

VIRGINIA MUNICIPAL LEAGUE

October 18, 2009

Virginia Municipal League Annual Conference

J. Michael McGuinness¹
The McGuinness Law Firm
P.O. Box 952
2034 Highway 701 North, Lakewood Plaza
Elizabethtown, North Carolina 28337
910-862-7087 Telephone
910-862-8865 Facsimile
jmichael@mcguinnesslaw.com
<http://www.mcguinnesslaw.com>
Copyright 2009. All Rights Reserved.

WHERE DOES THE RIGHT OF FREE SPEECH BEGIN AND END FOR A PUBLIC EMPLOYEE?

1. **Copyright and Disclaimers.** These materials may not be reproduced or distributed without the express written authorization of the author. All rights reserved. © 2009. These materials are intended for limited educational and informational use only. These materials do not constitute legal or other advice to anyone. Any legal dispute including the particular facts of that dispute should be reviewed by legal counsel at that time. Some of the information included herein may not be applicable or appropriate in some situations; therefore, each dispute must be evaluated independently. There is no warranty, express or implied or other guarantee or representation to anyone who might read any of the information contained herein.

TABLE OF CONTENTS

I.	BACKGROUND AND INTRODUCTION	1
II.	THE PERVASIVE ISSUE OF SPEECH IN PUBLIC WORKPLACES	2
	A. Chart for First Amendment Expression/retaliation Claims	2
	B. A Few General Expression Principles	3
III.	THE BASIC ELEMENTS OF A FREE EXPRESSION CLAIM	4
	A. Representative Case: Edwards v. Goldsboro	4
	B. First Amendment Tests and Factors	5
	C. Categories of Likely Protected Speech Where Garcetti Rule Does Not Appl:	6
	D. Categories of Likely Unprotected Expression	6
IV.	LEADING U.S. SUPREME COURT PUBLIC EMPLOYEE EXPRESSION CASES	7
	A. Pickering v. Bd. of Education	7
	B. Mount Healthy v. Doyle	7
	C. Connick v. Meyers	7
	D. Rankin v. McPherson	8
	E. Churchill v. Waters	9
	F. City of San Diego v. Roe	9
V.	GARCETTI V. CEBALLOS: SUBSTANTIAL EROSION OF THE FIRST AMENDMENT FOR PUBLIC EMPLOYEES	10
VI.	THE PUBLIC CONCERN THRESHOLD FOR CONSTITUTIONAL PROTECTION	12
VII.	CONTEXT OF THE SPEECH	13
VIII.	THE PICKERING BALANCING TEST	13
IX.	CONNICK AND THE DISRUPTION DEFENSE	13
X.	CAUSATION: WAS THE EXPRESSION A SUBSTANTIAL OR MOTIVATING FACTOR IN THE ADVERSE ACTION?	15
XI.	THE INVESTIGATION OF A PUBLIC EMPLOYMENT CASE	16
	A. Sources of Evidence and Areas of Investigation	16
	B. Locurto v. Giuliani: News Media Evidentiary Sources	17
	C. Checklist of Points To Consider In Developing Defenses To A Public Employee Retaliation Case	17
	D. Things to Analyze When Evaluating Management Conduct in Investigating or Punishing the Employee	18
XII.	THE FIRST AMENDMENT'S PETITION CLAUSE	19
XII.	CONCLUSION	20

I. BACKGROUND AND INTRODUCTION

Public officials in the Commonwealth of Virginia are sworn to support the Constitution of the United States and of Virginia. One of the foremost of all constitutional rights is that of freedom of expression. Most public officials appreciate this time honored constitutional value of free expression because, *inter alia*, their own protected expression was utilized in running for elected office and participating in our democracy.

Free expression is among the most widely respected of our constitutional rights. However, some types of expression are more protected than others. Some expression is in fact not protected. Determining what expression is likely protected or unprotected is often a complex task necessitating serious analysis by skilled legal counsel.

In this program, the type of expression being analyzed is that of public employees. Generally, public employee speech is likely to be more subject to some reasonable regulation than some other forms of expression by the general public. Public employers are afforded a little more latitude in limiting *some* types of employee expression. Much of public employee expression law is unclear. Virtually all expression disputes involving public employees involves application of an ill defined "balancing test" where the interests of the employee in the expression are comparatively weighed along with the government interest in suppressing the speech in issue. Predicting how a judge will conclude following this balancing process is often very difficult.

The tough question is under what circumstances may a public employer discipline a public employee for various types of expression? When is it constitutionally appropriate to retaliate against a public employee based upon his/her expression by discipline or other action?

Retaliation against public employees for various types of expression is a recurring concern for public employers and employees throughout America. Some public officials often openly vow to retaliate against those who disagree with them:

"We have been betrayed, and the guilty should not go unpunished." Senator Strom Thurmond, July 11, 1948, referencing northern democrats while addressing a caucus of southern delegates at the Democratic National Convention. Cohadas, Strom Thurmond & The Politics of Southern Change (1993).

This type of open-war retaliatory message creates serious problems for public employers and employees.² Public employment retaliation issues due to expression are frequently litigated throughout the country, therefore costing public employers millions of dollars in defense costs. Public employment claims represent a large portion of federal constitutional jurisprudence.

Many public employee retaliation claims are grounded in the Speech and Petition Clauses of the First Amendment. The Supreme Court periodically revisits First Amendment doctrine for public employers every few years. See review of historical public employee expression cases, infra. The latest word from the Supreme Court came in Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), where the Supreme Court enunciated a new rule that drastically restricts expression rights of public employees in certain whistleblowing contexts.

In light of Garcetti and other cases, employee plaintiffs will likely more often explore state constitutional claims as an alternative. Many states have developing state constitutional law that can no longer be ignored. While state constitutional law necessitates a state-by-state analysis, many state constitutions contain specific provision which apply to public employment issues. In most states, state constitutions have been infrequently used in public employment litigation. However, that is changing, thus public employers must be cognizant of the scope of protections for public employees under their own state constitutions.

II. THE PERVASIVE ISSUE OF SPEECH IN PUBLIC WORKPLACES

² E.g., Kirby v. Elizabeth City, 388 F.3d 440 (4th Cir. 2004)(Chief of Police retaliated against officer because the officer testified truthfully against the police administration in other officer's grievance hearing; qualified immunity granted and Monnell showing not made); Edwards v. City of Goldsboro, N.C., 178 F.3d 231 (4th Cir. 1999)(police officer suspended and threatened with termination by chief for teaching off-duty concealed carry handgun course where chief was adamant political opponent of state concealed carry handgun law; valid claim stated for free expression).

A plethora of recent cases demonstrate the ongoing controversy over the extent that public employees should be able to criticize their employers or speak out on a range of issues. See, e.g., Kirby v. Elizabeth City, 388 F.3d 440 (4th Cir. 2004). The Circuit courts have issued divergent opinions thus leaving employees and agencies with uncertainty about what expression is likely to be protected and what expression may be suppressed.

To what extent may employees communicate about working conditions, problems that affect the public safety or other matters of public concern? Should employees turn a deaf ear on hazards because the exposure of such hazards may embarrass the agency or officials thereof? Due to the special nature of their public service, public employees are usually in a unique position to observe and understand various issues that involve the public interest.

The First Amendment remains as a limited bedrock safeguard for the protection of whistleblowing employees and ultimately for the public safety. Our constitutional heritage places paramount value on robust discussion and criticism of government and government officials.³ However, in public employment disputes, this principle is under attack.

Speech about public issues occupies the "highest rung" of First Amendment values and is entitled to special protection. NAACP v. Claiborne, 458 U.S. 886, 913 (1982). As early as 1962, a sheriff was afforded free speech protection by the Supreme Court after the sheriff criticized a judge for racial agitation. Wood v. Georgia, 370 U.S. 375 (1962).

A. Chart for First Amendment Expression/retaliation Claims

Components of a public employee expression claim:

* Protected expression + causally related adverse employment action or chilling effect = First Amendment violation

* Expression (speech, conduct, written communication) by a public employee not pursuant to official employment duties (Garcetti Rule)

* Retaliation, chilling effect or adverse employment action by a public employer.

* Protected expression (expression on public concern + a favorable application of balancing test)

* Public concern test

* Balancing test (individual interest in speech v. governmental interest in expression of speech)

Purpose/motive of speech

Content, form and context of speech

Time, place and manner of speech

Disruption (may enable employer to prevail on balancing test unless underlying claim is a whistleblower claim reporting malfeasance or impropriety)

* Causation Test (Was adverse action in part caused by the expression?)

Substantial or motivating factor test

* Whether employer would have reached the same decision in the absence of the protected expression; defendant's burden on this issue.

³ See Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)("Speech concerning public affairs is more than self-expression, it is the essence of self-government."); Piver v. Pender County Board of Education, 835 F. 2d 1076, 1081 (4th Cir. 1987). A paramount priority of the First Amendment is to protect expression relating to "the manner in which government is operated." Mills v. Alabama, 384 U.S. 214 (1966).

B. A Few General Expression Principles

General Rule: The employee must establish that the speech complained of qualified as protected speech or activity and that such protected speech or activity was a substantial or motivating factor giving rise to adverse employment action. If the speech is on a matter where the employee had an official duty to speak, Garcetti generally precludes First Amendment protection.

In order for the speech to be constitutionally protected, it must relate to some matter of public concern. This public concern element has been broadly defined by various Courts as being any matter that broadly relates to any "matter of political, social or other concern to the community." Connick v. Myers, 461 U.S. 138, 145 (1983). "Matters relating to any alleged wrong doing, inefficiency, or any type of mismanagement or malfeasance on the part of public officials constitutes public concern."⁴ Courts have held that some matters are "inherently of public concern" while other matters gain public concern status after consideration of the circumstances surrounding the making of the statement.

General Rule: The greater the degree of public concern of the issues, the greater the degree of constitutional protection. Issues relating to working conditions within public agencies are typically matters of public concern. See, e.g., Hickory Firefighters Association v. City of Hickory, 656 F.2d 917, 920 (4th Cir. 1981). However, if the working conditions communications are narrowly limited to the speaking employee, courts will more likely conclude that the speech is not of public concern. In determining whether or not speech relates to a matter of public concern, many courts in part treat this issue by exploring the underlying motive of the speech. Generally, speech which merely relates to some isolated personal interest does not relate to a matter of public concern unless the broader consideration of that issue relates to some public interest. When speech concerns issues about which information is helpful to enable the public to make informed decisions about the operation of their government, then such speech merits the highest degree of First Amendment protection.

Employees frequently speak out about their working conditions and related matters within their employment context. There is often a fine line between protected and unprotected speech when the speech relates to the employee's individual working conditions. Such speech is generally protected if the concerns go beyond the speaking employee's own personal dissatisfaction and involve concerns expressed by other employees.⁵

For expression claims, the truth of the speech is largely irrelevant. See Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985), where the Fourth Circuit explained:

"It was accordingly unnecessary in the proof of their case for the plaintiffs to offer any evidence of the truth of their criticisms and likewise the defendants had no right to seek to prove the falsity of the criticisms. The question was simply one of law whether the statements, irrespective of their truth or falsity, raised a matter of public concern..."

An employee therefore need not prove that his communications or complaints are true. However, knowingly false expression which causes disruption or other serious adverse affects is generally not protected.

III. THE BASIC ELEMENTS OF A FREE EXPRESSION CLAIM

⁴ Brawner v. City of Richardson, 855 F. 2d 187 (5th Cir. 1988); Murphy v. City of Flushing, 802 F. 2d 191, 198 (6th Cir. 1986); Brickwell v. Norton, 732 F. 2d 664 (8th Cir. 1984).

⁵ See Powell v. Basham, 921 F.2d 165, 167 (8th Cir. 1990)(Deputy Sheriff's comments about promotion practices protected because the particular concern was not just limited to the speaking officer but to many); Walje v. City of Winchester, 773 F.2d 729 (6th Cir. 1985)(speech regarding firefighters' morale, training and working conditions protected); Gillette v. Delmore, 886 F.2d 1194 (9th Cir. 1989)(speech about manner of performance of duties held constitutionally protected).

General Rule: An employee may not be discharged or otherwise adversely treated for the expression of ideas on any matter of public concern unless the public employer's interest in the efficient and effective fulfillment of its responsibilities to the public outweighs the employee's interest in free expression of the ideas.⁶

In order for a public employee to recover for adverse action allegedly in retaliation for the exercise of the First Amendment right to free speech, the employee must establish:

- (1) that the speech complained of qualified as protected speech or activity, and
- (2) that such protected speech or activity was a substantial or motivating cause for the discharge.

A. Representative Case: Edwards v. Goldsboro

In Kenneth Edwards v. City of Goldsboro, N.C., 178 F.3d 231 (4th Cir. 1999), the Fourth Circuit issued a comprehensive decision analyzing the constitutional rights of public employees in the context of off-duty conduct, free expression and association. The Edwards decision outlines limitations upon public employers in attempting to regulate off-duty conduct, self-employment, speech and free association of employees.

Kenneth Edwards served as a police officer for the City of Goldsboro, North Carolina since 1975 and held the rank of sergeant. In 1995, the North Carolina General Assembly enacted a Concealed Carry Handgun bill. This law enabled citizens to carry concealed handguns after mandatory training and screening to protect themselves. The new law contained a mandatory education component. Edwards was a firearms instructor who had taken specific training to enable him to teach the concealed carry course. Edwards obtained a business license and scheduled instructional classes to be taught off-duty at a private location, as self-employment.

The heart of Sgt. Edwards' complaint was that he was precluded from teaching a firearms training course while off-duty by an illegal/invalid order because the content of Edwards' course did not suit the political and personal predilections of the Chief of Police, an avowed concealed carry handgun opponent.

Discovery revealed that dozens of others engaged in a vast array of off-duty, secondary and self employment. Despite his purported concern about Sgt. Edwards' "controversial" self-employment, the Chief ran his own income tax preparation business. The Chief selectively withheld permission for Sgt. Edwards to teach because of the content of the course. The case boiled down to the employer's admittedly discriminatory enforcement of its own admittedly "vague" secondary employment policy to suppress expression not politically correct under the Department's regulatory scheme. The case fundamentally turned on the City's conduct as reflected in the following memoranda:

On November 27, 1995 you submitted a request for off-duty employment. You stated the nature of the off-duty work would be the educational training for civilians, pertaining to but not limited, to firearms courses (concealed carry handgun).

At the present the issue of carrying a concealed handgun is a very sensitive and controversial issue.... I am denying your request for off-duty employment as it relates to the educational training for civilians in firearms courses (concealed carry handguns).

The Chief opposed the concealed carry law because he had "been monitoring this bill" and that he thought that it was "a bad law."

The Court in Edwards reaffirmed and clarified many free expression rules: "A public employer 'cannot condition public employment on a basis it infringes the employee's constitutionally protected interest in freedom of expression.'" Edwards quoted Rankin v. McPherson, 483 U.S. 378, 383 (1987):

"Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employee's speech."

Speech involves a matter of public concern if it affects the social, political or general well-being of a community. The court explained that

⁶ See Churchill v. Waters, 114 S.Ct. 1878, 128 L.Ed 2d 686 (1994); Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004).

“the answer to the public concern inquiry rests on ‘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.’”

In performing the public concern inquiry, the court explained that “we must examine the content, context, and form of the employee speech in light of the entire record.”

The Fourth Circuit concluded that “the speech in issue was a matter of public concern. "After examining the content, context and form of Sgt. Edwards’ speech ... we have no doubt that the proper use and manner of carrying a concealed handgun in North Carolina is a subject in which ‘the public or community is likely to be truly concerned’ and ‘interested.’”

The Court observed that “a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee’s rights under the First Amendment. The court explained how a court must “balance the interests of the [public employee], as a citizen in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency and public services it performs through its employees.” This balancing test is the central component of First Amendment jurisprudence for public employees.

Having concluded that the speech in issue was of public concern, the Court then applied the traditional Pickering balancing test. The Court examined whether Sgt. Edwards’ interest in speaking upon the proper use and manner of carrying a concealed handgun outweighed the City’s interest in providing effective and efficient services to the public. In performing this balancing test, the Court recognized that it should first assess the value of the employee’s speech.

The Fourth Circuit concluded that the speech at issue in Edwards was a “categorically public issue, the proper method of safely carrying a concealed handgun...” “Because the speech at issue is on a categorically public issue, it occupies the highest wrung of the hierarchy of First Amendment values.” The Court observed that the next assessment would be the time, place and manner of the speech as well as the context in which it arose:

“In this regard, relevant considerations are ‘whether the statement impairs discipline by superiors, or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operations of the enterprise.’”

The Fourth Circuit concluded that “we cannot discern any legitimate interest of the Defendants in preventing a police officer of the City from conducting a concealed handgun safety course for the public that is a creature of state law.” The Fourth Circuit concluded that the Pickering balancing test weighed in the favor of Sgt. Edwards. “The Defendant’s threat to terminate Sgt. Edwards employment if he resumed teaching the course was intended to chill his right to engage in protected expression. Accordingly, the threat is actionable.”

B. First Amendment Tests and Factors

MULTIPLE TESTS: Public concern, balancing, disruption and subissues (content, form, context, time, place, manner); Causation.

ANALYTICAL FACTORS:

Is the expression about a matter that the public would likely be interested in? (Any matter of political, social or other concern to the community)

The higher the degree of public concern, the greater the likelihood of protection.

Purpose/motive of speech (individual interest or broader concern)

What is the point of the speech?

Is public concern predominant?

Was the speech pursuant to official duties? Garcetti issue.

How broad is the speech?

Who is the audience?

On or off-duty speech? (Much on-duty speech may be regulated)

Size of employer? (Can impact disruption)

Relationship of speaker to subject of speech?

Is the subject of the speech unique to the speaker?

How many people does speech relate to or impact?

Was speech made in good faith to solve apparent problem?

Is expression defamatory or otherwise unlawful?

C. Categories of Likely Protected Speech Where Garcetti Rule Does Not Apply

Expression related to alleged institutional or widespread problems unless employee had duty to speak.

Expression related to alleged wrongdoing, malfeasance, corruption unless employee had duty to speak.

Whistleblowing speech where employee has no duty to report.

Expression about delivery of public services, such as law enforcement, fire protection and others.

Expression about governmental waste or inefficiency.

Expression about political matters.

D. Categories of Likely Unprotected Expression

Expression on topic that employee has a duty to speak about.

Expression which appears to be unique and personal to the speaking employee.

Expression that appears to be individually motivated; that which arises out of a grievance or ongoing individual personnel dispute of the speaker.

Expression which is knowingly false especially where actual disruption or likelihood of serious prospective disruption will likely occur.

Expression in very small agencies that has or will likely adversely affect close working relationships.

IV. LEADING U.S. SUPREME COURT PUBLIC EMPLOYEE EXPRESSION CASES

A. Pickering v. Bd. of Education

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court developed the balancing test to determine the scope of First Amendment protection for public employees. The Pickering balancing test has been reaffirmed by its progeny and remains as the determinative test for deciding what speech by public employees is

ultimately protected.

Pickering involved the publication of a letter to the editor in a local newspaper by a school teacher. The teacher's letter was critical of local school board policy and the superintendent. The letter criticized the handling of bond issues and the allocation of financial resources. The letter also alleged that the superintendent attempted to prevent teachers from opposing or criticizing the proposed bond issue. After a hearing before the school board, the teacher was dismissed after the letter was found to have been "detrimental to the efficient operation and administration" of the schools. The Pickering analysis provides that courts must balance the interest of the state in promoting efficiency in its public services against the interest of the employee in commenting upon matters of public concern.

Before announcing the balancing test, the Court in Pickering observed that "because of the enormous variety of fact situations ... we do not deem it either appropriate or feasible to attempt to lay down a general standard." After considering the competing interests of the parties, the Pickering Court observed that a public employee may not be punished for making statements on matters of public concern unless it is established by the employer that the employee's statements caused substantial disruption to or interference with the performance of his own duties or with the proper functioning of the employing public agency. Fifteen years later in Connick v. Meyers, 461 U.S. 138 (1983), the Court appears to have lessened the degree of disruption required in order for a governmental employer to regulate speech.

B. Mount Healthy v. Doyle

In Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the Court addressed a First Amendment challenge arising from a school board's decision refusing to renew a teachers employment contract. The district court concluded that the teachers exercise of his right to free speech had played a substantial part in the Board's decision not to rehire the teacher. The Court of Appeals affirmed. The Supreme Court held that the fact that constitutionally protected conduct played a substantial part in the decision not to rehire the teacher did not necessarily constitute a First Amendment violation justifying remedial action.

The Supreme Court held that a public employer has an opportunity to prove by a preponderance of the evidence that it would have reached the same adverse employment decision even in the absence of the protected conduct by the teacher. The Court reasoned that "this court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused."

The Court summarized the principle from the case as follows: the public employee must initially establish that his/her expression was a substantial or motivating factor in the adverse action. Then, a public employer may successfully defend by proving by a preponderance of the evidence...that it would have received the same decision...even in the absence of the protected conduct....

C. Connick v. Meyers

In Connick v. Meyers, 461 U.S. 138 (1983), the plaintiff, an assistant district attorney, was informed by her employer that she was being considered for transfer to another section of the criminal court. The employee was concerned that compliance with that order would result in a conflict of interest and she expressed her opposition to the proposed transfer to the employer. Subsequently, a memorandum was issued indicating that the employee was in fact being transferred. That evening, the employee prepared a questionnaire to solicit the views of her fellow assistant district attorneys about the proposed transfer and other matters of internal office policy.

The next day, the employee distributed the questionnaire in the office. The employer made a decision to terminate Meyers after he received a phone call informing him that Meyers was causing a "mini-insurrection" by her circulation of the survey. The employer informed Meyers that she was being terminated because of her refusal to accept the transfer and because he considered the distribution of the questionnaire to have been an act of insubordination.

Meyers filed suit alleging that her employment was terminated because she had distributed the questionnaire and that her activity constituted an exercise of free speech protected by the First and Fourteenth Amendments.

Although the employer claimed that Meyers was dismissed because of her refusal to accept the transfer, the District Court found the questionnaire to be the "substantial and motivating factor" underlying the discharge. The court applied the Pickering balancing test and found that the issues presented in the questionnaire related to the effective functioning of the district attorney's office and therefore touched upon matters of public concern. The court found that the Meyer's activities neither substantially nor materially interfered with the employer's interest in the efficient and effective operation of the public services performed by its employees. Accordingly, applying the balancing test, the District Court held that Meyer's conduct was entitled to constitutional protection.

Having established that Meyer's conduct was protected and constituted a motivating factor in the employer's decision to terminate, the burden then shifted to the employer to prove that he would have dismissed Meyers regardless of her circulation of the questionnaire. The court then applied the test enunciated in Mt. Healthy v. Doyle, 429 U.S. 274 (1977), which places the initial burden upon the employee to establish that his speech is constitutionally protected and that it was a substantial or motivating factor in the employer's decision. After this initial burden is met, the employer may justify the discharge if it proves by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Meyer was unable to satisfy the Mt. Healthy burden, therefore the District Court granted relief to the employee. The Fifth Circuit affirmed without opinion but the Supreme Court reversed.

The majority opinion in Connick observed that "government offices could not function if every employment decision became a constitutional matter." Justice White's majority opinion articulated a distinction between speech upon matters "inherently of public concern" and speech which gains public concern status upon consideration of the circumstances surrounding the making of the statement. The surrounding circumstances standard takes into account "the content, form and context of a given statement, as revealed by the whole record."

The Court in Connick concluded that only one question contained in the employee survey, which dealt with the pressure to work in political campaigns on behalf of employer supported candidates, was matter of public concern. Applying Pickering, the employer was given an opportunity to demonstrate that the employee's activity interfered with "the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees." The Court found that the burden placed upon the employer by the District Court was unduly onerous.

D. Rankin v. McPherson

In Rankin v. McPherson, 483 U.S. 378 (1987), the Court observed that "whether the employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." The issue before the Court in Rankin was whether an employee in a county constable's office was properly discharged for remarking after hearing of an attempt on the life of President Reagan, "if they go for him again, I hope they get him."

The Court in Rankin concluded that the speech was constitutionally protected because the employer's interest in discharging the employee did not outweigh the employee's First Amendment rights. Rankin represents an expanded view of public concern broadly opening door for further protection of speech. Despite the arguably unpleasant content of the speech, it involved a matter of public concern and was therefore protected. Rankin explained that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse."

E. Churchill v. Waters

Churchill v. Waters, 114 S.Ct. 1878 (1994) arose out of the employee's communication about a controversial new nurse staffing program, known as cross training. Waters was displeased with Churchill's "opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward..." The Seventh Circuit demonstrated how the risks of which Churchill complained contravene fundamental standards of healthcare organizations.

The precise communication in issue was disputed by the parties. Relying upon unsubstantiated hearsay, the employer perceived that Ms. Churchill was "knocking the department." The employer fired Ms. Churchill without ascertaining the true facts as to what Churchill actually said.

The Court observed that "[w]e agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." The primary legal issues before the Court involved determining what procedural and investigative mechanism if any must be followed in determining what work place speech was involved. Before addressing the procedural and investigative issues, the Court reaffirmed the historic free speech protections for public employees. The Court observed that "the First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance, as necessary side effects of ... the process of open debate.... Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."

The Court went on to hold that it is necessary that the employer reach its conclusion about what was said in a work place speech dispute in good faith. If a public employer punishes an employee without a reasonable investigation, the employer runs the risk of having to remedy depriving the employee of constitutional rights.

Churchill did not carve out a detailed test for the procedural and investigative standards imposed upon public employers. Rather, the Court's decision provides that a case by case basis must be employed to ascertain the extent of the procedural and investigative rights required. This is the difficult part of the Court's opinion. Since the Court did not specify particular procedures, litigation in the lower courts will be necessary to flesh out what is required in particular situations. This determination will likely be addressed with expert testimony from law enforcement labor experts.

The Court did not adopt a general test to determine what procedural safeguards are to be applied; rather the Court explained that a case-by-case approach would be applied. Thus, the Court enunciated a "reasonableness test" for the employer to meet in order to not infringe upon free speech rights.

Churchill has broad implications. It reaffirms and clarifies the procedural component of the First Amendment which had been very unclear for over thirty years. Churchill enhances the need for experts to examine the employer's investigative process, so as to determine if he employer has acted reasonably.

F. City of San Diego v. Roe

In City of San Diego v. John Roe, 125 S. Ct. 521 (2004), the Court addressed a First Amendment challenge to the termination of a police officer for selling video tapes which depicted him engaging in masturbation. The video tape showed the police officer stripping his uniform off even though the uniform apparently was not the specific uniform worn by the officer as a member of the San Diego Police Department. The officer also sold custom videos. The officer's Ebay user profile identified him as being a police officer as well as police equipment including official uniforms of the San Diego Police Department. A police supervisor discovered the officer's activities. The supervisor then conducted a search for other items. The Supervisor then recognized the officer. This was subsequently reported to the San Diego Police Department.

Initially the San Diego Police Department ordered the police officer to cease displaying, manufacturing or selling any explicit sexual videos. However, he did not fully comply with the directive. He was then terminated. The District Court concluded that the officer had not demonstrated that his conduct qualified as protected expression. However, the Ninth Circuit reversed and held that the officer's conduct constituted protected expression.

The Supreme Court reversed the Ninth Circuit and concluded that the officer's expression was not protected under the First Amendment. The Court reasoned that the officer took deliberate steps to link his video tapes and other products to his police work in a way that was injurious to his employer. The Court identified several factors in support of this conclusion including the officer's use of the uniform, the law enforcement reference in the web site, the listing of the speaker as in the law enforcement field, and the fact that the depiction of the officer performing indecent acts while in the course of official duties brought the mission of the police employer and the professionalism of its officers into serious dispute.

The Supreme Court observed that the Ninth Circuit had noted that the City conceded that the officer's activities were "unrelated" to his employment. The Supreme Court interpreted the City's concession as being that the officer's speech was not a comment on the working or functioning of the San Diego Police Department. The Supreme Court observed that "it is quite a different question to whether the speech was detrimental to the SDPD. On that score the City's consistent position has been that the speech is contrary to its regulations and harmful to the proper functioning of the police force."

The Court applied the traditional public concern test and concluded that the officer's expression did not

qualify as a matter of public concern. The Court reasoned that the officer's activities did nothing to inform the public about any aspect of the San Diego Police Department's functioning or operation.

The Court observed that the officer's activities were not like the remarks at issue in Rankin where one co-worker commented to another co-worker about an item of political news. The Supreme Court observed that the officer's "expression" was widely broadcast, linked to his official status as a police officer and designed to exploit his employer's image. The speech in question was detrimental to the mission and functions of the employer."

V. GARCETTI V. CEBALLOS: SUBSTANTIAL EROSION OF THE FIRST AMENDMENT FOR PUBLIC EMPLOYEES

In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), the Supreme Court issued a revolutionary decision restricting the constitutional rights to free expression by public employees. In a 5-4 decision, the majority created a bright line per se rule that public employees do not enjoy protection for expression made pursuant to their official employment duties.

Richard Ceballos was employed since 1989 as a Deputy District Attorney for the Los Angeles County District Attorney's office. Ceballos was a Calendar Deputy, and in that capacity, he exercised certain supervisory responsibilities over other staff. Ceballos was contacted by a criminal defense attorney, who claimed that there were inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. The defense attorney informed Ceballos that he had filed a motion to challenge the warrant, but he also requested that Ceballos review the case. Ceballos examined the affidavit and visited the location that it described. Ceballos then determined that the affidavit contained "serious misrepresentations."

Ceballos thereafter spoke by telephone with the Deputy Sheriff, whom was the affiant in support of the warrant. Ceballos did not receive the satisfactory explanation for the perceived inaccuracies. Consequently, Ceballos relayed his observations to his supervisors and followed up with a written memoranda. The memoranda explained Ceballos' concerns and recommended dismissal of the criminal case.

A meeting was held to discuss the affidavit. The meeting was attended by Ceballos, his supervisors, the Deputy Sheriff executing the affidavit and other employees from the Sheriff's Department. The meeting "became heated" and one police lieutenant sharply criticized Ceballos for his handling of the case. Despite the concerns demonstrated by Ceballos, his supervisors decided to proceed with the prosecution of the case. The trial court held a hearing on the motion challenging the warrant. Ceballos was called as a witness by the criminal defendant. Ceballos testified to his observations about the affidavit. However, the trial court rejected the challenge to the warrant.

In the aftermath, Ceballos was subjected to a series of adverse employment actions, which Ceballos believed were retaliatory. The actions included reassignment from his Calendar Deputy position to a trial deputy position, transfer to another court house, and denial of a promotion. Ceballos initiated an internal employment grievance, but the grievance was ultimately denied based on a conclusion that Ceballos had not suffered any retaliation. Ceballos thereafter filed suit in the United States District Court alleging retaliation in violation of the First and Fourteenth Amendments.

The District Court granted summary judgment for the defendants, reasoning that Ceballos prepared his memoranda pursuant to his official employment duties, which the Court reasoned precluded constitutional protection. The Ninth Circuit reversed and held that the allegations of wrong doing constituted protected speech under the First Amendment. The Ninth Circuit followed the traditional approach, first analyzing public concern, then applying the balancing test. See 361 F.3d 1168 (9th Cir. 2004). The Supreme Court granted certiorari and reversed.

The Supreme Court began its analysis by observing that Pickering v. Board of Education, 391 U.S. 563 (1968) "provides a useful starting point in explaining the Court's doctrine." The relevant speech in Pickering was a school teacher's letter to a newspaper addressing issues involving the funding policies of the school board. In Pickering, the Court observed that the problem in any case "is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of public services it performs through its employees."

In Garcetti, the Court observed that Pickering and its progeny two inquires to guide the interpretation of constitutional protection for expression afforded to public employees. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If not, the employee enjoys no First Amendment

protection based upon his/her employer's reaction to the speech. If the public concern threshold is satisfied, the next question becomes whether the Government has an adequate justification for treating the employee differently. The Court will next apply a constitutionally interest balancing test which determines whether the speech is constitutionally protected.

In Garcetti, the Court made a number of observations regarding factors, which were identified as either being not dispositive or dispositive in public employee free expression claims. First, the fact that Ceballos' expressed his views inside his office and privately, rather than publicly, was not deemed to be dispositive by the Court. The Court observed that: "the employees in some cases may receive First Amendment protection for expressions made at work." Thus, one can still retain "citizen" status while at work. Next, the Court observed that the fact that memoranda concerned the subject matter of Ceballos' employment was also not dispositive. The Court observed that: "the First Amendment protects some expression related to the speaker's job." Finally, the Court observed that:

"the controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a Calendar Deputy... That consideration - the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case - distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline."

The Court explained that Ceballos wrote his memoranda:

"because that is part of what he, as a calendar deputy was employed to do." The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as private citizen."

The Court further explained that Ceballos did not act as a citizen when he went about conducting his daily professional activities such as supervising attorneys, investigating charges and preparing filings. Similarly, Ceballos did not communicate as a citizen by writing a memoranda that addressed the proper disposition of a pending criminal case.

The Court explained that "employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." The Court observed the dispositive point of eliminating constitutional protection as being "when a public employee speaks pursuant to employee responsibilities..."

Three separate dissenting opinions were written. The majority felt compelled to address some of the analysis from Justice Souter's dissent. Justice Souter's dissent, which was joined by Justice Stevens and Ginsberg, was lengthy and compelling. Justice Souter stated that he expected:

"one response from the Court's holding will be misused by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from the First Amendment purview." 126 S. Ct. at 1965, n.2. "The government may well try to limit the English teachers' options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school."

Protection under Pickering "may be diminished by expansive statements of employment duties."

In the majority opinion, Justice Kennedy, writing for the Court, stated:

"we reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions... The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."

In Ceballos, the Supreme Court enunciated a clear bright line in the sand: “statements pursuant to their official duties” are not protected under the First Amendment. The point left for interpretation by lower courts appears to be the scope of “official duties.”

One interesting point, which appeared to be recognized by both the majority and the dissent, is the fact that employees may realize that the safest course of action is to communicate publically rather than internally. As Justice Stevens explained in dissent: “it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publically before talking frankly to their superiors.”

Despite the fact that the majority recognized that “exposing governmental inefficiency and misconduct is a matter of considerable significance,” the Court in Garcetti promulgated a much more restrictive principle. The Garcetti principle represents a substantial erosion of speech protection for public employees. However, the vote was close. The appointment of a new Justice by President Obama may well swing the pendulum back with more protected expression for public employees.

VI. THE PUBLIC CONCERN THRESHOLD FOR CONSTITUTIONAL PROTECTION

The threshold inquiry for determining whether or not the employee's speech is constitutionally protected and thus actionable is whether or not the speech involved a matter of public concern. Simply stated, speech on a matter of public concern is any speech which can "be fairly considered as related to any matter of political, social or other concern to the community."

There appears to be a settled rule in connection with expression about law enforcement agencies. A plethora of courts have held that speech relating to the conduct and performance of police departments is of utmost public concern and is among the most protected forms of any kind of speech.

Perhaps the clearest description of the public concern framework for public employees appears in Judge Sam Ervin's authoritative opinion in Piver v. Pender Board of Education:

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 it 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.

When speech is aimed at resolving a personnel matter, if the speech is broader than an individual employee grievance, it may involve public concern. Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994). Thus, a matter can arise in an individual dispute but if it involves sufficiently broad issues of concern to other employees, it may relate to public concern and be protected.

VII. CONTEXT OF THE SPEECH

The context of the speech must also be analyzed. The time, place and manner of the speech are often critically important factors in the balancing inquiry.

Frequently, free speech issues in law enforcement agencies are methodologically distinguishable from the typical public employee discharge case. This different context presents some "threshold conceptual problems" as in Berger v. Battaglia, 779 F.2d at 997 (4th Cir. 1985). In Berger, the officer performed an artistic performance in "blackface," which offended the black community in Baltimore. There, the court observed that "this particular controversy does not fit too neatly within the paradigmatic factual pattern out of which the "balancing test has developed. Id. The court found the officer's conduct to be constitutionally protected.

In Givehan v. Western Line, 439 U.S. 410 (197), the Supreme Court held that if the speech in question involves a matter of public concern, it does not matter whether or not the statement is uttered in private or public. Thus, the speech need not be communicated in a public forum. Internal communications within the employing public

agency are clearly protected.⁷ The fact that the statement may have been communicated only to one or a few individuals and not to the news media will not diminish its constitutionally protected status.⁸

VIII. THE PICKERING BALANCING TEST

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court developed the balancing test to determine the scope of First Amendment protection for public employees. Rankin v. McPherson explained that the balancing test requires "a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern against the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees."⁹ Pickering and its progeny provide that when a public employee's speech touches upon matters of public concern, the employee should "be able to speak out freely on such questions without fear of retaliatory dismissal." In Edwards v. City of Goldsboro, the Fourth Circuit applied the balancing test as follows:

"In this regard, relevant considerations are 'whether the statement impairs discipline by superiors, or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise.'"

IX. CONNICK AND THE DISRUPTION DEFENSE

In Connick v. Meyers, 461 U.S. 138 (1983), the Court analyzed disruption issues in public employee speech cases. Pickering and earlier cases tended to require evidence of actual disruption. At the least, Connick lowered the threshold and observed that future prospective disruption, at least under some circumstances, may tip the balance in favor of not protecting the speech.

With respect to the employer's interest, the Court in Connick found highly relevant the employer's judgment that the employee's circulation of the questionnaire would likely disrupt the office. Generally, the employer must justify its actions restricting free speech. The burden of showing disruption is on the employer.

The Court in Connick relied upon the employer's alleged reasonable belief that the questionnaire would disrupt the office. "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." The Court determined that the employee's conduct was of limited public concern, which therefore placed a lighter burden on the employer to justify his actions. This finding of limited public concern was instrumental in the Court's conclusion that the termination did not offend the First Amendment.

Connick's "reasonable belief of disruption" analysis may present significant problems for employees. This deference to the employer's judgment in such cases of "limited public concern" may afford the employer a degree of discretion to trample upon First Amendment rights. Under a strict application of this standard, actual disruption of the government's operation may not be required to justify the discharge of the public employee. Action taken in response to a mere potential for disruption, however, must be objectively justifiable under the circumstances.¹⁰ Post-Connick cases have shown that disruption cannot be claimed from thin air; rather, it must be real and identifiable or

⁷ See Maciarelo v. Sumner, 973 F.2d 295, 299 (4th Cir. 1992); Wilson v. UT Health Center, 973 F.2d 1263 (5th Cir. 1992).

⁸ See Rankin v. McPherson, 483 U.S. 378, 387 n.11 (1987); Billette v. Delmore, 886 F.2d 1194, 1198 (9th Cir. 1989).

⁹ Rankin, 107 S.Ct. 2891, 2898 (1987). In balancing the competing considerations, Pickering and Rankin suggest that a number of factors are to be considered including "the manner, time, and place of the employee's expression [and] the context in which the dispute arose." Rankin, 107 S.Ct. 2891, 2898 (1987). See Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) (police officer's interest in writing letter to attorney general alleging departmental problems outweighed the employee's interest in discharging him); Moore v. City of Kilgore, Texas, 877 F.2d 364, 372 (5th Cir. 1989) (exhaustive analysis of interest balancing; court found that a firefighter's statements to press indicating staff shortages was protected); Frazier v. King, 873 F.2d 820, 826 (5th Cir. 1989) (employee's interest in whistleblowing outweighed disruption created by the whistle blowing); Tyler v. City, 72 F. 3d 568 (8th Cir. 1995) (balancing interest in police agency's favor where officer violated chain of command in writing letter to another law enforcement agency).

¹⁰ Jackson v. Bair, 851 F.2d 714, 718 (4th Cir. 1988), modified F.2d (4th Cir.) (en banc); Melton v. City of Oklahoma, 879 F.2d 706, 715-16 & n. 11 (10th Cir. 1989) ("the government must introduce evidence of an actual disruption of its services resulting from the speech at issue," citing Rankin and Pickering)

objectively probable under the circumstances.

"The nature of the government's burden to show disruption, moreover, varies with the content of the speech." Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir. 1992)(employee's memo criticizing her own employing agency's director and problems within the agency held to constitute a matter of public concern and protected). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." Id. The disruption to be proven by the employer must be "actual, material and substantial ..." Id. at 1140, citing numerous cases. Disruption must be "real [and] not imagined." "Where First Amendment rights are concerned, operational efficiency must be real and important before they can serve as a basis for discipline or discharge of a public employee." Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985).

In Zamboni v. Stamler, 847 F.2d 73, 78 (3rd Cir. 1987), the Third Circuit held that "in cases such as this involving speech on matters of significant public concern, a showing of actual disruption is required."¹¹ In Zamboni, the court expressly rejected the employer's suggested potential disruption as being sufficient to preclude protection of the speech. However, other cases conflict with Zamboni's holding that actual disruption is required. Connick, supra.; Tyler, supra. In light of Zamboni and other cases, the degree of importance of the issue is determinative of whether actual disruption must be shown by the employer. The alleged disruption, whether potential or actual, is by no means dispositive of the interest balancing. Rather, it is simply one of several factors that the court should consider in balancing the competing interests of the parties.

In Hall v. Marion, 31 F.3d 183 (4th Cir. 1994), the employee's questioning of expenditure of public funds was held to clearly implicate matters of public concern. There, the court explained that where "employees' speech substantially involves matters of public concern,...the [government] must make a stronger showing of disruption." There, because the employee's speech addressed mismanagement of tax monies and there was no evidence that she encouraged any disruptive conduct by her fellow teachers, her speech was entitled to First Amendment protection. "The more tightly the First Amendment embraces the speech the more vigorous the showing of disruption must be made...actual material and substantial disruption must be demonstrated [and] mere allegations of interference with a working relationship cannot serve as a pretext for stifling legitimate speech."

In Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), the court explained how the expression interests of law enforcement officers is so substantial that alleged disruption in the nature of near race riots is insufficient disruption in order to suppress the officer's right of expression

X. CAUSATION: WAS THE EXPRESSION A SUBSTANTIAL OR MOTIVATING FACTOR IN THE ADVERSE ACTION?

Once the public concern element has been satisfied, the employee must also establish that the protected speech or activity in question was a substantial or motivating factor in the adverse employment action.¹² The causation element appears to be the most difficult element for plaintiffs to satisfy. Unlike the public concern question, the "substantial or motivating factor" issue is a question of causation to be decided by the jury.¹³ Circumstantial evidence

¹¹ Even a finding of actual disruption is not sufficient to conclude that the speech is not protected. O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3rd Cir. 1989). "[I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office..." Czurlansis v. Albanese, 721 F.2d 98, 107 (3rd Cir. 1983) Disruption, whether potential or actual, is simply one of several factors that the court will consider in balancing the interests of the parties. Id. Disruption may certainly be outweighed by First Amendments interests. O'Donnell, 875 F.2d at 1062; Frazier v. King, 873 F.2d 820, 826 (5th Cir. 1989).

¹² Lanskaris v. Thornburgh, 733 F.2d 260, 264 (2nd Cir. 1984); Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990).

¹³ Roberts v. Van Buren Public Schools, 773 F.2d 949, 954 (8th Cir. 1985).

is sufficient to establish proof of motivation and causation.¹⁴

In Ware v. Unified School Dist., 881 F.2d 906 (10th Cir. 1989), the Tenth Circuit reversed the district court's decision setting aside an employee's verdict after being discharged for speaking out on a school bond issue. There, the court rejected the district court's conclusion that the employee's evidence was insufficient as a matter of law because it was subjective. Circumstantial evidence and reasonable inferences necessarily involve subjective elements. Only rarely can direct evidence of improper motive be captured. Most all types of civil rights claims are ultimately premised upon indirect or circumstantial evidence.¹⁵

In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), the Court identified several factors to be examined to determine whether discriminatory intent or purpose is present. Those factors are:

- 1) The impact of the governmental action;
- 2) The historical background of the decision, particularly if it reveals a series of actions taken for invidious purposes;
- 3) The sequence of events leading up to the decision;
- 4) Departures from normal procedure;
- 5) Departures from normal substantive criteria;
- 6) The legislative or administrative history;
- 7) Contemporaneous statements by members of the decision-making body.

Invidious discriminatory or improper intent "may often be inferred from the totality of the relevant facts."¹⁶ The Supreme Court has held that one need not submit "direct evidence of discriminatory intent."¹⁷ Some direct evidence, however, may often be the key to ultimate success. Finally, it is not necessary to prove that the challenged decision rested solely on an improper or discriminatory purpose.¹⁸ However, it must be established that an improper or discriminatory purpose has been one of the motivating factors involved but it need not be the dominant or primary purpose.¹⁹ While the case law has somewhat eased the technical burden in proving intent, practical proof of improper intent is often difficult to capture.

XI. THE INVESTIGATION OF A PUBLIC EMPLOYMENT CASE

The investigation of a public employment dispute is a challenging and difficult task for employers and employees.

A. Sources of Evidence and Areas of Investigation

¹⁴ See, e.g., Fishel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980); Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). See, e.g., Ratliff v. Wellington School Bd., 820 F.2d 792, 796 (6th Cir. 1987)(relying upon post-speech job criticism and post-speech vindictiveness as inference of improper motive; verdict affirmed); Ware v. Unified School Dist., 881 F.2d 906, 911-912 (10th Cir. 1989)(relying upon proof of body language and other non-verbal conduct as evidence of causation); Morro v. City, 117 F.3d 508 (11th Cir. 1997)(proof of causation was based on the chronology of events; verdict affirmed). Accord Stever v. Indp., 943 F.2d 845, 851-52 (8th Cir. 1991)(sequence of events and timing and order of events raises inference of retaliatory motive).

¹⁵ See, Matulin v. Village of Lodi, 862 F.2d 609, 163 (6th Cir. 1988); Gillette v. Delmore, 886 F.2d 1194, 1198 (9th Cir. 1989); H. Perritt, Employee Dismissal Law and Practice, section 7.5 at 373-74 (2nd ed. 1987).

¹⁶ Washington v. Davis, 426 U.S. 229, 242 (1976). See Yick Wo v. Hopkins, 118 U.S. 356, 362-363 (1886) (statute facially neutral but an equal protection violation for administration of a building code "with an evil eye and unequal hand"). See also Barnes v. Yellow Freight, 778 F.2d 1096, 1101 (5th Cir. 1985).

¹⁷ Postal Service, 460 U.S. at 717. See Kercado-Melendez, 829 F.2d at 264 ("Proof of such an improper motive may be shown via circumstantial evidence."); Rokovich v. Wade, 819 F.2d 1393, 1398 (7th Cir. 1987), vacated on other grounds, 850 F.2d 1180 (1988) (proof of actual intent to retaliate against employee for exercise of constitutional rights not required; jury allowed to examine totality of evidence and to "infer a retaliatory motive.").

¹⁸ See Arlington Heights, 429 U.S. at 265; Smith, 682 F.2d at 1066.

¹⁹ Arlington, 429 U.S. at 265-66; Smith, 682 F.2d at 1066.

The following are suggested possible sources of evidence. Many public employee advocates will be searching in these areas.

1. Learn the complete labor and conduct history of the employee, employer and the particular decisionmakers who purportedly made the disputed personnel decision.
2. Investigate and determine the prior litigation history, personnel and personal history of employee, employer and individual decisionmakers.
3. Investigate and determine employee and employer's history of prior employment relations including but not limited to prior settlements, EEOC charges, grievances and other labor disputes.
4. Identify all possible witnesses, particularly all ex-employees (the alleged "disgruntleds") and ex-spouses and ex-significant others of management who may have overheard management officials speak about employment relations matters.
5. Conduct internet and newspaper search for articles and news stories referencing employer and any comments by employer's representatives and/or individual decisionmakers. This is often a major source of direct evidence. See analysis of Locurto v. Giuliani, 95 F. Supp. 2d 161 (S.D.N.Y. 2000), infra.
6. Investigate and discover any news media/press releases used by the employer in the particular employment dispute, and in prior employment disputes.
7. Obtain prior testimony of employer officials in previous litigation. Retrieve prior depositions, trial and hearing testimony.
8. Obtain all current and prior published/written employment policies of employer.
9. Investigate and determine the rationale for any significant changes in employer's employment policies.
10. Obtain resumes of employee, employer decisionmakers and investigate for possible misrepresentation and/or fraud.
11. Determine if employer officials and decisionmakers have attended courses/seminars/workshops addressing employment relations or legal issues. Obtain seminar materials used.
12. Identify and interview prior spouses and/or prior "significant others" of employer officials and decisionmakers. Hell hath no fury like that of a scorned ex-significant other.
13. Investigate and discover employer's budgets, particularly in the Human Resource area including training budgets.
14. Identify and discover all changes made to pertinent personnel files. Has part of the employee's file been destroyed? Why?
15. Identify and obtain documents which demonstrate employer's organizational structure, chain of command, supervisory chain, and decisionmaking authority.
16. Identify and discover all types of personnel documents and records used by the particular employer including but not limited to performance/job evaluations, conduct evaluations, incident reports, job descriptions, internal affairs records, etc.
17. Identify social clubs, civic organizations, unions, associations, professional groups of employee and employer's decisionmaking officials.
18. Identify, investigate and discover all scholarly and other professional writings of employer officials and decisionmakers.
19. Identify and discover all recorded evidence regarding the subject employment dispute including but not

limited to videotapes, audiotapes, photographs, etc.

20. Identify and discover all insurance policies that may cover the employment dispute in issue.
21. Conduct an archeological dig.

B. *Locurto v. Giuliani*: News Media Evidentiary Sources

The press can be a valuable source of compelling evidence. The media's efforts may serve to record and preserve evidence. The media can also stir up evidence. Public officials must beware of dangers lurking in media scrutiny of public employment disputes.

A leading example of overwhelming evidence that is captured in news media stores appears in *Locurto v. Giuliani*, 95 F. Supp. 2d 161 (S.D.N.Y. 2000), where the Court was presented with First Amendment claims by a New York City law enforcement officer and two firefighters brought against Mayor Giuliani and Commissioners Safir and Von Essen, as well as the City of New York. *Locurto* arose from Plaintiff's participation in the annual Labor Day Parade in Broad Channel, Queens, New York. Plaintiffs, who were wearing "black face," rode atop a float entitled "Black To the Future" which purportedly parodied African Americans. Plaintiffs were not in uniform or on duty; rather they participated in their capacity as individual members of the community. Initially, the float to be prepared for the parade was to be named "Gottizilla", which would depict Italian Americans with a Godzilla theme. However, the float with that theme could not be timely prepared, so the name of the float changed to "Black to the Future." A tape of the parade depicting the float was aired on CBS the following night.

The media portrayed the float as racist, although an alternative interpretation would not have suggested racism by the officers, but rather an effort to call attention to alleged racism in the officers' community. The expression was not meant to be racist. Al Sharpton sided with the white officers. See "Sharpton Defends Cop in Parade-Racism Case," which appears in the Dailey News, October 6, 1998. The NYPD acknowledged that no cop was previously fired for having engaged in racist speech.

"In response to the incident, Mayor Giuliani stated that any city employee involved in the float would be fired." 95 F. Supp. 2d at 163. "Specifically, Giuliani was quoted in the Friday, September 11, 1998 edition of the New York Times as saying,

"I have spoken to Commissioners Safir and Von Essen...and we all agree that any police officer, firefighter or other city employee involved in this disgusting display of racism should be removed from positions of responsibility immediately. They will be fired." *Id.*

Mayor Giuliani stated publicly, "the only way this guy gets back on the police force is if the Supreme Court of the United States tells us to put him back." *Id.*

C. Checklist of Points To Consider In Developing Defenses To A Public Employee Retaliation Case

Have specialized counsel assist immediately.

Don't let Human Resources terminate without review and advice by counsel.

Take full advantage of employer's right to interview employee before taking adverse action. Nail down admissions before firing.

Make sure that your pre-adverse action investigation of the dispute is thorough, non-biased and documented.

Comply with your own personnel policies; deviation may infer improper motive.

Be careful what you investigate.

Be careful to not create an appearance that you might be retaliating against the employee.

Make sure that there are non-protected and justified grounds for adverse action.

Avoid subjectivity in grounds for adverse action.

Gag the politicians. Keep politicians away from the case.

Don't let the Plaintiff politicize the case.

Look closely for breaks in the chain of causation.

In non-termination cases, avoid changed course of dealings of the parties which may infer retaliation.

Use expert witnesses on summary judgment, especially to opine regarding future disruption from employee expression.

Watch out for potentially stinking disparate treatment problems.

Be careful of police and firefighter termination cases; post 9/11 sympathy can be intense if properly developed.

Concentrate on summary judgment: this is your forum.

Be careful to not blacklist the fired employee. Avoid any post-termination contact or additional adverse action. Do not kill the employee again. Be very careful with references.

D. Things to Analyze When Evaluating Management Conduct in Investigating or Punishing the Employee

1. Employer's attitude regarding the employee's conduct. A hostile attitude suggests an improper motive.
2. Disparate treatment of the employee. Any disparate treatment in a range of employment practices should be analyzed including promotions, disciplinary action, termination practices, or other conduct suggesting that the employee has been singled out for adverse treatment.
3. Threats of retaliation against other employees for engaging in similar conduct.
4. Reduced work performance evaluation after engaging in protected conduct.
5. Manner of how employee is informed of termination.
6. Inadequate investigation of allegations surrounding the adverse action. Failing to review and consider all facts purportedly in employee's favor suggests arbitrariness.
7. Adverse action by employer in close proximity following the protected activity.
8. Deviations from grievance, termination or other employment procedures.
9. Lack of warnings.
10. Timing of the adverse action following engagement in the protected activity. The closer in time, the greater the inference of retaliation.
11. The magnitude of the alleged offense. Comparisons of punishment that the employee has been more harshly punished than others suggests an improper motive.
12. History of employee's work performance.
13. Proof of pretext.
14. Investigation or scrutiny of employee's conduct following the protected conduct.
15. Employer conduct interfering with employee's efforts seeking employment elsewhere, i.e., "blacklisting".
16. Issuing inferior equipment or other benefits to employee after protected conduct.

17. Subjecting employee to employer mandated testing (physical, psychological, polygraph) following protected conduct.
18. Negligent retention of other less qualified employees.
19. Derogatory remarks made regarding or toward employee after protected conduct.
20. Amendment of personnel policies or rules to facilitate adverse action against employee after protected conduct.
21. Attempts to obstruct unemployment compensation benefits.

See McGuinness, *Equal Protection Rights of Non-Suspect Class Victims of Governmental Misconduct: Theory and Proof of Disparate Treatment and Arbitrariness Claims*, 18 Campbell Law Review 333 (1996).

XII. THE FIRST AMENDMENT'S PETITION CLAUSE

A Petition Clause claim is subject to the same analysis as a claim under the Speech Clause of the First Amendment. Valot v. Southeastern, 107 F.3d 1220, 1226 (6th Cir. 1997). In Bill Johnson v. NLRB, 461 U. S. 731 (1983), the Court held that NLRB could not enjoin the filing of a lawsuit by an employer even if the employer's only reason for initiating the civil action was to retaliate against an employee's proper exercise of his protected rights.

A number of lower courts have addressed retaliation claims by public employees for the filing of grievances and lawsuits. Many of these have applied the Connick public concern standard to these cases. See White Plains v. Patterson, 991 F.2d 1049, 1059 (2nd Cir. 1993); Rice v. Ohio, 887 F.2d 716, 719-21 (6th Cir. 1989). These cases have held that the subject matter of the grievance or lawsuit must constitute a matter of public concern in order to invoke the Petition Clause. Cases recognize the Petition Clause as being a separate claim for relief. Stellmaker v. Depetrillo, 710 F.Supp. 891 (D. Conn. 1989); Fuchilla v. Prockop, 682 F.Supp. 247 (D.N.J. 1987).

In Fliippo v. Bongiovanni, 30 F.3rd 424 (3rd Cir. 1994), the university fired a professor who had filed grievances and lawsuits against the university. The professor contended that his termination was in retaliation for his grievance and lawsuits. The Third Circuit held that the First Amendment's petition clause extends constitutional protection to grievances and lawsuits.

The Petition Clause places a particular obligation on the government to have "at least some channel open" for those with grievances to seek proper redress. 30 F.2d at 442. Under the reasoning of San Fliippo, when a governmental agency provides a mechanism for the invocation of a grievance, this triggers the constitutional protection of the Petition Clause. Petitions to governmental bodies seeking redress of grievances often disclose "incompetence, corruption, waste and other government misconduct." Smith, "Shall make no law abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U.Cin. L.Rev. 1153, 1168 (1986). Suits and grievances against government officials "are often the only effective channel for keeping within bounds official arrogance and lawlessness. . . they may provide the basis for legislative and executive ameliorative action even when the courts lack power to act. . . even in what appeared to be purely commercial actions, the threat of suit may deter official abuses such as favoritism." Eastway Construction Corp. v. City of New York, 637 F.Supp. 558, 575 (E.D.N.Y. 1986).

In Kirby v. City of Elizabeth City, 388 F.3d 440 (4th Cir. 2004), the Fourth Circuit recognized the theoretical viability of a public employee Petition Clause claim. However, the Court affirmed summary judgment and denied relief because the Court concluded that the individuals enjoyed qualified immunity and the Monnell municipal liability claim failed.

XII. CONCLUSION

Constitutional law defining what public employee speech is protected is unclear and evolving. Garcetti has restricted protection in that particular area but other avenues of protection remain. Public officials and agencies must be very careful in this area in order to avoid liability risks.

