup>63</sup> The Court's solution was a judicial balancing act involving the individual's freedom of speech interests and those interests of public employers in managing the efficient and effective provision of public services.<sup>64</sup> The Court cautioned that "[b]ecause of the enormous variety of fact situations" in which speech "by teachers and other public employees may be thought by [management] to furnish grounds for dismissal" it was neither appropriate nor feasible "to attempt to lay down a general standard against which all such statements may be judged."<sup>65</sup>

In applying the *Pickering* balance to Marvin Pickering's statements, the Court found that his speech was not directed toward any person with

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57. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568-69 (1968).

58. See *id.* at 568 (citing *Keyishian*, 385 U.S. 589; *Shelton*, 364 U.S. 479; *Wieman*, 344 U.S. 183).

59. See *id.*

60. See *id.* at 568.

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.* at 568-73.

65. See *id.* at 569.

whom Pickering worked directly.<sup>66</sup> Further, no question regarding the maintenance of "either discipline by immediate superiors or harmony among coworkers" was at issue.<sup>67</sup> Moreover, because Pickering directed his statements toward the decisions of the Board of Education, and because Pickering did not have a direct working relationship with the Board, the Court discounted the Board's interest in personal employee loyalty and confidence.<sup>68</sup> The Court also found that the Board of Education did not present evidence that Mr. Pickering's statements had an actual or *per se* harmful or detrimental impact upon the Board, teachers, administrators, or residents of the district.<sup>69</sup> In fact, according to the Court, some of Pickering's statements amounted to mere assertions of opinion regarding the Board's operating procedures, as opposed to statements of fact.<sup>70</sup> In addition to these factors weighing in the balance, the Court found that "the question whether a school requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive."<sup>71</sup> In the Court's opinion, this was a situation where "free and open debate is vital to informed decision-making by the electorate."<sup>72</sup> "[T]he members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent" are the insiders, the teachers.<sup>73</sup> "Accordingly, it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal."<sup>74</sup> The Court concluded that "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."<sup>75</sup>

In *Perry v. Sindermann*,<sup>76</sup> the Court was again faced with a teacher's claim that his contract was not renewed in retaliation against his public disagreements with the policies of his employers, the Board of Regents

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66. See *id.* at 569-70.

67. See *id.* at 570.

68. See *id.* at 569-70.

69. See *id.* at 570-73.

70. See *id.* at 571.

71. *Id.*

72. *Id.*

73. See *id.* at 572.

74. *Id.*

75. *Id.* at 574 (footnote omitted).

76. 408 U.S. 593 (1971).

of a junior college in Texas.<sup>77</sup> The Court reiterated its previous decisions, stating that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially . . . freedom of speech.”<sup>78</sup> If this were the case, public management could “produce a result which [it] could not command directly.”<sup>79</sup>

On the same day the Court handed down the *Perry* decision, the Court decided the *Board of Regents v. Roth*.<sup>80</sup> However, in *Roth*, the Court pointed out that “the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.”<sup>81</sup> Even though the *Perry* Court recognized that the government may not deny public employment to any individual on a basis that infringes his constitutionally protected interests in freedom of speech,<sup>82</sup> the same Court in *Roth* was unwilling to compare that prohibition to a direct impingement upon interests in free speech.<sup>83</sup> The *Perry* Court, relying on *Roth*, specifically rejected the court of appeal’s suggestion that Sindermann “might have a due process right to some kind of hearing simply if he asserts to college

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77. See *id.* at 592-94. Mr. Sindermann “was a teacher in the state college system of the State of Texas.” *Id.* at 594. In 1965, “he became a professor of Government and Social Science at Odessa Junior College.” *Id.* “He was employed at the college [Odessa] for four successive years, under a series of one-year contracts.” *Id.* For a time, he was appointed co-chairman of his department. *Id.* In the 1968-1969 school year, he “was elected president of the Texas Junior College Teachers Association.” See *id.* In that capacity, he was required to leave “his teaching duties on several occasions to testify before committees of the Texas Legislature.” *Id.* “[H]e became involved in public disagreements with the policies of the college’s Board of Regents.” *Id.* at 595. Finally, in 1969, Mr. Sindermann’s “one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year.” *Id.*

78. See *id.* at 597.

79. See *id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

80. 408 U.S. 564 (1972).

81. *Id.* at 575 n.14.

82. See *Perry*, 408 U.S. at 597.

83. See *Roth*, 408 U.S. at 575 n.14. In *Roth*, the Court stated:

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large scale seizure of a person’s allegedly obscene books, magazines, and so forth.

In the respondent’s case, however, the State had not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings.

*Id.* (citation omitted).

officials that their decision was based on his constitutionally protected conduct.<sup>84</sup>

Likewise, in *Mt. Healthy City School District Board of Education v. Doyle*,<sup>85</sup> the Court was faced with an untenured teacher whose contract was not renewed<sup>86</sup> due in part to the teacher's clearly protected free speech.<sup>87</sup> The Court disagreed with the district court's finding that, simply because the protected conduct played a substantial part of the decision not to rehire, a violation of the teacher's freedom of speech occurred.<sup>88</sup> Such a rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."<sup>89</sup> According to the Court, an employer should be allowed to present as a defense the argument that, apart from the constitutionally protected conduct that it considered, the employee's record "was such that he would not have been rehired in any event."<sup>90</sup> The goal, said the Court, was to construct a test that "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."<sup>91</sup> The Court concluded that the burden would be on the employ-

84. *See Perry*, 408 U.S. at 599 n.5 (citation omitted).

85. 429 U.S. 274 (1977).

86. *See id.* at 276. "Doyle was first employed by the Board in 1966[,] work[ing] under one-year contracts for the first three years, and under a two-year contract" for the next two years. *See id.* at 281. In 1969, "he was elected president of the Teacher's Association." *Id.* Unrelated to his role as president of the teacher's association, Doyle became involved in a number of work-related incidents involving discipline. *See id.* First, "he engaged in an argument with another teacher" in which he was slapped and subsequently refused to accept an apology. *See id.* at 281-82. On another occasion, he argued with employees of a school cafeteria, called some students "sons of bitches," and made an obscene gesture to girls. *See id.* Finally, Doyle leaked a "memorandum relating to teacher dress and appearance" to the local media. *See id.* at 282. Shortly thereafter, while making his usual recommendations to the School Board regarding rehiring of nontenured teachers, the Superintendent "recommended Doyle not be rehired." *See id.*

87. *See id.* at 284-85. After a bench trial, "the [d]istrict [c]ourt found that all of [the] incidents had in fact occurred. It concluded that . . . Doyle's [leak to the media] was 'clearly protected by the First Amendment,' and that because it had played a 'substantial part' in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay." *Id.* at 283 (quoting App. to Petition for Cert. 12a-13a).

88. *See id.* at 285.

89. *See id.*

90. *See id.* at 286.

91. *See id.*



ee “to show that his conduct was constitutionally protected, and that this conduct was a ‘substantial factor’ or . . . ‘motivating factor’ in the Board’s decision not to rehire him.”<sup>92</sup> Because Doyle carried that burden, it would be up to management to show “by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.”<sup>93</sup> It would then be up to the employee to show that the management-proffered explanation was pretextual, which is an extremely difficult task for any employee.

After *Perry* and *Mt. Healthy*, the Supreme Court again addressed the public employment freedom of speech issue in *Givhan v. Western Line Consolidated School District*.<sup>94</sup> Bessie Givhan, a junior high English teacher, argued that she was terminated as a result of demands involving employment policies and practices at the school, which Givhan perceived to be racially discriminatory in purpose and effect.<sup>95</sup> Her employer argued that the demands were “petty and unreasonable” and made in an “insulting,” “hostile,” “loud,” and “arrogant” manner.<sup>96</sup> “After a two-day bench trial, the [d]istrict [c]ourt concluded that the ‘primary reason for the school district’s failure to renew [Givhan’s] contract was her criticism of the policies and practices of the school district.’”<sup>97</sup> The Fifth Circuit reversed, finding that “because [Givhan] had *privately* expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment.”<sup>98</sup> In reversing, the Supreme Court held that a public employee does not forfeit “his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.”<sup>99</sup> Exclaiming that *Perry* and *Mt. Healthy* involved public expressions by employees, the Court illustrated an important difference in *Givhan*:

Although the First Amendment’s protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they “in any way either impeded the teacher’s proper performance of his daily duties in the classroom or . . . interfered with the regular operations of the schools generally.” Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee per-

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92. See *id.* (footnote omitted).

93. See *id.* at 287.

94. 439 U.S. 410 (1979).

95. See *id.* at 411-13.

96. See *id.* at 412 (quoting petitioner).

97. *Id.* at 412-13 (quoting App. to Petition for Cert. 35a).

98. *Id.* at 413 (emphasis added) (citing *Ayers v. Western Line Consol. Sch. Dist.*, 555 F.2d 1309 (5th Cir. 1977)), *vacated*, 439 U.S. 410 (1979).

99. See *id.* at 414.

sonally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.<sup>100</sup>

A. *Connick v. Myers: "Thresholds" and Matters of Public Concern.*

In 1983, the Supreme Court issued a landmark decision involving First Amendment rights of public employee speech. In *Connick v. Myers*,<sup>101</sup> an Assistant District Attorney lost her job as a result of a questionnaire she circulated.<sup>102</sup> She was discharged and subsequently sought relief under 42 U.S.C. § 1983, "contending that her employment was wrongfully terminated because she had exercised her constitutionally-protected right of free speech."<sup>103</sup> The district court held that the questionnaire involved a matter of public concern and that the State had not demonstrated that the survey "adversely affected" the operations of the District Attorney's Office.<sup>104</sup> The Fifth Circuit affirmed.<sup>105</sup> The Supreme Court reversed.<sup>106</sup>

The *Connick* Court noted that the lower courts "got off on the wrong foot" in finding that "the issues presented in the questionnaire . . . [were] matters of public importance and concern."<sup>107</sup> According to the Court, in all previous First Amendment cases on point, before and after *Pickering* "[t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations" or from speaking on matters of public concern.<sup>108</sup> However, when employee speech did not relate "to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>109</sup> Accordingly, the Court held:

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100. *Id.* at 415 n.4 (italics added) (citations omitted).

101. 461 U.S. 138 (1983).

102. *See id.* at 141; *supra* notes 13-14 and accompanying text.

103. *See Connick*, 461 U.S. at 141.

104. *See Myers v. Connick*, 507 F. Supp. 752, 759 (E.D. La. 1981), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).

105. *See Myers v. Connick*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).

106. *See Connick*, 461 U.S. at 154.

107. *Id.* at 143 (quoting *Myers*, 507 F. Supp. at 758).

108. *See id.* at 144-45.

109. *See id.* at 146.

[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.<sup>110</sup>

The Court observed that its responsibility "is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."<sup>111</sup> This, in turn "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."<sup>112</sup> In determining whether an employee's speech addresses a matter of public concern, one must examine the "content, form, and context" of the statement as a whole.<sup>113</sup> Thus, according to Justice White's majority opinion, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."<sup>114</sup>

In reviewing the content, form, and context of the questionnaire at issue, the *Connick* Court simply concluded that the employee's questions were "mere extensions" of the dispute regarding her transfer, and the questions were not "of public import in evaluating the . . . District Attorney as an elected official," nor did she "seek to inform the public that the District Attorney's [O]ffice" was not operating properly.<sup>115</sup> However, according to Justice White, one of the employee's questions did involve a matter of public concern.<sup>116</sup> Question number eleven of the questionnaire asked fellow employees if they "ever feel pressured to work in political campaigns on behalf of office supported candidates."<sup>117</sup> The Court cited recently decided cases which concluded that official pressure on employees to work on political campaigns may be coercion in violation of the constitution.<sup>118</sup> Because the speech concerned a matter of

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110. *Id.* at 147 (citation omitted).

111. *See id.*

112. *Id.*

113. *See id.* at 147-48.

114. *Id.* at 149.

115. *See id.* at 148.

116. *See id.* at 149.

117. *See id.*

118. *See id.* (citing *Branti v. Finke*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)). On another occasion, the Court stated that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.* (citing *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947)).

public concern, the Court concluded that the *Pickering* balance test must be conducted.<sup>119</sup>

After discussing the facts surrounding the questionnaire, the Court concluded that "Myers' questionnaire touched upon matters of public concern in only a most limited sense" because it was effectively "an employee grievance concerning internal office policy."<sup>120</sup> Accordingly, the Court found that any First Amendment interest that Myers had did "not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."<sup>121</sup> Therefore, the Court determined that the First Amendment was not offended by Myers' dismissal.<sup>122</sup>

However, Justice Brennan stated in his dissent that the survey did involve matters of public concern.<sup>123</sup> Additionally, he concluded that the showing was inadequate to establish that the speech might impair working relationships.<sup>124</sup> Therefore, according to Justice Brennan, mere apprehension was insufficient to justify suppression.<sup>125</sup>

In 1987, the Supreme Court had another opportunity to address the issue of speech as a matter of public concern in *Rankin v. McPherson*.<sup>126</sup> *Rankin* involved Ardith McPherson, a nineteen-year-old black woman on a probationary appointment as a clerical employee of the Harris County, Texas, Constable's Office.<sup>127</sup> In response to the assassination attempt on President Ronald Reagan, she was overhead stating, "If they go for him again, I hope they get him."<sup>128</sup> The employee was fired for her remarks.<sup>129</sup> In applying the required *Connick* analysis, the Court concluded that the statement actually dealt with a matter of public concern.<sup>130</sup> In defending this amazing result, the Court reasoned that the "statement was made in the course of a conversation addressing the policies of the President's administration."<sup>131</sup> Further, "[i]t came on

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119. *See id.* at 150.

120. *See id.* at 154.

121. *See id.*

122. *See id.*

123. *See id.* at 169 (Brennan, J., dissenting).

124. *See id.* at 166-68 (Brennan, J., dissenting).

125. *See id.* at 166 (Brennan, J., dissenting).

126. *See* 483 U.S. 378 (1987).

127. *See id.* at 380.

128. *See id.*

129. *See id.* at 382.

130. *See id.* at 386.

131. *See id.*

the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.”<sup>132</sup> The speech also did not involve a threat to kill the President.<sup>133</sup> According to the Court, “[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. ‘Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’”<sup>134</sup> After finding that the employee’s statements touched on a matter of public concern, the Court applied the *Pickering* balancing test and concluded that the State’s interest was negligible and that the employee’s speech should be provided First Amendment protection.<sup>135</sup>

In a strongly worded dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and O’Connor, attacked the majority’s findings on the issue of whether the employee’s speech addressed a matter of public concern.<sup>136</sup> Justice Scalia, reflecting what we believe is clearly the better view, reasoned that McPherson’s statement was “‘a far cry from the question by the Assistant District Attorney in *Connick*’” regarding pressure to work in political campaigns.<sup>137</sup> It was also different

from the letter written by the public school teacher in *Pickering* criticizing the Board of Education’s proposals for financing school construction[;] . . . from the legislative testimony of a state college teacher in *Perry v. Sindermann*, . . . advocating that a particular college be elevated to 4-year status; [and] from the memorandum given by a teacher to a radio station in *Mt. Healthy City Board of Education v. Doyle*, . . . dealing with a teacher dress and appearance.<sup>138</sup>

In Scalia’s view, McPherson’s statement was different from those the Court “previously held entitled to no First Amendment protection even in the nonemployment context—including assassination threats against the President (which are illegal under [federal law]).”<sup>139</sup> According to Scalia, a “statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the ‘heart’ of the First Amendment’s protection; it lies within the category of speech that can neither be characterized as speech on matters of public concern nor properly subject to criminal penalties.”<sup>140</sup> McPherson crossed the line,

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132. *Id.*

133. *See id.* at 386-87.

134. *Id.* at 387 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

135. *See id.* at 392.

136. *See id.* at 394-401 (Scalia, J., dissenting).

137. *See id.* at 397 (Scalia, J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

138. *Id.* (Scalia, J., dissenting) (citations omitted).

139. *See id.* (Scalia, J., dissenting).

140. *Id.* at 397-98 (Scalia, J., dissenting).

in Scalia's view, when she "stopped explicitly criticizing the President's policies and expressed a desire that he be assassinated."<sup>141</sup> In Justice Scalia's words:

The Court reaches the opposite conclusion only by distorting the concept of "public concern." It does not explain how a statement expressing approval of a serious and violent crime—assassination of the President—can possibly fall within that category. It simply rehearses the "context" of McPherson's statement, which as we have already seen is irrelevant here, and then concludes that because of that context, and because the statement "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President," the statement "plainly dealt with a matter of public concern." I cannot respond to this progression of reasoning except to say I do not understand it. Surely the Court does not mean to adopt the reasoning of the court below, which was that McPherson's statement was "addressed to a matter of public concern" within the meaning of *Connick* because the public would obviously be "concerned" about the assassination of the President. That is obviously untenable: The public would be "concerned" about a statement threatening to blow up the local federal building or demanding a \$1 million extortion payment, yet that kind of "public concern" does not entitle such a statement to any First Amendment protection at all.<sup>142</sup>

*B. Waters v. Churchill: Factfinding Procedures and the First Amendment.*

In *Waters v. Churchill*,<sup>143</sup> the Court addressed the firing of Cheryl Churchill, a nurse at a public hospital in Illinois, for allegedly making statements to co-workers during a work break.<sup>144</sup> The contents of Churchill's statements were disputed.<sup>145</sup> After conducting an investigation, her employer concluded that during this conversation Churchill, assigned to the hospital's obstetrics department, told a fellow nurse, who had been considering a transfer to the obstetrics department, of the poor working conditions in obstetrics.<sup>146</sup> Churchill further stated that management's training policy was going to "ruin' the hospital."<sup>147</sup> Short-

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141. *See id.* at 398 (Scalia, J., dissenting).

142. *Id.* (Scalia, J., dissenting) (citations omitted).

143. 511 U.S. 661 (1994). *See generally* Edward J. Velazquez, Comment, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055 (1995) (discussing *Waters*).

144. *See Waters*, 511 U.S. at 664.

145. *See id.*

146. *See id.* at 665.

147. *See id.* at 666 (quoting *Churchill v. Waters*, 977 F.2d 1114, 1118 (1992)).

ly after the conversation, the nurse considering the transfer decided not to transfer.<sup>148</sup> In her suit against the hospital, Churchill claimed she was discharged in violation of her First Amendment rights.<sup>149</sup> The district court granted summary judgment to the hospital, finding that neither the hospital's nor Churchill's version of the conversation was protected under *Connick*.<sup>150</sup> According to the court, no matter "whose story was accepted, the speech was not on a matter of public concern, and even if it was on a matter of public concern, its *potential* for disruption nonetheless stripped it of First Amendment protection."<sup>151</sup>

The Seventh Circuit reversed, holding that "the speech, viewed in light most favorable to her, was protected public speech under the *Connick* test."<sup>152</sup> Thus, according to the circuit court, "the hospital's [alleged] violation of state nursing regulations as well as the quality and level of nursing care" was a matter of public concern.<sup>153</sup> However, the circuit court ruled that the inquiry for the court must turn upon Churchill's actual speech, not upon the employer's interpretation thereof.<sup>154</sup> Therefore, according to the Seventh Circuit, "[i]f the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, . . . the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental."<sup>155</sup>

A conflict existed among the holdings of the Seventh,<sup>156</sup> Eighth,<sup>157</sup> Tenth,<sup>157</sup> and Eleventh<sup>158</sup> Circuits.<sup>159</sup> The issue, according to the Supreme Court's plurality decision, was as follows: "Should the court apply the *Connick* test to the speech as the government employer found it to

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148. *See id.* at 665.

149. *See id.* at 667.

150. *See id.*; 731 F. Supp. 311, 321-22 (C.D. Ill. 1990).

151. *See Waters*, 511 U.S. at 667 (emphasis added).

152. *See id.* (citing *Churchill v. Water*, 977 F.2d 1114, 1122 (7th Cir. 1992)).

153. *See id.* (quoting *Churchill*, 977 F.2d at 1122).

154. *See id.*

155. *Id.* at 667-68 (quoting *Churchill*, 977 F.2d at 1127).

156. *See, e.g., Atcherson v. Siebenmann*, 605 F.2d 1058, 1064 (8th Cir. 1979) (holding that there is no liability if there is an "existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief").

157. *See, e.g., Wulf v. City of Wichita*, 883 F.2d 842, 867 (10th Cir. 1989) (holding that there is no liability because a "reasonable police chief should have been on notice that it would be a violation of the First Amendment to terminate a police officer who wrote a letter").

158. *See, e.g., Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236 (11th Cir. 1992) (holding that there is no liability because "official's actions do not violate clearly established rights of which a reasonable person would have known").

159. *See Waters*, 511 U.S. at 668.

be, or should it ask the jury to determine the facts for itself?"<sup>160</sup> Writing for a sharply divided Court, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Souter, and Justice Ginsburg, noted that the Court's prior decisions "establish a basic First Amendment principle [that] [g]overnment action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected."<sup>161</sup> However, according to Justice O'Connor, "not every procedure that may safeguard protected speech is constitutionally mandated."<sup>162</sup>

On the issue of due process, Justice O'Connor, speaking for the plurality, held that the "propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."<sup>163</sup> Further,

to evaluate these factors here we have to return to the issue we dealt with in *Connick* and in the cases that came before it: What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?<sup>164</sup>

Based upon its own analysis of the *Connick* test involving the government's interest in "achieving its goals as effectively and efficiently as possible,"<sup>165</sup> Justice O'Connor found that the Seventh Circuit had failed to give sufficient weight to the government's interest in what she called "efficient employment decisionmaking."<sup>166</sup> Justice O'Connor further noted that:

The problem with the Court of Appeals' approach—under which the facts to which the *Connick* test is applied are determined by the judicial factfinder—is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience. If she thinks the alleged offense is so egregious that it is

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160. *See id.*

161. *See id.* at 669.

162. *Id.* at 670.

163. *Id.* at 671.

164. *Id.*

165. *See id.* at 675.

166. *See id.*



proper to discipline the accused employee even though the evidence is ambiguous, she must consider that a jury might decide the other way.

But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct.<sup>167</sup>

Justice O'Connor cautioned that, when applying the *Connick* test, courts must also "consider . . . the reasonableness of the employer's conclusions."<sup>168</sup> Accordingly, courts are to decide whether the decisionmaker's conclusions are made in good faith, rather than as a pretext.<sup>169</sup> Moreover, Justice O'Connor took the analysis one step further, holding that the findings of the decisionmaker must be reasonable.<sup>170</sup> According to Justice O'Connor:

If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case.<sup>171</sup>

Justice O'Connor concluded that "the possibility of inadvertently punishing someone for exercising her First Amendment rights make such care necessary."<sup>172</sup> Thus, according to Justice O'Connor, if Churchill's supervisors really did believe the story of the witnesses and fired Churchill because of that belief, the hospital did not violate Churchill's First Amendment right of free speech.<sup>173</sup> Therefore, the Court's plurality remanded the case on the question of whether Churchill was actually fired because of those statements, as found by the supervisor, or for some other reason.<sup>174</sup>

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167. *Id.* at 675-76.

168. *See id.* at 677.

169. *See id.*

170. *See id.* at 677-78.

171. *Id.*

172. *Id.* at 678 (acknowledging agreement with Justice Scalia's concurring opinion that such care is normally not constitutionally required unless employee has a protected property interest in his or her job).

173. *See id.* at 679-80. Justice O'Connor found that if this was truly their belief, it would have been entirely reasonable. *See id.* at 680. Moreover, under the *Connick* test, according to Justice O'Connor, Churchill's speech was unprotected either as not involving a matter of public concern or as being potentially disruptive and thus outweighing whatever First Amendment value it might have had. *See id.* at 680-81.

174. *See id.* at 682.

Concurring in the judgment, Justice Scalia, joined by Justices Kennedy and Thomas, pointed out that under the Court's prior cases, "public employees who . . . lack a protected property interest in their jobs, are not entitled to *any* sort of a hearing before dismissal."<sup>175</sup> According to Justice Scalia, under the opinion set forth by Justice O'Connor:

[I]f a reason happens to be given, and if the reason relates to speech and "there is a substantial likelihood that what was actually said was protected," (whatever that means), . . . an investigation to assure that the speech was not the sort protected by the First Amendment must be conducted—after which, presumably, the dismissal can still proceed even if the speech was not what the employer had thought it was, so long as it was not speech on an issue of public importance.<sup>176</sup>

The approach proposed by Justice O'Connor "provides more questions than answers, subjecting public employers to intolerable uncertainty."<sup>177</sup> "It remains entirely unclear what the employer's judgment must be based on."<sup>178</sup> What is clear is that allowing public management to dismiss an employee based on what it believes the employee actually said, the interpretation of which will be based on its own fact-finding process, does not bode well for public employees desiring to speak out on what they believe are matters of concern.

### III. RECENT COURT DECISIONS: FACTS IN SEARCH OF STANDARDS AND THEORY

The *Connick* Court made it clear that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."<sup>179</sup> Thus, under *Connick*, if a public employee's speech cannot be fairly characterized as constituting speech on a matter of public concern, no *Pickering* balancing test is necessary.<sup>180</sup> As pointed out by Justice White in *Connick*, when employee speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should

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175. See *id.* at 688 (Scalia, J., concurring) (emphasis added) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972)).

176. See *id.* at 688 (Scalia, J., concurring) (citation omitted).

177. See *id.* at 692 (Scalia, J., concurring).

178. *Id.* at 693 (Scalia, J., concurring).

179. See *Connick v. Myers*, 461 U.S. 138, 145 (1982) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

180. See *id.* at 146 (citations omitted).

enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>181</sup>

Applying the *Connick*, *Pickering*, and *Mt. Healthy* standard on a case-by-case basis has proven to be an arduous task for most reviewing courts. It is even more arduous for employment lawyers rendering advice to clients. Over the past two decades, reviewing courts have produced a number of inconsistent rulings dealing with public employees, particularly teachers, police officers, and other low-ranking governmental officials. The vast number of inconsistencies arise out of the individualized applications of the threshold "public concern" test articulated in *Connick*. For the most part, these inconsistencies can be traced to the judicial subjective valuing process required under *Connick*. As Professor Tribe notes, courts must now make "subjective, content-based determinations of the social importance of speech."<sup>182</sup> What is created are "doctrinal cubbyholes" depending to the extent to which a court desires to think conceptually about *Connick*'s time, manner, and place criteria and their relationship to the *Pickering* balancing test.<sup>183</sup> What speech is "important" and deserving of protection and what speech is not? Is the determination ever capable of an objective test? When should the judiciary give deference to management's judgment regarding a claim of organizational camaraderie? Four separate (but not mutually exclusive) approaches emerge.

#### A. The "Avoidance" Approach

The cleanest and least demanding approach taken by some courts in dealing with the public concern issue is simple avoidance. These courts (like many labor arbitrators) merely assume a positive reading on the threshold *Connick* test and turn directly to a *Pickering* balance. Arguably, this approach is taken only when the *Pickering* balance is resolved in favor of the employer, thereby negating any need to consider the form, content, or context of the speech in question.

Illustrative of the "avoidance approach" is *Waldau v. Coughlin*.<sup>184</sup> In *Waldau*, although the court noted that the employee's speech was on a matter of public concern, Judge Oberdorfer stated that the "speech for which plaintiff was terminated is not constitutionally protected because the Postal Service's interest 'in promoting the efficiency of the public services it performs through its employees' outweighs plaintiff's 'interest

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181. *See id.*

182. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-18, at 931 n.15 (2d ed. 1988).

183. *See id.*

184. No. 95-1151, 1997 WL 161958 (D.D.C. Apr. 1, 1997).

as a citizen, in commenting upon matters of public concern."<sup>185</sup> According to the court, it therefore was unnecessary to determine whether the speech was a matter of public concern.<sup>186</sup>

Similarly, the Eleventh Circuit, in *Shahar v. Bowers*,<sup>187</sup> a First Amendment freedom of association case, ignored *Connick* and declared:

*Pickering* balancing is never a precise mathematical process: it is a method of analysis by which a court compares the *relative* values of the things before it. A person often knows that "x" outweighs "y" even without first determining exactly what either "x" or "y" weighs. And it is this common experience that illustrates the workings of a *Pickering* balance.<sup>188</sup>

In a footnote, the court rationalized that it was "not the first court to assume the existence of a right and, then, to go on to apply the *Pickering* balancing test, taking into account the assumed right."<sup>189</sup>

The Eighth Circuit, in *Barnard v. Jackson County*,<sup>190</sup> took the same approach.<sup>191</sup> In *Barnard*, the court justified disregarding *Connick* by simply declaring that "[b]ecause we believe that the second component of the above [inquiry] resolves the issues . . . , we assume without deciding that Barnard's speech with the Star touched upon matters of public concern, and we proceed to the *Pickering* balancing test."<sup>192</sup>

The Supreme Court took a similar approach in *Waters v. Churchill*.<sup>193</sup> In *Waters*, the Court held that under *Connick*, the First Amendment did not protect a worker's comments relating to a particular department at work.<sup>194</sup> Justice O'Connor, writing for the majority, did not address whether Churchill's speech touched a matter of public concern because, "[a]s a matter of law, [the] potential disruptiveness [of her speech] was enough to outweigh whatever First Amendment value the speech might have had."<sup>195</sup>

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185. *See id.* at \*4 (source of internal quote omitted in original).

186. *See id.* at \*4.

187. 114 F.3d 1097 (11th Cir. 1997).

188. *See id.* at 1106.

189. *Id.* at 1106 n.19.

190. *See id.* at 1233.

191. 43 F.3d 1218, 1233 (8th Cir. 1995).

192. *See id.* at 1223.

193. 511 U.S. 661 (1994).

194. *See id.* at 679-82.

195. *See id.* at 681.

*B. All Speech is Protected to an Extent: "Exclusionary Analysis Approach"*

Other courts, in an attempt to face the difficult application of *Connick* head on, view the *Connick* test as an attempt to exclude public employee speech that is not a matter of public concern from First Amendment protection.<sup>196</sup> Based on this exclusionary interpretation, these courts presume that *all* speech has some First Amendment protection.<sup>197</sup> According to these courts, *Connick* was merely the Supreme Court's attempt to categorically remove speech that dealt with purely private workplace grievances.<sup>198</sup> Thus, even though virtually all speech has some form of First Amendment protection, *Connick* implicitly requires that public employee speech that is not a matter of public concern should be excluded from First Amendment protection.<sup>199</sup>

This approach is evident in *Berger v. Battaglia*.<sup>200</sup> In *Berger*, the Fourth Circuit had to determine whether the City of Baltimore could condition a police officer's employment on the officer's compliance with the city's order to cease his controversial off-duty "blackface" performances, which included impersonation of the late singer Al Jolson.<sup>201</sup> The officer alleged that the city's actions violated his free speech rights under the First Amendment.<sup>202</sup> The court began its analysis, noting that "[t]his particular controversy does not fit too neatly within the paradigmatic factual pattern out of which the '*Pickering* test' has developed."<sup>203</sup> The court distinguished this case from the usual *Pickering*-type case because the employee's speech was not critical of or in disagreement with governmental operations, and

the governmental interest assertedly threatened by the speech was not internal employment relationships and operations. Instead the speech was a form of artistic expression wholly unrelated in content to the public employer or its operations, and the threat it assertedly posed to employer interests was not internal disruption by the speech itself, but external disruption by third persons reacting to the speech.<sup>204</sup>

The issue of whether this artistic expression rises to a matter of public concern is of particular interest. According to the *Berger* court:

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196. See *Boring v. Boncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996); *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985).

197. See *Boring*, 98 F.3d at 1477; *Berger*, 779 F.2d at 999.

198. See *Boring*, 98 F.3d at 1480; *Berger*, 779 F.2d at 998-99.

199. See *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

200. 779 F.2d 992 (4th Cir. 1985).

201. See *id.* at 993.

202. See *id.* at 996.

203. *Id.* at 997.

204. See *id.*

*Pickering*, its antecedents, and its progeny—particularly *Connick*—make 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. The principle that emerges is that *all* public employee speech that by content is within 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. That is to say, the purpose of the inquiry is to prevent turning every public employee expression of private grievance into a constitutional case, while at the same time enforcing the new dispensation, dating back at least to *Keyishian v. Board of Regents*, that by accepting public employment a citizen does not absolutely forfeit his first amendment right to express himself freely upon “any matter of political, social, or other concern to the community.” The focus is therefore upon 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.<sup>205</sup>

Applying this rationale, the court determined that the officer’s performances “were not purely personal expressions of no concern to the community. Rather, they constituted speech upon a matter of obvious public interest to those considerable segments of the community who willingly attended and sometimes paid to see and hear them.”<sup>206</sup> The court further noted the fact that “the content was sheer entertainment—presumably neutral as to any political or even social views—does not of course take them outside First Amendment protection.”<sup>207</sup>

A divided panel of the Fourth Circuit again decided not to apply the *Connick* test in *Boring v. Buncombe County Board of Education*.<sup>208</sup> In the panel decision in *Boring*, the issue was whether a high school drama teacher’s First Amendment rights were violated when she was transferred to a middle school as a result of her selection of a controversial play that was to be performed by high school drama students.<sup>209</sup> The

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205. *Id.* at 998-99 (emphasis added) (citations omitted).

206. *See id.* at 999.

207. *Id.*

208. 98 F.3d 1474 (4th Cir. 1996), *vacated by*, 136 F.3d 364 (4th Cir. 1998). In February 1998, shortly before final editing of this Article, in a severely divided decision, the Fourth Circuit Court setting en banc reversed the panel’s decision. The full court’s majority opinion found the plaintiff’s selection of the play *Independence*, even though it may have amounted to speech, was not a matter of public concern, and therefore was not “protected speech.” Finding that the makeup of the curriculum should be entrusted to the local school authorities, rather than to the teachers, the full court’s majority found that plaintiff’s speech was nothing more than an ordinary employment dispute.

209. *See id.* at 1476. The play, “*Independence*,” is a drama that ‘powerfully de-

School District argued that because the teacher selected the play in her role as a teacher, she failed to satisfy the “public concern” element of *Connick*.<sup>210</sup>

In addressing the issue, the panel’s majority acknowledged that “the *Connick* ‘public concern’ analysis simply does not provide a very useful tool when analyzing a teacher’s classroom speech.”<sup>211</sup> According to the panel’s majority, “the [very] essence of a teacher’s role in the classroom . . . is to discuss with students issues of public concern.”<sup>212</sup> Thus, the teacher’s classroom comments almost always touch upon “matter[s] of political, social or other concern to the community.”<sup>213</sup> Consequently, this teacher’s choice of play, which “involv[ed] a variety of social themes, meets this criterion.”<sup>214</sup>

In discussing *Berger*, the panel’s majority noted that the teacher’s selection of a particular play, or, for that matter, “a teacher’s choice of a film or course material, [was not] analogous to private personnel grievances,” therefore, such selection touched upon matters of public concern.<sup>215</sup> Moreover, the panel’s majority rejected the Board of Education’s argument that to obtain the protection of *Connick*, “a teacher must show that she expressed her views in her role as a private citizen, rather than as a government employee.”<sup>216</sup> The panel’s majority reasoned that to hold otherwise “would mean that a teacher lacks *all* First Amendment protection whenever she teaches, because by definition she is then acting in her role as a government employee.”<sup>217</sup> Moreover, the panel’s majority noted that “[t]he Supreme Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence.”<sup>218</sup> The panel’s majority declared that “the notion that

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pict[ed] the dynamics within a dysfunctional, single-parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child.’ The students planned to perform the play . . . in a state competition.” *Id.* (source of internal quote omitted in original).

210. *See id.* at 1479.

211. *Id.*

212. *Id.* at 1480.

213. *See id.* (applying *Connick*’s broad definition of “public concern” to the teacher’s role in the classroom).

214. *See id.*

215. *See id.* at 1479.

216. *See id.*

217. *See id.* at 1480 (emphasis added); *see also* *Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1199 (8th Cir. 1993) (discussing a school bus driver’s responses to questions by parents concerning the school district’s plan to charge for transportation costs and holding that even though the contents of her response related to a matter of public concern, she spoke in the course of acting as a school district employee engaged in a job-related task and therefore was without First Amendment protection).

218. *Id.* at 1480.

teachers have no First Amendment right when teaching, or that the government can censor teacher speech without restriction, is 'fantastic' and stands in direct contrast to an imposing line of precedent."<sup>219</sup>

The Seventh Circuit took a similar exclusionary approach in *Swank v. Smart*.<sup>220</sup> In *Swank*, a police officer was discharged after taking a minor female on a late-night motorcycle ride during which the two discussed the girl's courses at college, the motorcycle, her former boyfriend, her opinion of Carthage, Illinois (the town in which they lived), and other topics.<sup>221</sup> After he was discharged, the officer claimed that his conversation was protected under the First Amendment.<sup>222</sup> Writing for the court, Judge Posner reasoned that the conversation between Swank and the co-ed on the motorcycle "was speech in the literal sense, but not speech protected by the free-speech clause of the First Amendment."<sup>223</sup> In Judge Posner's opinion, "casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to the marketplace, and is not protected."<sup>224</sup> While such conversation may be important to its participants, it does not advance "knowledge, . . . cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment."<sup>225</sup> With respect to the assertion that all speech touches some aspect of public concern, the court found that "[t]hat the kernel of expression which can be found 'in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall . . . is not sufficient to bring the activity within the protection of the First Amendment."<sup>226</sup> While acknowledging that "discussion of motorcycles and former boyfriends can contribute to the marketplace of ideas," Judge Posner found that the conversation at issue was "idle or flirtatious in character," and "too remote from the political rally, the press conference,

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219. *Id.* (citing *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996)); *see also* *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (reaffirming the rule that teachers and schools are accorded First Amendment protection); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (same); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (commenting on the need to allow students and teachers the freedom to inquire about any issue).

220. 898 F.2d 1247 (7th Cir. 1990).

221. *See id.* at 1249-50.

222. *See id.* at 1250.

223. *See id.* (citation omitted).

224. *Id.* at 1251.

225. *See id.*

226. *See id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989)).



the demonstration, the theater, or other familiar emporia of the marketplace of ideas to activate the guarantees of the First Amendment.<sup>227</sup>

C. *Applying Connick to the evidence record: The speaker's motive as a determinative element.*

The vast majority of cases applying the *Connick* test turn to a case-by-case, subjective factual analysis which appears to focus mainly upon the *motives of the speaker* in making the speech. Why did the speaker utter the words at issue? Similar inconsistent results are produced.

For example, in *Campbell v. Towse*,<sup>228</sup> an Alton, Illinois police lieutenant was suspended for writing a letter to the Chief critical of the police department's policies and management style.<sup>229</sup> The Seventh Circuit discussed the *Connick* standard and the court's obligation to determine whether the officer's letter "addressed a matter of general concern to the public, rather than being wholly centered on a personal dispute or grievances with his employer."<sup>230</sup> The defendants in *Campbell* argued that the lieutenant's motive in writing the memorandum was entirely personal in nature—hoping apparently that he would be relieved of his position—because he did not seek a public airing of his views and because the matter was one more analogous to a personal grievance.<sup>231</sup> Setting forth the tests as a focus on content, form, and context, in light of the record as a whole, the court added that the speaker's motive, although not dispositive, "may well serve to clarify the central point of his expression."<sup>232</sup> The court said that the speaker's motive would "assist us in determining whether he sought to air his criticism of the C.O.P.S. program because he was concerned as a citizen about the weaknesses he perceived in that program, or whether the central point of Campbell's speech was instead 'to further some purely private interest' arising out of his employment relation with the Department."<sup>233</sup>

With this version of the *Connick* test in hand, the court found that the lieutenant's letter, when viewed in the light most favorable to him, was not intended as a personal grievance.<sup>234</sup> The court found that the lieutenant disagreed with "the wisdom of bringing the . . . program to Alton, and its efficacy in serving the nonminority members of the Alton commu-

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227. *See id.*

228. 99 F.3d 820 (7th Cir. 1996).

229. *See id.* at 823.

230. *See id.* at 827.

231. *See id.* at 828.

232. *See id.* at 827.

233. *See id.* (quoting *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985)).

234. *See id.* at 828.

nity.<sup>235</sup> The court based its determination of the lieutenant's intent on the fact that the lieutenant could have aired his views publicly to gain some advantage but, instead, sought only to distance himself from what he felt was a failure by giving up his recent promotion.<sup>236</sup> Thus, he wrote the letter intending it to reach these ends.<sup>237</sup> According to the court, "the central point of Campbell's speech was aimed at a matter of public rather than private concern within the meaning of *Connick* and *Pickering*."<sup>238</sup>

Other appellate courts also apply the *Connick* test with a weighted "motive-related" element. For example, in *Havekost v. United States Department of the Navy*,<sup>239</sup> the Ninth Circuit noted that in applying *Connick*, the "critical inquiry is whether the employee spoke in order to bring wrongdoing to light or merely to further some purely private interest."<sup>240</sup> Moreover, in *Hartman v. Board of Trustees of Community College District No. 508*,<sup>241</sup> the Seventh Circuit noted "[w]hether these statements are directed toward a matter of public concern depends in part on the motivation behind them."<sup>242</sup> Thus, according to the court, "even if an issue is one of public concern in a general sense, as sexual harassment surely is, still we must ask whether the speaker raised the issue because it is matter of public concern or whether, instead, the issue was raised to 'further some purely private interest.'"<sup>243</sup> The court added that

[w]hen the speaker's motives are mixed, as often they are, the speech will not be found to raise a matter of public concern if 'the overriding reason for the speech,' as determined by its content, form, and context, appears to have been related to the speaker's personal interests as a employee.<sup>244</sup>

Under this approach to *Connick*, the weight to be given to a speaker's motive varies depending upon the court. In *Belk v. Minocqua*,<sup>245</sup> an employer fired an employee for threatening to file what appeared on the

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235. *See id.*

236. *See id.*

237. *See id.*

238. *Id.*

239. 925 F.2d 316 (9th Cir. 1991).

240. *See id.* at 318 (citing *Breuer v. Hart*, 909 F.2d 1035, 1039 n.5 (7th Cir. 1990)).

241. 4 F.3d 465 (7th Cir. 1993).

242. *Id.* at 471 (citing *Colburn v. Trustees of Ind. Univ.*, 973 F.2d 581, 586 (7th Cir. 1992)).

243. *Id.* (quoting *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987)).

244. *Id.* at 471-72 (quoting *Colburn*, 973 F.2d at 587).

245. 858 F.2d 1258 (7th Cir. 1988).

surface merely to be a personal grievance.<sup>246</sup> The court stated that “although the point or motive behind an employee’s speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive.”<sup>247</sup> The court held that the employee’s threat “revealed not only that the Town Board had been paying more compensation to the incumbent . . . than the residents of Minocqua had authorized, but also that the occupancy of those two offices by the same individual was proscribed by a state statute.”<sup>248</sup> Thus, by downplaying the speaker’s motive and emphasizing the content of the speech in question, the court concluded that the speech touched on a matter of public concern.<sup>249</sup>

On the other hand, in *Barnes v. McDowell*,<sup>250</sup> the Sixth Circuit reversed the emphasis and downplayed the importance of the content of the speech.<sup>251</sup> The court stated “[t]he mere fact that public monies and government efficiency are related to the subject of a public employee’s speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.”<sup>252</sup> The court went on to find the speech in that case, even though it involved the charging of corruption in a governmental agency, was “nothing more than examples ‘of the quintessential employee beef: management has acted incompetently.’”<sup>253</sup>

A recent case reported by the Seventh Circuit illustrates the problems inherent in the “speaker’s motive” approach. In *Wales v. Board of Education of Community Unit School District 300*,<sup>254</sup> a teacher’s contract was not renewed allegedly because she sent her principal a letter critical

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246. See *id.* at 1263.

247. See *id.* (quoting *Breg v. Hunter*, 854 F.2d 238, 242-43 (7th Cir. 1988)).

248. See *id.* at 1263. In an interesting footnote, the court noted that matters of public concern are rarely so easily discernable. See *id.* at 1263 n.7. Personal issues do not necessarily “assume a larger, public dimension.” See *id.* Thus, plaintiffs should do the following:

In assessing whether the speech touches upon a matter of public concern, it is important not to equate the public’s curiosity about a matter with the matter having societal ramifications. People may be interested in any number of aspects of the lives of public officials and employees, but that does not mean that such matters have societal ramifications. Conversely, the public may be extremely apathetic about certain matters of public concern . . . .

*Id.* (quoting *Egger v. Phillips*, 710 F.2d 292, 316-17 (7th Cir. 1983) (en banc)).

249. See *id.* at 1264.

250. 848 F.2d 725 (6th Cir. 1988).

251. See *id.* at 734-35.

252. *Id.*

253. See *id.* at 735 (quoting *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985)).

254. 120 F.3d 82 (7th Cir. 1997).

of the principal's policies and management style.<sup>255</sup> In a well-reasoned opinion, Judge Frank Easterbrook noted:

Cases such as this illuminate a problem posed by *Pickering*. Speech has multiple objectives. One statement can address issues of both public and private concern. An employer may respond to either or both of these facets of the speech. *Pickering* expresses optimism that courts can separate one kind of speech (and one kind of response) from the other at low cost, and then permit the public employer to react when speech goes "too far" (or becomes "to disruptive") while protecting speech that has net public benefits. How this is to be done *Pickering* does not say. When both speaker and employer have (or appear to have) mixed motives, the task is intractable. And the cost can be substantial—by which we mean not the monetary costs litigants bear themselves, or the time the judicial system must divert from serving the needs of other litigants, or the risk of error, but the opportunity costs that will be borne by the public when public servants seek to avoid litigation. Exchanges of views between employees and their supervisors are routine—especially at schools, which deal in expression. Every teacher has, or easily can gin up, a claim that speech made a difference, as often it should. What people say reflects or presages what they do, and employers (public and private alike) therefore may properly consider job-related speech when making decisions. *Pickering* and *Connick v. Myers*, say that speech about a topic of public concern may be a ground of adverse action only if the speech is disruptive, but non-disruptive speech can be highly informative about how well a given person fits a particular slot.

Rational employers routinely consider speech . . . . Because public employers do, or can be made to appear to, react to non-disruptive speech, good and bad employees alike can threaten to impose costs on public employers who demote or fire them . . . . Faced with both a threat to the pocketbook and the substantial diversion of time from the principal task at hand . . . many a supervisor will let things be. Then the people who suffer are the children, deprived of the best education the school district can provide. That was not the goal of the Supreme Court in *Pickering*, but it is an inevitable consequence; it is not possible to protect public employees' right to speak their minds without creating incentives that threaten the quality of services agencies deliver to the public.<sup>256</sup>

#### D. *Coming Full Circle: Connick and "Labels of Distinction."*

Finally, an aggressive challenge to the traditional *Connick* analysis has emerged, at least in the Seventh Circuit. The fourth approach, highlighted in a case reported by the Seventh Circuit, distinguishes the matter of public concern test as a mere "label of the distinction" between "levels of first amendment protection."<sup>257</sup> This approach seems to take the

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255. See *id.* at 82.

256. *Id.* at 84-85 (citations omitted).

257. See *Eberhardt v. O'Malley*, 117 F.3d 1023, 1027 (7th Cir. 1994).

*Connick* analysis full circle by returning the matter of public concern issue back into a factor to be considered in the *Pickering* balance.<sup>258</sup> By returning the public concern test to a *Pickering* balance, a pre-*Connick* analysis is taken.

Illustrative is *Eberhardt v. O'Malley*.<sup>259</sup> In *Eberhardt*, an Assistant State's Attorney working in Cook County, Illinois was fired because he wrote a novel involving fictional prosecutors and other individuals in the criminal justice system.<sup>260</sup> According to Eberhardt, "all characters and locations in the manuscript were a consolidation of persons and places Eberhardt had become familiar with during his careers as a police officer and a prosecutor."<sup>261</sup>

Judge Posner's lengthy reasoning is particularly interesting and worth reprinting:

As we have already intimated, it is not the case that the only expression which the First Amendment protects is expression that deals with "matters of public concern," unless this formula is understood to mean any matter for which there is potentially a public. The First Amendment protects entertainment as well as treatises on politics and public administration . . . . The less serious, portentous, political, significant the genre of expression, the less imposing the justification that the government must put forth in order to be permitted to suppress the expression. So Eberhardt's novel, whether or not it alleges wrongdoing or addresses matters of public import in some word-important sense, presumptively is protected by the First Amendment. It follows that his employer could not fire him for writing it unless the employer had a *reason*—something that might rebut the presumption of privilege. The employer could not *gratuitously* punish him for exercising freedom of speech. This is true even if—indeed, especially if—the protected expression has nothing to do with the employee's job or with the public interest in the operation of his office. The less his speech has to do with the office, the less justification the office is likely to have to regulate it.

The elementary proposition that the government must be able to give a good reason (how good we need not decide in this case) for wanting to deter protected speech by attaching a sanction to it has been obscured by failure to consider the context in which the courts have said that the public employee complaining of infringement of his First Amendment rights must show that he was expressing himself on matters of public rather than private concern. Those cases are concerned not with drawing a line between different *forms* of protected speech—say, charges of official malfeasance versus entertainment—but with distinguishing between different *levels* of protection. Most of the speech in which people engage—in *Swank v. Smart*, we gave the example of casual chitchat between a policeman and a college coed to whom he was giving a ride on his motorcycle; grousing to one's supervisor about the raise one didn't get is another example—is so remote from the central purposes of the First Amendment that an employee fired for such speech is not entitled to relief under that amendment. The employer's interest in controlling such speech, meager as that interest may be, is

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258. See *id.* at 1026-27.

259. 17 F.3d 1023 (7th Cir. 1994).

260. See *id.* at 1024.

261. *Id.* at 1025.

thought to outweigh the social interest in speech so remote from the core of the First Amendment. The courts have had to separate speech that is not very valuable socially from whistleblowing and other socially valuable expressive activities of public employees, and "matter of public concern" is the label of the distinction. But a novel is not like grousing about a raise. It is comfortably within the protection of the amendment and this regardless of its subject matter or its relation to the author's employment.<sup>262</sup>

*E. What is the effect of speech within the context of an ongoing labor dispute or formal grievance under a collective bargaining agreement?*

Unlike the private sector, courts appear unwilling to apply the balancing process to favor public-sector employee speech when made within the context of a labor dispute, either in grievance adjustment or collective bargaining.

*Brown v. Department of Transportation F.A.A.*,<sup>263</sup> a decision by the Court of Appeals for the Federal Circuit, applied both *Pickering* and *Connick* and recognized "loyalty" as a valid managerial interest, even within the context of a labor dispute.<sup>264</sup> In *Brown*, the Federal Aviation Administration fired Brown, a supervisory air traffic control specialist, for making comments to striking air traffic controllers.<sup>265</sup> Although Brown did not participate in the nationwide air controllers' strike (indeed, he worked a twelve-hour shift the first day of the strike), during his off-duty hours Brown went to the local union hall and advised his controllers that he was still working.<sup>266</sup> He also stated, "I wish you'd all come back, 'cause I'm too tired and too old to be working these long hours."<sup>267</sup> He further stated, "I'm so happy that you're together. Stay together, please, because if you do, you'll win."<sup>268</sup> The media broadcast Brown's remarks nationwide that same evening.<sup>269</sup> The agency subsequently removed Brown from his position and the Merit Systems Protection Board upheld the removal.<sup>270</sup> On appeal, the court addressed "whether Brown's speech was constitutionally protected," and if not,

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262. *Id.* at 1026-27 (citations omitted).

263. 735 F.2d 543 (Fed. Cir. 1984).

264. *See id.* at 547-48.

265. *See id.* at 544.

266. *See id.* at 545.

267. *Id.*

268. *Id.*

269. *See id.*

270. *See id.*

“whether a nexus existed between Brown’s off-duty remarks . . . and the efficiency of the agency’s operations.”<sup>271</sup>

With respect to the constitutional question, the court, citing *Pickering*, stated that the test to be applied was “(1) whether Brown’s speech addressed a matter of public concern and, if so, (2) whether the interest of the agency in promoting the efficiency of the public service it performs (air traffic control) outweighed Brown’s interests as a citizen.”<sup>272</sup> In deciding whether the employee’s remarks addressed a matter of public concern, the court, applying *Connick*, looked to the “content, form, and context” of the statements.<sup>273</sup> The court concluded that Brown’s comments “extended well beyond the local union hall and his friends, the controllers, to rise to the level of speech on a matter of urgent public concern.”<sup>274</sup>

More interesting is the court’s analysis with regard to the second part of the test. The court reasoned that “on the agency’s side of the balance was the seriousness of the general situation: a nationwide strike, illegal and a criminal offense under federal law . . . .”<sup>275</sup> The court went on to focus on Brown’s “duty of loyalty,” holding that his remarks were not constitutionally protected.<sup>276</sup> The court reasoned that “Brown’s position as a supervisor not only to whom nine controllers reported but who reported himself to higher-level agency management, weigh[ed] heavily on the agency’s side.”<sup>277</sup> To bolster its reasoning, the court quoted *Brousseau v. United States*,<sup>278</sup> in a First Amendment context:

“Management cannot function effectively unless it operates ‘with one voice’ *vis-a-vis others*. Cohesive operation of management is dependent on the loyalty of inferior management to superior management. This loyalty must be maintained in situations involving management’s relations with nonmanagerial employees. For management to countenance disloyalty in such situations would be for management to render itself impotent.”<sup>279</sup>

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271. *See id.* at 545-46.

272. *See id.* at 546 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1967)).

273. *See id.* (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

274. *See id.*

275. *Id.* at 547.

276. *See id.*

277. *Id.*

278. 640 F.2d 1235 (Ct. Cl. 1981).

279. *Brown*, 735 F.2d at 547 (quoting *Brousseau*, 640 F.2d at 1249). It is of note that the court also found that the necessary nexus existed between Brown’s conduct and his job responsibilities in a supervisory position. *See id.* at 548. The court remarked that “Brown’s ‘common sense should have forewarned him’ that appearing before a union hall full of strikers, even though those strikers were his friends, could easily turn into a situation where his loyalty to management could be case in doubt—as indeed it was.” *See id.* (quoting *Brousseau*, 640 F.2d at 1247). Still, the court found the penalty of removal too severe and remanded the case for mitigation of that penalty. *See id.* at 548-49.

A case that outlines with clarity the law in this area is *Roberts v. Van Buren Public Schools*.<sup>280</sup> Two elementary teachers filed three grievances against a school district on forms developed by the union.<sup>281</sup> The first grievance expressed dissatisfaction with the handling of parental complaints regarding seating arrangements for the bus on a class trip.<sup>282</sup> The second grievance criticized the failure of the school to provide monetary support for the trip.<sup>283</sup> The third grievance noted a lack of teaching supplies.<sup>284</sup> The school district did not renew the teachers' contracts.<sup>285</sup> At trial, the teachers argued that by not renewing their contracts the board acted in "retaliation for their protected speech activities, [and] deprived them of their rights under the [F]irst and [F]ourteenth [A]mendments."<sup>286</sup> The judge submitted to the jury the following instruction: "Do you find that the teacher was engaged in activity protected by the First Amendment and that the protected activity was a substantial or motivating factor *in any of the defendants* decisions not to renew her teaching contract?"<sup>287</sup>

The jury answered "no" to this interrogatory.<sup>288</sup> The Eighth Circuit ruled that the use of the jury instruction to determine whether the teachers' speech was protected was improper.<sup>289</sup> According to the court, "[t]he inquiry into the protected status of speech is one of law, not fact"<sup>290</sup> and thus, subject to summary judgment.<sup>291</sup>

Particularly interesting is the court's declarations of law with respect to the First Amendment claims of the teachers. Invoking *Pickering* and stating the teachers did not relinquish their First Amendment rights to comment on matters of public interest, the court proceeded to apply a three-step analysis:<sup>292</sup>

First, plaintiffs must demonstrate that their conduct was protected; second, plaintiffs must demonstrate that such protected conduct was a substantial or motivat-

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280. 773 F.2d 949 (8th Cir. 1985).

281. *See id.* at 952.

282. *See id.*

283. *See id.* at 953.

284. *See id.*

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See id.* at 954.

290. *Id.* at 954 (quoting *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983)).

291. *See id.*

292. *See id.* at 953-54.



ing factor in the adverse employment decision; and third, the employer may show that the employment action would have been taken even in the absence of the protected conduct.

Identification of protected activity since *Connick* is a two-step process in itself. As a threshold matter, the speech must have addressed a "matter of public concern,"<sup>293</sup> . . . then, the interest of the employee in so speaking must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>294</sup>

The court pointed out the *Pickering* balance looks to the following factors:

(1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.<sup>295</sup>

In determining whether the teachers' speech addressed a matter of "public concern," the court stated that:

We need not proceed to the *Pickering* balance when the employee spoke not as a citizen but as an employee expressing a personal grievance as to internal office policy. The state has a greater interest in regulating the speech of its employees than it has in regulating the speech of its citizenry in general, and respect for fundamental rights does not require that the first amendment be read to afford to state employees a grant of immunity for job-related grievances not afforded to those who do not work for the state.<sup>296</sup>

The court declared that "[t]he public nature of the subject of the speech . . . is not negated by the fact that, as here, the employees chose to communicate their concerns privately."<sup>297</sup> However, the court also pointed out that the teachers' grievances went more to the relationship between employee and employer than to the discharge by the school administration of its public educational function.<sup>298</sup> The court also found that the time and manner of the employees' speech "implicate to a great degree legitimate concerns of the government, as an employer, with insubordination versus respect for proper authority and decision-making procedures . . . ."<sup>299</sup>

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293. *Id.* (quoting *Connick*, 461 U.S. at 143, 146).

294. *Id.* (citations omitted) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

295. *Id.* (citing *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644 (8th Cir. 1933)).

296. *See id.* at 955 (citations omitted).

297. *Id.*

298. *See id.* at 956.

299. *See id.* at 956-57.

## IV. ARBITRATION DECISIONS

Even in the private sector where constitutional restrictions are not applicable absent state action,<sup>300</sup> a review of arbitral case law, both published and unpublished, indicates that arbitrators track the holdings of the courts and apply a *Pickering*-type balancing test to employee speech. Arbitrators may consider the public concern of the employee's speech, but rarely do they discuss it as a threshold requirement. Instead, and like the courts that skip a *Connick* analysis, the nature of the speech is analyzed within the context of a *Pickering* balancing process. Without question and with few exceptions, arbitrators take the position that defaming or unjustly criticizing the employer is an industrial offense and an act of disloyalty.<sup>301</sup> While application of any balancing test may invite what Professor Laurence Tribe calls "standardless balancing,"<sup>302</sup> arbitrators have formulated criteria to be applied in post hoc employee disciplinary cases.

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300. See *Huron Forge & Mach. Co. v. United Auto. Aerospace and Agric. Implement Workers of Am., Local 174*, 75 Lab. Arb. (BNA) 83, 90 (1980) (Roumell, Arb.). In *Huron Forge & Machine Co.*, the arbitrator correctly ruled that the First Amendment does not prohibit private conduct unaccompanied by governmental action. See *id.* The arbitrator sustained the dismissal of an employee despite a First Amendment claim for distributing leaflets entitled "strike or go under" and advocating violence against racists, Nazis, and members of the Ku Klux Klan. See *id.* at 96-97. Arbitrator Roumell, quoting the decision of the Supreme Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976), stated:

It is, of course, a common place that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state. Thus, while statutory or common law may in some situations extend the protection or provide redress against a private corporation or persons who seek to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

*Huron Forge & Mach. Co.*, 75 Lab. Arb. (BNA) at 90 (quoting *Hudgens*, 424 U.S. at 513). From this language, it is apparent that the union's argument that the employee has a First Amendment right to distribute literature on Company property must be rejected. See *id.* at 90-91.

The decision of Arbitrator Roumell reflects the thinking of most arbitrators. See generally MARVIN HILL JR. & ANTHONY SINICROPI, *EVIDENCE IN ARBITRATION* 243-55 (1989) (discussing improperly seized evidence and the application of constitutional constraints).

301. See TIM BORNSTEIN & ANN GOSLINE ET AL., *LABOR AND EMPLOYMENT ARBITRATION* § 20.05(1) (1989).

302. See TRIBE, *supra* note 182, at 931 n.15.

Discussing the role of employee free speech in the workplace, Arbitrator Carlton Snow stated:

Free speech rights are not lost in the work place, but there is also an obligation not to be a disruptive influence. One arbitrator has defined the duty of an [employee's] loyalty as "the obligation to do his best to act or refrain from acting so as to enhance rather than to endanger the best interests of his employer. Loyalty usually is manifested in the context of voluntary acceptance of a relationship which itself implies an assumption of an identity of interests and support of a common effort and continued effectiveness."<sup>303</sup>

Arbitrator Snow went on to outline the criteria that are considered in balancing the rights of management vis-a-vis the employee:

There are a number of relevant factors to be considered in analyzing breaches of an employe[e]'s duty of loyalty. For example, was the disputed conduct expressed orally or in writing? Written expressions generally have been viewed by arbitrators as more serious. Second, were disputed statements of an employe[e] reasonably believed to be "true" or "false" when made? If known to be "partially true" or if proven to be "false," this has been a significant factor in arbitral decisions. Another factor considered by arbitrators in disloyalty cases has been the tone of statements made by an employe[e]. Was the tone malicious, inflammatory, disruptive, or [did it place] the company in a position of ridicule? One arbitrator has been clear about the fact that this theme in arbitral law has remained sensitive to "free speech" rights of employe[e]s and does recognize that there may be circumstances that require an employe[e] to "go public" with certain disputes.<sup>304</sup>

Arbitrator Snow went on to note the observations of a fellow arbitrator:

Before [going public], an employee should attempt to get all the facts and give his or her employer an opportunity to explain or correct the problem. If no satisfaction results, then and only then may an employee go public, and if so, such employee must be willing to assume the consequences if he or she is wrong.<sup>305</sup>

Reflecting the better view regarding employee speech, Arbitrator Snow concluded:

As a general rule, injurious remarks against an employer that damage the employer's image or adversely affect employe[e] discipline or morale are grounds for discharge or substantial discipline. This is particularly true when such remarks are made in public or to individuals outside one's facility.<sup>306</sup>

Arbitrator Adolph M. Koven, in *United Cable Television Corp. v. Freight Checkers Local 856*,<sup>307</sup> applied the criteria cited by Arbitrator Snow and added an additional one:

Issues of loyalty and free speech ordinarily go hand in hand. This is particularly the case where loyalty is in issue (with the possible exception of conflict-of-inter-

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303. *United Grocers, Inc. v. Joint Council of Teamsters No. 37, Local 962*, 93 Lab. Arb. (BNA) 1289, 1292 (1992) (Snow, Arb.) (quoting Los Angeles Herald-Examiner, 67-2 Labor Arb. Award (CCH) ¶8658 (1967)).

304. *See id.* at 1292-93 (citations omitted).

305. *See id.* at 1293.

306. *See id.*

307. 92 Lab. Arb. (BNA) 3 (1988) (Koven, Arb.).

est situations such as those involving the holding of a second job with a competing employer). Five of the many factors discussed by [Arbitrator Joe] Gentile in *Zellerbachk Paper Co. [v. Freight Checkers, Clerical Employees and Helpers Union, Local 856]* are especially apt in the Grievant's case: (1) whether the act or conduct was expressed orally or in writing; (2) whether the act or conduct was directed toward persons within the private organization or outside the organization; (3) "(I)f 'harm' is found by an arbitrator, . . . and there are certainly varying degrees noted in the reported decisions, arbitrators take a firm stand and will generally find support in the facts to sustain some degrees of discipline;" (4) whether the "tone" or actual language of the statements were malicious, slanderous, inflammatory, disruptive; (5) whether there were "substantial rights of expression . . ." involved. This Arbitrator would add another factor: (6) whether the act or conduct, if outside proper union channels, was directed to disrupt the legitimate goals of the collective bargaining process and the proper relationship between the parties.<sup>308</sup>

Announcing he was "formulat[ing] a set of standards for judging whistle-blowing in the public sector,"<sup>309</sup> Arbitrator Howard Sacks, writing for a tripartite Board of Arbitration,<sup>310</sup> formulated the following standards to be applied in balancing the interests of employer and employee:

1. The significance of the activity exposed by the act of whistle-blowing. The more important such interest, the greater the protection that ought to be afforded the whistleblower. Compare the communication of information about (1) illegal acts; (2) the investment of municipal pension funds in corporations doing business in South Africa; and (3) a projected reorganization of a six-person clerical unit in a recreation department that would reduce the whistleblower's responsibilities.

2. The employee's motives in becoming a whistleblower. Are they purely personal, e.g., to protect or advance his own career, or to damage someone else's career? Or are they directed toward vindicating the public's interest in preventing fraud, waste or criminal activity?

3. Whether the information given by the employee is true, and if not, the employee's "state of mind" regarding the truth of such information. Thus, if it turns out that the employee is mistaken, did he have reasonable grounds for believing the truth of his charges? Or was he guilty of knowing use of false information or of reckless indifference to the truth of such information? In this regard, we prefer the standard established by the Civil Service Reform Act, "reasonable belief," to the somewhat lower standard enunciated in *Pickering*, any state of mind other than "knowledge of falsity or reckless disregard for truth or falsity of the information."

4. The means chosen by the employee to communicate his information or alle-

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308. See *id.* at 10 (citations omitted) (quoting *Zellerbachk Paper Co. v. Freight Checkers, Clerical Employees and Helpers Union, Local 856*, 75 Lab. Arb. (BNA) 868, 875-76 (1980) (Gentile, Arb.)).

309. *Town of Plainville Conn. v. American Fed'n of State, County and Mun. Employees Local 1303*, 77 Lab. Arb. (BNA) 161, 166 (1981) (Sacks, Arb.).

310. See *id.* at 161.

gations. Ordinarily, internal channels should first be used, unless there are good reasons for not using them, such as a reasonable belief that his superiors will do a poor or dishonest job of investigating the matter. If special channels for whistleblowers are established, . . . the employee should use this channel. If the circumstances justify going outside of regular channels, does the employee write his legislator or the prosecutor, or does he arrange a media event? If he attempts to maintain his anonymity, is there good reason for it, such as a legitimate fear of employer reprisal?

5. The potential or actual harm to the employer caused by the whistleblowing. Harm can take several forms: creation of disharmony within the enterprise; impairment of discipline of the whistleblower and others; other interference with efficiency; damage to the employer's relations with other government agencies, persons it services, taxpayers, or citizens generally. The employer's ability to defend itself must also be considered, such as its ability promptly and effectively to refute false charges of wrongdoing.

Compare a charge by a high-level employee in a municipal water department that another city department has been polluting the city reservoir with a charge by a low-level employee in a state agency that his supervisor is using an office typewriter to type personal letters.

6. The employee's right to engage in self-expression, that is, his freedom, as a citizen, to exercise his rights of free speech and the right to petition.<sup>311</sup>

Applying the above criteria and stating that the arbitration board was "not declaring open season on government agencies," Arbitrator Sacks reversed the dismissal of an employee (despite the Arbitrator's concern about the "Grievant's future usefulness as a town employee") for notifying a councilman anonymously that a town-owned machine, "claimed missing or stolen," may have, instead, been misappropriated.<sup>312</sup> The employee also stated that he believed that the authorities conducted an improper investigation of the matter.<sup>313</sup> Arbitrator Sacks concluded with a cautionary warning to other employees: "Anyone who wants to blow the whistle ought carefully to consider the several limitations we—and other tribunals—have placed on that activity."<sup>314</sup>

Arbitrator Morris Shanker reported a 1997 decision<sup>315</sup> involving the discipline of a clerk-typist working in a water treatment plant who sent a memo to the city council asserting management was engaging in illegal activities involving the plant's operation.<sup>316</sup> Citing both *Connick* and *Pickering*, Arbitrator Shanker upheld the employee's three day suspension reasoning that "considering the content, time, place and manner of Grievant's public statements," the speech was not protected under the

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311. *See id.* at 166-67.

312. *See id.* at 161, 171.

313. *See id.* at 161.

314. *See id.* at 171.

315. *City of Wooster v. Wooster Employees Ass'n*, 109 Lab. Arb. (BNA) 230 (1997) (Shanker, Arb.).

316. *See id.*

First Amendment.<sup>317</sup> The arbitrator pointed out that the employee made her statements "with next to no objective evidence to support them."<sup>318</sup> Arbitrator Shanker also noted that the employee's "high school diploma plus her service as a clerk-typist at the Water Plant hardly qualify her as one capable of dealing with the highly technical and scientific determinations that must be made in connection with operating and building a water plant."<sup>319</sup> Furthermore, the arbitrator found it important that the employee's statements "were much more than mere expressions of disagreement with management."<sup>320</sup> Rather, the statements "impugned the honesty and integrity of the City Council."<sup>321</sup> A mere belief of misconduct, with no reasonable and good faith effort to determine the accuracy of the information, was insufficient to provide a safe harbor for the employee.<sup>322</sup> The arbitrator's final comments recognized the efficiency and goal-oriented function of the organization:

Comparable to any other private production facility, managerial decisions to improve the production facility, and which are made after proper investigation, needs to be respected by the employees who are called upon to implement these decisions. Further, employee morale is seriously undercut when one of the employees publicly impugns the integrity and honesty of the remaining employees.

This is not to suggest that mere disagreement with managerial decisions is cause for employee disciplinary action, so long as it is presented through proper channels in good faith and supported by sound arguments and/or objective evidence. Indeed, such constructive criticism often can be helpful in improving the production effort.

But, at some point, a managerial decision, made after consideration of all of the available evidence and competing viewpoints, must be respected by the employees who need to carry it out. If doing so becomes too personally burdensome for a particular employee, then her appropriate action is not to continue vociferously to oppose and criticize the decision. That can only lead to the undercutting of legitimate managerial authority, as well as strife, disharmony, and demoralization in the work place. Rather, an employee who finds it impossible to live with a particular managerial decision must seriously consider transferring to another situation where the managerial decision will not affect her.<sup>323</sup>

In the rare case where management can offer no good reason to regulate the employee's speech, disputes are likely to be resolved in favor of the employee. Arbitrator Ronald Talarico, in *Hicksville Exempted Village*

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317. *See id.*

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.*

322. *See id.*

323. *See id.*

*Board of Education v. Hicksville Education Ass'n*,<sup>324</sup> considered the free speech argument of a teacher who received a letter of reprimand for making a statement at a school board meeting that contradicted the superintendent.<sup>325</sup> While seated in the audience, the teacher stated that no teacher earns the \$39,000 proffered by the superintendent (who had the podium at the time) as the amount the district would save by not filling a teacher vacancy.<sup>326</sup> The administration subsequently verified that six teachers made that amount or more.<sup>327</sup> Applying a *Pickering* balancing test, Arbitrator Talarico ruled for the teacher.<sup>328</sup> Consistent with *Connick*, the arbitrator reasoned that the key factor was “whether the employee’s speech touch[ed] a matter of ‘public concern’” and, “[c]onversely, [whether] the speech deal[t] with personnel disputes or grievances with management.”<sup>329</sup> The arbitrator found that although the teacher had a “personal interest in . . . what teachers earn[ed] this did not reduce her comment to being one of purely personal interest.”<sup>330</sup> Failing “to see how [the] superintendent could take personal offense at or be embarrassed” at the comment, the Arbitrator found the comment “innocuous.”<sup>331</sup>

In *O’Connor v. Ortega*,<sup>332</sup> the Supreme Court explored the reasonableness of a government employee’s expectation of privacy in his government-issued desk and files.<sup>333</sup> *Ortega* involved a search of the desk and files of a state employee on administrative leave during an investigation of work-related misconduct.<sup>334</sup> During the course of the search, the administration seized several items belonging to Ortega.<sup>335</sup> The majority of the Court held that Ortega’s expectation of privacy in his desk and filing cabinets was reasonable.<sup>336</sup> Justice O’Connor, writing for four justices, pointed out that employees’ expectation of privacy “may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.”<sup>337</sup> Although the majority did not reach a consensus as

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324. 102 Lab. Arb. (BNA) 214 (1994) (Talarico, Arb.).

325. *See id.* at 215.

326. *See id.*

327. *See id.* at 218.

328. *See id.* at 219.

329. *See id.* at 218.

330. *See id.*

331. *See id.*

332. 480 U.S. 709 (1987).

333. *See id.* at 711-12.

334. *See id.* at 712-13.

335. *See id.* at 713.

336. *See id.* at 719.

337. *See id.* at 717. Justice O’Connor delivered the opinion of the Court. *See id.* at 709. Chief Justice Rehnquist and Justices White and Powell joined the opinion. *See id.*

to what standard to use for public employer searches, what is important in *Ortega* is that the Court specifically rejected management's argument that "[government] employees can never have a reasonable expectation of privacy in [his or her] place of work."<sup>338</sup> Thus, an employee who is given areas or equipment for his or her exclusive use can legitimately assert a reasonable expectation, absent practice or regulation to the contrary.<sup>339</sup>

Do employees have a reasonable expectation of privacy in their e-mail and the messages they send? In the only reported decision we know on the subject, Arbitrator Ronald Talarico, in *Conneaut School District*,<sup>340</sup> reversed the discipline (a letter of reprimand) of a librarian for using her employer's e-mail system to send outside librarian's messages that complained about the school's curriculum policy.<sup>341</sup> The Administration issued the reprimand because of the librarians use of the school's computer to express her personal opinion.<sup>342</sup> In reversing management, Arbitrator Talarico applied a *Pickering*-type balancing test and declared: "We must start from the premise that as a basic tenet of constitutional law freedom of speech is not an absolute. Moreover, in situations where a public employer places limitations upon the speech of its employees a balancing of interests approach must be considered."<sup>343</sup> Furthermore, the arbitrator found that other teachers had criticized the new curriculum plan during workshops and group meetings,<sup>344</sup> and the school district did not discipline these other teachers. Additionally, the arbitrator determined that "the Grievant would have been able to speak over the

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338. *See id.*

339. *See, e.g.,* Gillard v. Schmidt, 579 F.2d 825, 828 (3d Cir. 1978) (holding that a "[school] guidance counselor, charged with maintaining sensitive student records, in the absence of an accepted practice or regulation to the contrary, enjoys a reasonable expectation of privacy in his school desk"); *United States v. Bunkers*, 521 F.2d 1217, 1218-21 (9th Cir. 1975) (upholding search of postal worker's locker after employee was observed taking package from work station to women's locker room, noting regulations made clear lockers were subject to search); *United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (holding that an employee's exclusive use of desk made search for evidence of petty larceny unreasonable, noting the search was not for official property needed for governmental use).

340. 104 Lab. Arb. (BNA) 909 (1995) (Talarico, Arb.).

341. *See id.* at 914.

342. *See id.* at 911-12.

343. *See id.* at 913; *see also* *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (holding that public employees have free speech protection for matters of public concern).

344. *See Conneaut*, 104 Lab. Arb. (BNA) at 913.



telephone or write personal letters . . . expressing her reservations or criticisms . . . with impunity.<sup>345</sup> Without the school's express instruction that the e-mail system be used for school purposes only, the arbitrator could not find a blatant misuse of the employer's system.<sup>346</sup> What was of note was the arbitrator's declaration that "freedom of speech does not ordinarily attach to one's use of personal property owned by another."<sup>347</sup> His analysis accordingly tracked *Ortega*.<sup>348</sup> He found the message "appropriate."<sup>349</sup>

One issue frequently litigated before labor arbitrators, courts, and agencies concerns the special status of employees who serve as union representatives. Are they accorded special consideration because of their status and allowed more leeway to disparage management? Or, alternatively, are they held to a higher standard of conduct because of their special knowledge and responsibility? Does speech that would otherwise result in discipline become "protected" if uttered at a union meeting? Do arbitrators track National Labor Relations Board (NLRB) case law?

Interpreting section 7<sup>350</sup> and 10(c)<sup>351</sup> of the National Labor Relations Act,<sup>352</sup> the NLRB has recognized a duty of loyalty owed by employees to their company, even though the Act itself makes no reference to public disparagement or disloyalty. In *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*,<sup>353</sup> the Supreme Court affirmed an NLRB decision sustaining the dismissal of unionized technicians working for Jefferson Standard Broadcasting Company, a North

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345. *Id.* at 914.

346. *See id.*

347. *See id.*

348. *O'Connor v. Ortega*, 408 U.S. 709 (1987).

349. *See Conneaut*, 104 Lab. Arb. (BNA) at 914.

350. National Labor Relations Act § 7, 29 U.S.C. § 157 (1994). Section 7 provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

*Id.* Section 8(a)(1) provides in relevant: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1994).

351. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1994). Section 10(c) in relevant part provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . . ." *Id.*

352. 29 U.S.C. §§ 151-169 (1994).

353. 346 U.S. 464 (1953) [hereinafter *Jefferson Standard*].

Carolina television station.<sup>354</sup> The technicians distributed handbills containing disparaging remarks about the quality of the station's product and its business policies.<sup>355</sup>

The issue of the case centered on whether the employees were discharged for actual cause.<sup>356</sup> It was clear they were discharged for their disparaging attack on the company.<sup>357</sup> What was not clear, however, was whether this demonstration of disloyalty was adequate cause for terminating the employees.<sup>358</sup>

In ruling against the employees, the Court noted the factors used in making its decision: (1) the employees' attack did not relate to labor practices at the company; (2) the speech made "no reference to wages, hours, or working conditions[;]" (3) the policies attacked "finance and public relations for which management, not technicians, [were] responsible[;]" (4) "[t]he attack asked for no public sympathy or support[;]" and (5) the attack was continuing, "initiated while off-duty, upon the very interests [the employees] were paid to conserve and develop."<sup>359</sup> More important, the Court noted that when employees continue to work, they owe a duty of loyalty not to disparage the produce or services of their employer or to hamper the employer's sales, even if such activity is not illegal.<sup>360</sup> According to the Court:

There is no more elemental cause for discharge of an employee than disloyalty to

354. *See id.* at 465.

355. *See id.* at 467-68. The leaflet read in part:

IS CHARLOTTE A SECOND-CLASS CITY?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV . . . . Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups . . . . Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled [sic] to the pictures now being presented to them?

WBT TECHNICIANS

*Id.* at 468.

356. *See id.* at 471.

357. *See id.*

358. *See id.* at 472.

359. *See id.* at 476.

360. *See id.* at 473.

his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.<sup>361</sup>

The Court noted that “Congress, while safeguarding, in § 7, the right of employees to engage in ‘concerted activities for the purpose of collective bargaining or other mutual aid or protection,’ did not weaken the underlying contractual bonds and loyalties of employer and employee.”<sup>362</sup>

What is interesting is the Court’s declaration that the “fortuity of the coexistence of a labor dispute” does not afford the employees a defense.<sup>363</sup> The technicians’ attack “was a concerted separable attack purporting to be made in the interest of the public rather than in that of the employees.”<sup>364</sup> The Court accordingly left an opening for employees who engage in disparaging speech that is “related to” a current labor dispute.<sup>365</sup>

The NLRB has been liberal in determining when employee speech is sufficiently “related to” working conditions so as to be protected under the Act.<sup>366</sup> The problem for employees, however, is that unlike *Connick’s* public concern requirement,<sup>367</sup> broad-based appeals to the public will not be protected under the Act, no matter how much the speech is related to issues of public concern, if the speech does not

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361. *Id.* at 472.

362. *Id.* at 473 (quoting National Labor Relations Act § 7, 29 U.S.C. § 157 (1994)).

363. *See id.* at 476.

364. *See id.* at 477.

365. *See id.*

366. *See, e.g.,* *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 813-15 (2d Cir. 1980) (distinguishing *Jefferson Standard* and upholding an NLRB determination protecting a nurse who made a report “analogous to complaints concerning safety violations made to appropriate governmental bodies”); *Community Hosp. v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (enforcing NLRB decision that protected employee’s letter to editors and television interviews complaining about low pay and nursing shortages in general and employer’s hospital, in particular); *Emarco, Inc.*, 284 N.L.R.B. 832, 833-34 (1987) (applying *Jefferson Standard’s* “related to” test, finding employee speech regarding delinquency of employer’s payments to health and safety plan protected); *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. 442, 443 (1987) (stating that “[t]here is no rule that only concerted activity undertaken for the purpose of having a grievance adjusted or in anticipation of some other action is entitled to protection under Section 7”); *Pincus Bros., Inc.*, 237 N.L.R.B. 1063, 1065 (1978) (refusing to defer to arbitrator’s award finding cause for employee who distributed handbill critical to management); *American Hosp. Ass’n*, 230 N.L.R.B. 54, 57 (1977) (finding that leaflets critical of employer were protected when not distributed to general public and kept within confines of employer’s business). *See generally* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992) (discussing the subject-matter limits of section 7 of the NLRA regarding free speech).

367. *See Connick v. Myers*, 461 U.S. 138, 146 (1983).

advance the economic self-interest of employees in the bargaining unit.<sup>368</sup> Public concern alone will not make the speech protected under the Act.<sup>369</sup> Arbitrators, however, have tracked NLRB case law regarding striking a balance between employees's section 7 rights and management's interest in not having its managers, products, or reputation disparaged.<sup>370</sup> In general, labor arbitrators hold that management may restrict

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368. See Estlund, *supra* note 366, at 922. . "This seeming anomaly—the privileging of material self-interest over moral responsibility under section 7—is all the more striking to those familiar with the law governing the speech rights of public employees." *Id.*

369. See *id.* at 924.

370. See, e.g., Department of the Air Force, Luke Air Force Base, 90 Lab. Arb. (BNA) 1065, 1071 (1988) (Cohen, Arb.) (finding that arbitrator lacks authority to grant relief against newspaper publication of union's alleged false and misleading statements, reasoning that "[t]o prohibit the Union from using its own choice of language in describing its feelings would require censorship and/or denial of First Amendment rights"); Greyhound Food Management, 87 Lab. Arb. (BNA) 619, 621-22 (1985) (Ellmann, Arb.) (reversing verbal reprimand to union steward who posted notices stating employer intended to introduce "fast food" as way to "destroy union wages and conditions" and noting strike at second facility and mass picketing); United States Dep't of Navy, Norfolk Naval Shipyard, 75 Lab. Arb. (BNA) 889, 893 (1980) (Aronin, Arb.) (finding union did not violate parties' agreement where "employer has not presented proof of false statements knowingly or recklessly made, which would constitute exception of employees' right of free speech under First Amendment"); San Antonio Air Logistics Ctr., 73 Lab. Arb. (BNA) 1020, 1024 (1979) (Lilly, Arb.) (noting that employer has burden of proof in showing that matters complained of in newspaper "did in fact contribute to a deterioration in the relationship between the parties"); *Wisconsin Tissue Mills, Inc.*, 73 Lab. Arb. (BNA) 271, 274 (1979) (Flagler, Arb.) (noting that absent agreed upon contractual restrictions, a union's freedom of speech is interpreted broadly under the Constitution). *But see* News-Sun Div. of Copley Press, Inc., 91 Lab. Arb. (BNA) 1324, 1330 (1988) (Goldstein, Arb.) (allowing management to move union bulletin board to a remote area where the board contained disloyal, critical, scatological, and obscene material, reasoning "[t]he simple fact is that in the area of labor relations, rights of free expression and free speech have been consistently balanced with employer interests in discipline, production and safety, as well as its rights to use physical property freely"); U.S. Army Soldier Support Ctr., 91 Lab. Arb. (BNA) 1201, 1204 (1988) (Wolff, Arb.) (denying union free-speech defense for posting article referring to a management official in a disparaging, disdainful, belittling manner, where parties' collective bargaining agreement prohibited posting of material containing "derogatory remarks" or "personal attacks on individuals"); Marion Community Sch., 88 Lab. Arb. (BNA) 916, 920 (1987) (Ipavec, Arb.) (upholding school board's written warning to teacher for directing derogatory comments at two non-union teachers for not supporting the union, stating "[p]rotected speech does not include coercion or humiliation of fellow employees . . ."); San Antonio Air Logistic Ctr., 73 Lab. Arb. (BNA) 1074, 1082 (1979) (Caraway, Arb.) (finding that union improperly published statement in newsletter advising members to oppose a survey that

what would otherwise be the “free speech” rights of employees, even union stewards, “if there is a legitimate and overriding reason to do so.”<sup>371</sup> It apparently matters little whether the employee is a union official, although it does matter whether traditional union-type interests are at issue.<sup>372</sup>

In *United Cable Television Corp.*,<sup>373</sup> Arbitrator Adolph M. Koven recognized that speech critical of an employer may be protected concerted activity under the National Labor Relations Act.<sup>374</sup> Nevertheless, Arbitrator Koven ruled that a shop steward’s posting of a letter on a union bulletin board calling his employer’s vice president a “liar” was outside the zone of protected activity.<sup>375</sup> Applying NLRB case law, the arbitrator correctly reasoned that conduct, although concerted, can be unprotected “if it maliciously disparages an employer or otherwise unduly interferes with the employer’s business interests.”<sup>376</sup> What is of note is the arbitrator’s finding that NLRB case law appeared to favor the grievant’s case.<sup>377</sup> Arbitrator Koven cited *Dreis & Krump Manufacturing Co.*,<sup>378</sup> where the NLRB stated that “[o]ffensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act’s protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.”<sup>379</sup> Arbitrator Koven found it irrelevant, at least with respect to the protection issue, “whether accusations made in the course of union activity were libelous or defamatory so as to support a lawsuit.”<sup>380</sup>

Following the views of some courts, an important consideration voiced by many arbitrators is whether the employee acted with malice.<sup>381</sup> In

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employer initiated to gather information concerning employees’ attitude toward their jobs).

371. See *Rohr Indus., Inc.*, 76 Lab. Arb. (BNA) 273, 278 (1980) (Weiss, Arb.) (“What these arbitration awards teach is that an employer may validly restrict the ‘free speech’ activities of employees, even when they are engaged in Union business, if there is a legitimate and overriding reason to do so.”).

372. See, e.g., *Yellow Freight Sys., Inc.*, 103 Lab. Arb. (BNA) 388, 392 (1994) (Odom Jr., Arb.) (stating that “[p]rotection for his rights as an advocate does not extend to exempt him from the consequences of violations of work rules”).

373. 92 Lab. Arb. (BNA) 3 (1988) (Koven, Arb.).

374. See *id.* at 8-12.

375. See *id.*

376. See *id.* at 9.

377. See *id.* at 12.

378. 221 N.L.R.B. 309 (1975).

379. *United Cable Television Corp.*, 92 Lab. Arb. (BNA) at 9 (quoting *Dreis A. Krump Mfg. Co.*, 221 N.L.R.B. at 315 (citations omitted)).

380. See *id.*

381. See, e.g., *NLRB v. Red Top, Inc.*, 455 F.2d 721, 728 (8th Cir. 1972) (holding employee’s bad faith threat to complain to customer unprotected); *American Arbitration Ass’n*, 233 N.L.R.B. 71, 74-75 (1977) (finding employee’s letters ridiculing

*Air Canada*,<sup>382</sup> Arbitrator Howard Brown considered the suspension of a union chairman for writing a letter to the district office castigating management's handling of the grievance of an employee.<sup>383</sup> Management argued the letter was libelous and insubordinate in nature.<sup>384</sup> In ruling for the union, Arbitrator Brown quoted with approval the principles outlined by another arbitration board dealing with the speech issue:

"While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers and do so in vivid and unflattering terms. Being at the forward edge of encounters with management the shop steward becomes particularly vulnerable in the area of discipline . . . [.]

If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer . . . . The statements of union stewards must be protected but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute licence [sic] or an immunity from discipline in all cases . . . [.]"<sup>385</sup>

In *John's Super Valu*,<sup>386</sup> Arbitrator Ed Krinsky reversed the dismissal of an employee who announced that if the owner "hadn't taken money out of the registers, he wouldn't have to be blaming his help for it."<sup>387</sup> Arbitrator Krinsky pointed out that the remark followed a union meeting discussing the ability of the owners to pay the wages sought by the union.<sup>388</sup> Similarly, in *City of Williamsport*,<sup>389</sup> Arbitrator Loewenberg reversed the suspension of a police officer who wrote an open letter criti-

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employer's relationships with its customers unprotected); *Coca Cola Bottling Works, Inc.*, 186 N.L.R.B. 1050, 1054-55 (1970) (holding leaflet designed to create fear in the public in drinking Coke was unprotected).

382. 77 Lab. Arb. (BNA) 172 (1981) (Brown, Arb.).

383. *See id.* at 172.

384. *See id.* at 179.

385. *See id.* at 180 (quoting *Burns Meats Ltd. & Canadian Food & Allied Workers' Local P-139* (June 1980) (Picher, Arb.) (unreported)).

386. 661 Lab. Arb. (BNA) 1125 (1973) (Krinsky, Arb.).

387. *See id.* at 1125-26.

388. *See id.* at 1128.

389. 61 Lab. Arb. (BNA) 279 (1973) (Loewenberg, Arb.).

cal of management.<sup>390</sup> The arbitrator found that the employee was carrying out a legitimate union function.<sup>391</sup>

Arbitrator Frank Murphy, in *Mid-West Chandelier Co.*,<sup>392</sup> cited *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, and specifically held that a union steward, who told two bargaining-unit members that two management officials had bribed or bullied an Asian supervisor, could be disciplined, even though the comments were part of on-going collective bargaining and were made "intra union."<sup>393</sup> After finding the activities protected, the arbitrator nevertheless outlined the criteria to be applied in deciding whether the employee's speech could result in discipline.<sup>394</sup> According to Arbitrator Murphy:

In determining whether or not the grievant's statements were such as to deprive him of his protected status, consideration must be given to what he actually said, to the circumstances in which his statements were made, to the effects of his statements, as well as to any guidelines or standards utilized by the National Labor Relations Board and the courts in making such a determination.<sup>395</sup>

#### Arbitrator Murphy reasoned

that the statements and actions of the grievant were so unwarranted and had such a negative effect on the integrity and reputation of the Company president and such a potentially disruptive effect on plant operations and discipline, as well as on relations among employees and between management and its employees, as to place them outside the special status and protection accorded to him as Union steward under the Agreement.<sup>396</sup>

Statements considered "flagrant," "obscene," "violent," "indefensible," or otherwise "extremely disparaging" will not be protected under the Act and, as such, are unlikely to be sanctioned by arbitrators ruling on discipline for this type of speech.<sup>397</sup> Of course, what one arbitrator considers "flagrant," "obscene," "violent," "indefensible," or otherwise "extreme-

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390. *See id.* at 285.

391. *See id.* (stating that, although discharged employee violated company policy by not obtaining approval for letter from superiors, he did "not need such approval since he was acting as [a] spokesman for the [union] and carrying out [a] legitimate [union] function").

392. 102 Lab. Arb. (BNA) 833 (1994) (Murphy, Arb.).

393. *See id.* at 837-38.

394. *See id.* at 838-39.

395. *Id.* at 839.

396. *Id.* at 840.

397. *See, e.g.,* Tenesco Corp., 107 Lab. Arb. (BNA) 689, 692 (1996) (Nicholas, Arb.) (stating that the "company recognizes the right of Union's stewards to present their arguments zealously in grievance meetings, nevertheless, it is not the intention of the Labor Relations Act to allow Union officers to make defamatory or slanderous accusations"); *Mid-West Chandelier Co.*, 102 Lab. Arb. 833, 841-42 (BNA) (1994) (Murphy, Arb.) (affirming idea that if employee's conduct becomes so flagrant that it threatens employer's ability to maintain order and respect it will not be protected).

ly disparaging<sup>398</sup> will receive a pass from another arbitrator. The final outcome will, in significant part, be determined by the arbitrator's finding regarding the employee's motivation, whether his conduct interfered with the operation of the employer's business, and whether the parties' collective bargaining agreement in any way limits the form, manner, or timing of the statements. Speech will generally be protected if it relates to the employee's job (but not the job as it individually affects the employee), the employee's status or conditions at work, union security, or employees' overall common interests.<sup>399</sup>

## V. CONCLUSION

The implications of *Pickering* and *Connick* for public management are clear: the First Amendment, while protecting the speech of public employees, does not give an employee carte blanche license to castigate his employer or his employer's product in a public forum. As so well put by the Seventh Circuit, "public employers do not lose their ability to control behavior and speech in the workplace merely because they are governmental bodies subject to the restraints of the First Amendment."<sup>400</sup> Courts have even recognized the employer's interest in protecting its product and reputation against a First Amendment claim of freedom of religion.<sup>401</sup> No hard and fast rules exist other than to stress that the key

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398. See *supra* note 397.

399. See *Huron Forge & Mach. Co.*, 75 Lab. Arb. (BNA) 83, 91 (1980) (Roumell, Arb.).

400. *Yoggerst v. Hedges*, 739 F.2d 293, 295 (7th Cir. 1984).

401. See *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997). In *Lumpkin*, the City of San Francisco removed the Reverend Eugene Lumpkin from his position as a member of the San Francisco Human Rights Commission because of statements he made. See *id.* at 1499. The statements cited by the City in removing Lumpkin included the following: "[T]he homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin. See *id.* Lumpkin also stated, "I believe everything the Bible sayeth,' which includes belief in the proscription in Leviticus that a man who sleeps with a man should be put to death." *Id.*

Lumpkin sued the Mayor and the City, "claiming his removal violated his rights under the First Amendment and the Religious Freedom Restoration Act of 1993." See *id.* at 1500; see also U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 (1994)). The district court granted the administration's motion for summary judgment on the ground that the City was justified "because Reverend Lumpkin's public statements were inconsistent with his 'broad responsibilities for formulating, implementing and explaining [the] policy' of the Human Rights Commission, . . . and because his dismissal did not constitute governmental establishment of religion." See *id.* at 1500



is whether the employee's speech touches a matter of public concern and, according to the *Connick* Court, this is determined by the "content, form, and context of a given statement."<sup>402</sup> If the speech does not address a "public concern," it is *not* entitled to constitutional protection. No further inquiry is necessary.

What makes speech a matter of public concern? Simply because the comments of the employee are in *some* way a matter of social interest does not mean that the speech is protected by the First Amendment. To be protected, the complaints must involve the public in some important way. It apparently matters not whether the speech is made in private conversation with a co-worker (although we believe *Rankin v. McPherson* was decided incorrectly).<sup>403</sup> However, under the First Amendment, the "main thrust" of the employee's speech must not take the form of a private grievance. Case law indicates that when the employee's speech deals only with personnel disputes or individual grievances with management, it will *not* be protected.<sup>404</sup> The rationale is that such information, however accurate, adds little to the public's evaluation

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(alteration in original) (citation omitted). The Ninth Circuit affirmed. *See id.* at 1502.

The court stated "[t]he First Amendment strictly protect[ed] freedom of expression. Nonetheless, when the government acts as an employer, it has certain latitude to protect its operations and policies from being subverted by its own personnel." *Id.* at 1500 (citing *Waters v. Churchill*, 511 U.S. 661, 675-77 (1994) (plurality opinion)). In the court's view, "his First Amendment rights may be trumped by important interests of the City he agreed to serve." *Id.* Applying *Pickering*, the court declared:

When we apply *Pickering* and weigh the City's interest in eliminating prejudice and discrimination against Reverend Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City's interests prevail. As a private citizen, Reverend Lumpkin is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a Human Rights Commissioner.

*Id.* at 1501. The court found that "the City's interest in having commissioners who work to promote City policies far outweighs any commissioner's First Amendment interest in publicly expressing views that subvert those policies." *Id.*

402. *See Connick v. Myers*, 461 U.S. 138, 147-48 (1983). One practitioner, addressing the *Connick* test, quipped that making this judgment is "an interpretative task that is tantamount to deciding what is good abstract art and what is bad abstract art." 35 Gov't Empl. Rel. Rep. (Warren, Gorham & Lamont) No. 1733, at 1294 (Oct. 6, 1997) (quoting Dennis P. Duffy, former general counsel of the Congressional Office of Compliance). "The outcome of such cases may depend on how well the attorneys are able to shape the facts in deposition and explain what made a particular individual angry or what motivated the plaintiff to speak out." *Id.*

403. *See Rankin v. McPherson*, 483 U.S. 378 (1987); *see also supra* notes 126-42 and accompanying text.

404. *See supra* notes 228-56 and accompanying text; *see also infra* note 405 and accompanying text.

of the performance of government and, accordingly, is not a matter of public concern.<sup>405</sup> Courts, more so than arbitrators, generally require a

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405. See *McKinley v. City of Eloy*, 705 F.2d 1110, 1113-14 (9th Cir. 1983). "Speech 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 governmental agencies." *Id.* at 1114 (citing *Connick*, 461 U.S. at 140). The court further stated that "[o]n the other hand, speech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Id.* (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1946)); see also *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (finding disclosure of alleged fraudulent billing of a mental health board protected under First Amendment); *Johnson v. Lincoln Univ.*, 776 F.2d 443, 452 (3rd Cir. 1985) (protecting speech by chemistry professor regarding academic policy); *Anderson v. Central Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984) (holding that teacher coach's letter to school board concerning structure of athletic program was protected because "*Connick* does not require every word of a communication to be of interest to the public"); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 407 (7th Cir. 1984) (holding that an officer is entitled to an injunction against an institution of disciplinary proceedings for disclosing potential police graft because "the public's interest in being informed of serious governmental misconduct is very great"); *Zook v. Brown*, 748 F.2d 1161, 1163 (7th Cir. 1984) (finding endorsement for particular ambulance service by deputy sheriff protected); *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644-45 (8th Cir. 1983) (protecting speech by assistant coach regarding excessive use of corporal punishment by head coach). *But see* *Smith v. Fruin*, 28 F.3d 646, 652-53 (7th Cir. 1994) (holding employee's complaint about non-enforcement of municipal anti-smoking ordinance in his office, which focuses upon employee's own sensitivity to smoke, and not made on behalf of others, communicated in private conversations with his superiors, does not constitute speech on a matter of public concern); *Pruitt v. Howard County Sheriff's Dep't*, 623 A.2d 696, 700-02 (Md. Ct. Spec. App. 1993) (holding use of Nazi mannerisms, such as exaggerated German accents, Nazi salutes, heel clicks, and using terms "achtung" and "seig heil" unprotected under First Amendment).

There is good reason to challenge the "individual grievance" versus "matter of public concern" classification. There are numerous instances where conduct may give rise to an individual grievance while at the same time be of interest to the public. For example, a teacher is terminated for allowing students on a Spain trip to use alcohol with the permission of their parents. Prior to the termination, she challenges the "no alcohol policy" in the parties' negotiated grievance procedure and also goes public with her complaint. Protected? A school district unilaterally eliminates smoking in the faculty lounge. A teacher challenges her termination for sneaking a smoke. She goes public. Protected? A railroad worker is disciplined for talking about the poor way the railroad is run. Safety is just one issue he cites in his personal grievance to management. Protected? The analysis is not advanced very far by simply concluding that an activity is a personal grievance and thus, not deserving of protection. The better inquiry, we believe, is to analyze what conduct, in what context, will give rise

clear issue of public concern *before any Pickering-type* balancing takes place.

Moreover, even when the speech does touch a matter of public concern, if the speech or activity (1) adversely affects the efficiency, discipline, or administration of the public employer,<sup>406</sup> (2) impairs harmony among co-workers (generally important in the protective services),<sup>407</sup> (3) has a detrimental impact on close working relationships for which personal loyalty is important,<sup>408</sup> or (4) applying *Connick* has the *potential* to cause any of the above, the employee's conduct may still be subject to regulation.<sup>409</sup> If management is citing organizational harmony or discipline as an interest that is deserving of being balanced against the employee's free speech claim, there must be *some* showing that harmony or discipline is important to the organization. We submit that organizational discipline may be more important to military and para-military organizations (police, fire, the protective services) than, say, the summer ground crew staff at a university and, in this respect, we see no infirmity when a court or labor arbitrator takes judicial-type notice of this fact. Loyalty requirements are not the same for all organizations.

Disloyal speech that is knowingly or recklessly false should not be protected even if shown to have no harmful effect, although the Supreme Court has not addressed this issue.<sup>410</sup> Motive is apparently relevant. Arbitrators who either apply or look to the law in deciding loyalty cases take a balancing approach.<sup>411</sup> Clear and simple, arbitrators have uni-

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to a court or labor arbitrator concluding the speech is deserving of protection independent of any reference to a private grievance.

406. See *Jurgenson v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984).

407. See *id.*

408. See *id.*

409. See *id.* at 879.

Where personal or employee grievances are more the subject-matter of the speech than matters of public interest it is the rule that "a wide degree of deference to the employer's judgment is appropriate." . . . In fact, it has been said that "under *Connick*, employment issues are not of a public concern . . ." Similarly, the judgment of the employer is generally to be deferred to where, even if there is public concern, there is such concern "in only a most limited sense."

*Id.* at 879-80 (quoting *Connick v. Myers*, 461 U.S. 138, 152 (1982) (citations omitted)); see also, *Waldau v. Coughlin*, No. 97-5162, 1997 WL 634539, at \*1 (D.C. Cir. Sept. 25, 1997), *cert. denied*, 1998 WL 69663 (U.S. Feb. 23, 1998) (upholding removal for postal employee's personal campaign to promote privatization of U.S. Postal Service).

410. The NLRB has ruled that the falsity of a communication does not necessarily deprive it of its protected character. See *Cordura Publications, Inc.*, 280 N.L.R.B. 230, 232 (1986).

411. See, e.g., *County of Monterey*, 93 Lab. Arb. (BNA) 841, 842-43 (1989) (Riker, Arb.) (upholding 20 day suspension of employee for writing letters to state officials protesting a promotion interview process because employee did not use official chan-

formly recognized that the employment relationship is a two-way street and an employee has certain responsibilities to his or her employer, including loyalty. At a minimum, this means that an employee does not have the right to disparage his employer's product or service without risk of discipline.<sup>412</sup> As so well put by one arbitrator, "[i]ndeed, in this sense as compared to the world outside, the industrial world is a relatively closed-society."<sup>413</sup> In short, employees will not be able to bite the hand that feeds them and stay for the banquet.<sup>414</sup> Absent a statute to the contrary, this includes suing your employer<sup>415</sup> or writing articles or books taking management to task.<sup>416</sup>

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nels for complaints and he exceeded interests of public concern); City of Detroit, 83-2 Lab. Arb. Awards (CCH) 5491, 5494 (1983) (McCormick, Arb.) (sustaining suspension of city auditor who, during an interview on a network television station, implicated city officials in a coverup of improprieties in a contract with an oil company); Town of Plainville, 77 Lab. Arb. (BNA) 161, 165 (1981) (Sacks, Arb.) (finding *Pickering* and "the host of decisions which have followed it" relevant); Douglas County, 79-2 Lab. Arb. Award (CCH) 5306, 5310 (1979) (Doyle, Arb.) (upholding suspension of employee for making public statements that care provided by hospital-employer was inadequate); see also Los Angeles Harbor Dep't, 84 Lab. Arb. 860, 862 (1985) (Weiss, Arb.) (holding city employer properly suspended employee for writing letter to newspaper referring to department head as "head inquisitor"); United States Dep't of the Navy, 75 Lab. Arb. 889, 895-96 (1980) (Aronin, Arb.) (holding employee's use of media to resolve grievance disputes was permitted, reasoning, in part, that the activity was protected under the First Amendment).

412. See, e.g., Monarch Mach. Tool Co., 82 Lab. Arb. (BNA) 880, 883 (1984) (Schedler, Arb.) (sustaining 20 day suspension for employee who, as a "joke," wrote on bottom of posted newspaper that his employer "builds junk").

413. United Cable Television, Corp., 92 Lab. Arb. (BNA) 3, 11 (1988) (Koven, Arb.).

414. See Forest City Publ'g Co., 58 Lab. Arb. (BNA) 773, 783 (1972) (McCoy, Arb.) ("Can you bite the hand that feeds you, and insist on staying for future banquets?").

415. See Southwestern Elec. Power Co., 84 Lab. Arb. (BNA) 743, 749 (1985) (Taylor, Arb.) (sustaining dismissal of employee for filing lawsuit against employer and claiming damages of \$1,500,000 for injuries because the "Company is entitled to some measure of loyalty from its Employees and should not be required to continue the employment of an individual who has taken spiteful and vengeful action against Management in a public denouncement").

416. See United Press Int'l, Inc., 94 Lab. Arb. (BNA) 841, 842-45 (1990) (Ables, Arb.) (sustaining discharge of newspaper journalist who wrote and published book about his employer's financial difficulties, bankruptcy, management, and ownership based on his experience as investigative reporter). In *United Press*, the arbitrator stated:

[I]t is in the fabric of American institutions, including the workplace, that if an employee, bargaining unit or not, effectively declares war against his employer about how the employer is conducting his business, he must do it from outside his job. Writing a book about an employer is no different than other jobs. A certain loyalty to the employer must be presumed. Public criti-

What, then, is left of speech within the context of employment? With few exceptions, courts and arbitrators have made it clear that an employee cannot “ride with the cops and cheer for the robbers.”<sup>417</sup> The duty of loyalty has survived the First Amendment, both in the public sector and (absent state action and access to arbitration) even more so in the private sector where the common law employment at-will doctrine is alive and well. The clear message for employees is “keep your mouth shut” and do not criticize anyone in the organizational chain of command except in those rare situations where the speech brings to light actual or potential wrongdoing on the part of governmental officials<sup>418</sup> or, in the private sector, a clear violation of a statute by management. Simply addressing the internal workings or evaluation of management, without more, will not find sympathy from many courts or most labor arbitrators even if the message is of concern to the public. “[T]he government as employer indeed has far broader powers [to regulate speech] than does the government as sovereign.”<sup>419</sup> Absent the rare case where management offers no convincing reason to forbid the speech (in this situation there is a presumption in favor of the employee),<sup>420</sup> the balancing is likely to be resolved in favor of management in loyalty cases. Rarely will courts require management to provide actual evidence of the harm it alleges, a fact that should not go unnoticed by management attorneys.

Making it even harder for an employee to assert a successful First Amendment claim, under *Mt. Healthy*, a legitimate, nonspeech reason for an employee’s dismissal is a complete defense to a firing for protected speech if the reason motivated management.<sup>421</sup> The lesson for public

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cism, which may destroy the subject, is not in keeping with honorable relations between employers and employees.

*Id.*

417. See *Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) (“I agree with the proposition, felicitously put by Constable Rankin’s counsel, that no law enforcement agency is required by the First Amendment to permit one of its employees to ‘ride with the cops and cheer for the robbers.’”).

418. *But see Azzaro v. Allegheny County*, No. 95-3253, 1996 WL 426792, at \*14 (July 31, 1996), *vacated*, 91 F.3d 490 (3d Cir. 1996) (stating that “speech is a matter of public concern if it discloses malfeasance or misfeasance on the part of a public official of sufficient gravity to be of legitimate interest to members of the community”).

419. *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (citations omitted).

420. See, e.g., *Brown v. Disciplinary Comm. of Edgerton Volunteer Fire Dep’t*, 97 F.3d 969, 974 (7th Cir. 1996) (reversing district court’s dismissal of lawsuit challenging the suspension of firefighter for writing a letter to a newspaper opposing a change in the fire district’s name, reasoning “it is hard to see how a debate on the proper name for the District (or Department) would be disruptive at all”).

421. See *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977); see also *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 275 (2d Cir. 1996) (holding that a “mixed motives” defense requires a properly motivated same-day action).

management is to dismiss employees not for their speech but for some made-up performance-based reason. The employee is then left with the difficult task of showing the reason for dismissal was pretextual. Furthermore, under *Churchill*, if management conducts an investigation and believes the results, the deference-to-management equation is further balanced against the employee, regardless of whether a reviewing court would reach a different result. One context where employee speech rights may be substantively recognized as protected under the NLRA (which, of course, is not applicable to public employers) is where the speech is part of *current* collective bargaining efforts or a labor dispute, and relates to wages, hours, or working conditions, and the speech is "uttered in the context of a conventional appeal for support of the union in the labor dispute."<sup>422</sup> Still, the speech connected to a labor controversy must not contain statements to the point of being egregious.<sup>423</sup> No litmus test exists in determining when speech within a collective bargaining/labor union context is outside the envelope of fair play. A fair reading of Board and arbitral opinions tracking NLRB case law is that if the speech satisfies the above criteria, employees will have more literary license to disparage and denigrate their employers than would otherwise be allowed. It may also be of help to the employee if he or she can point to a professional code of ethics making employees "duty bound" to act to improve standards in the profession.<sup>424</sup> Further, it helps if the employee makes his speech off-duty away from the job site in a non-public forum (thus limiting the damage to management). Finally, it may help the employee if he or she makes the criticism through internal channels in a respectful and polite manner.

In *Churchill*, Justice O'Connor queried: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"<sup>425</sup> *Pickering*, *Connick*, *Churchill*, and *Mt. Healthy* are engendered by the private-sector profit maximization model. It is "Adam Smith" pure and unadulterated. If government is to operate efficiently

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422. See *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 477 (1953); see also *supra* notes 353-65 and accompanying text (discussing *Jefferson Standard*).

423. See, e.g., *Columbus Educ. Ass'n v. Columbus City Sch. Dist.*, 623 F.2d 1155, 1160 (1980) (stating that "egregious misconduct" would take "speech outside the limits of protected activity").

424. See, e.g., *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 814 n.9 (2d Cir. 1980) (discussing the use of a professional code in an employee speech dispute).

425. *Churchill v. Waters*, 511 U.S. 661, 671 (1994).

within the market, it must have the power to demand cooperation from its employees, even if the market in which it operates is monopolistic. Employers are entitled to employ individuals who share its organizational philosophy.<sup>426</sup> It is nothing more than matching skills to the job. At minimum, as part of a duty of loyalty, management may demand that its employees engage in no speech that disparages its service, product, or managers. The standard may not be “duty, honor, country,” but it is close. Virtue is its own reward for employees when it involves their employer’s business.

Does all this make for good law? Is society worse off because of the termination risk to employees who elect to “stir things up?” As early as 1919, Justice Holmes declared that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,”<sup>427</sup> thus recognizing that freedom of speech was not absolute.<sup>428</sup> Justice Holmes also noted that “the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language.”<sup>429</sup> The exercise of free speech is subject to restriction “if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral.”<sup>430</sup> In 1951, in *Dennis v. United States*,<sup>431</sup> Justice Frankfurter endorsed a “balancing test” reasoning that “[t]he demands of free speech in a democratic society are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”<sup>432</sup> The alternative to balancing, of course, is the “rights-privilege” approach.<sup>433</sup> We see no utility in courts analyzing public employment in terms of a privilege where public employees have no First Amendment rights.

The balancing test announced by Justice Frankfurter in *Dennis* has been the guiding star in employee speech cases. Although many of the

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426. See, e.g., *Wales v. Board of Educ. of Comm. Unit Sch. Dist. 300*, 120 F.3d 82, 84-85 (7th Cir. 1997) (“A school district is entitled to put in its classroom teachers who share its educational philosophy.”).

427. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

428. See *id.* (formulating the “clear and present danger” test).

429. See *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)); see also *Patterson v. Colorado*, 205 U.S. 454, 461 (1907) (noting the existence of exceptions to the Bill of Rights’ protections).

430. See *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

431. 341 U.S. 494 (1951).

432. See *id.* at 524-25 (Frankfurter, J., concurring).

433. See, e.g., *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1230-34 (6th Cir. 1997) (Ryan, J., concurring), *cert. denied*, 118 S. Ct. 164 (1997) (discussing rights and privileges of plaintiff in a speech dispute).

results reported by the courts are suspect, the overall *process*, as we see it, is fair if *applied*. What we see, however, is a disparately-weighted interest of government in self-preservation and economic efficiency. We also see substantial weight accorded to the employer's prediction of disruption unaccompanied by hard evidence. The employment context is one case where "saying it may make it so," at least in the judicial forum. Is this "outside the pale of fair judgment?"<sup>434</sup> Can a systematic bias toward employers be justified? If an employer can fire anyone it wants with no checks, a primary source of information from those most likely "in the know" (the so-called "insiders") will be lost.<sup>435</sup> This is the downside when the balancing process is given short shrift. With the exception of *Rankin*, for the most part the courts' balancing has been in line with traditional microeconomic theory of profit maximization and economic efficiency. Ironically, an employee, asserting a free speech right within an employment context, may fare better in the arbitral forum than before the courts, especially where the employee is engaging in behavior arguably protected under labor law. Arbitrators routinely cite *Connick* and *Pickering*, even though not applicable to private-sector employers, in arriving at an accord between the rights of an employer to efficiently operate in a market-oriented economy and the rights of an employee to address matters of public concern. Unlike the courts, however, we believe arbitrators, applying a "just cause" standard under a collective bargaining agreement (where the burden of proof is on management), require hard evidence of harm to the employer when applying a case-by-case *Pickering* balancing test.

Must an employee join in management's philosophy regarding what is best for the organization? Employees, of course, are free to think and believe as they wish. Even though fixed standards are incapable of formulation (outside of the few paradigm cases law professors love to think of), employees are, however, duty bound to stay the course by not engaging in speech disparaging or vilifying the organization, its products, managers, or reputation. They need not be like King Arthur's knights but they must be loyal subjects (without the loyalty oath). Contrary to the function of speech under our democratic system of government—where according to Justice Douglas, it is designed to invite dispute, create unrest, dissatisfaction, or "even stir people to anger"<sup>436</sup>—employers should not

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434. See *Dennis*, 341 U.S. at 540.

435. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 581 (1991).

436. See *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Justice Douglas, writing for



be forced to contend with employee speech that undercuts the organization. Like Victor Hugo's Napoleonic France of 1832, the law of employee speech is economics with "the guillotine of dismissal" waiting for those employees who fail to conform.<sup>437</sup> The law reflects the view that management should not have to compete for the loyalty of its workforce even though the public may have an interest in what the employee has to say.

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the majority, stated:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

*Id.* (citations omitted).

437. *Cf.* VICTOR HUGO, *LES MISERABLES* (Penguin Books) (1987) (1862). "The guillotine is the law made concrete; it is called the Avenger. It is not neutral and does not permit you to remain neutral." *Id.* at 16.