First Amendment Issues with Private Social Media Posts of Government Employees

Brett Bacon – February 18, 2026 CLE with Minnesota Attorney General's Office

I. Introduction

There were plentiful news stories last year of people being fired for what they posted on their private social media accounts, especially after the assassination of right-wing influencer Charlie Kirk. *See, e.g.,* Lauren Edmonds and Lacia Moses, "Companies from ABC to Office Depot are disciplining employees for their public comments on Charlie Kirk's death," BUSINESS INSIDER, Sept. 18, 2025, available at https://www.businessinsider.com/charlie-kirk-microsoft-nasdaq-delta-office-depot-employees-public-comments-2025-9. While private companies can usually fire employees just because they disagree with that employee's speech, government employees do not have that option in most cases.

This is because "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quotation omitted). Under that First Amendment right to freedom of expression, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

However, the government does have some leeway to regulate the speech of its employees in certain situations. "[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417. But even if the public employee spoke as a citizen on a matter of public concern, their speech could still lose First Amendment protection if that speech is either (1) the kind of speech that is not categorically protected by the First Amendment or (2) speech that has had an adverse impact on the efficiency of the employer's operations.

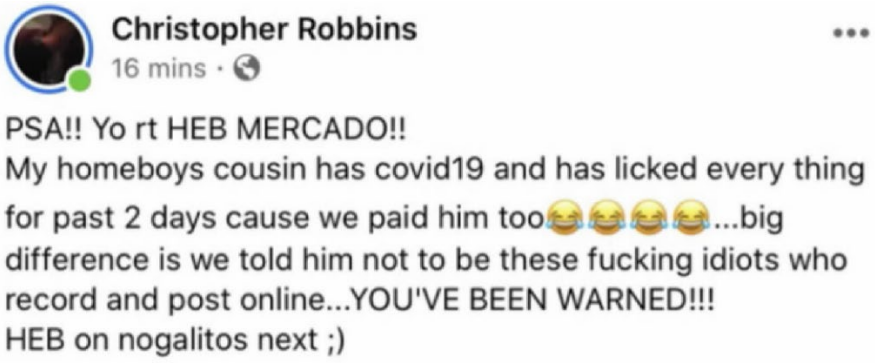
This handout, and the accompanying presentation, will give government lawyers necessary information to aid their determination if a government employee's speech on their private social media account is likely First Amendment protected speech. That determination will aid the government lawyer in advising the employer of the potential consequences of a First Amendment retaliation claim by that employee should they be fired or disciplined for the protected speech.

II. Speech Categorically Not Protected by First Amendment

As detailed below, the analysis of determining whether a government employee's speech is entitled to First Amendment protection can be tricky and time-consuming. But if a government is facing a situation where an employee makes a post containing a serious expression of intent to commit an act of unlawful violence, the legal analysis is quite short: the post is not entitled to First Amendment protection because it constitutes a "true threat."

"Free speech protections do not extend . . . to certain categories or modes of expression, such as obscenity, defamation, and fighting words." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). A "true threat" is also a form of speech that is not protected by the First Amendment. *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 622 (8th Cir. 2002). "True threats" are "'serious expressions' conveying that a speaker means to 'commit an act of unlawful violence.'" *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003) (cleaned up)). The "true" in that term "distinguishes what it at issue from jests, hyperbole, and other statements that when taken in context do not covey a real possibility that violence will follow." *Id*. (quotation omitted). "The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end. *Id*. (quoting *Elonis v. United States*, 575 U.S. 723, 733 (2015)).

For example, in *United States v. Perez*, the criminal defendant made the following two posts on Facebook in April 2020:



The Fifth Circuit upheld the defendant's conviction for perpetrating a hoax biological-weapons attack under 18 U.S.C. § 1038(a)(1). 43 F.4th 437 (5th Cir. 2022). The Court rejected the defendant's as-applied First Amendment challenge to the statute, ruling that the posts were true threats that were not First Amendment protected speech. *Id*. at 443. Even though defendant subjectively believed that he was telling a joke, the Court found that the posts evinced a serious intent to spread COVID-19 at local grocery stores and that a jury could find that defendant was serious in his intent. *Id*.

Contrast this with *Bailey v. Iles*, 87 F.4th 275 (5th Cir. 2023). In that case, plaintiff sued a police detective and county sheriff under § 1983, claiming a First Amendment retaliation claim based on his arrest for making the following Facebook post on March 20, 2020:

Id. at 280-81. The District Court, in granting defendants summary judgment based on qualified immunity, ruled that the post constituted an unprotected true threat. *Id*. at 281-82. The Fifth Circuit reversed, finding that the speech was an unprotected true threat because

the post lacked believability and was not serious, as evidenced clearly by calls for rescue from Brad Pitt, which was an apparent reference to his role in the movie WORLD WAR Z.

III. Determining Whether Speech is Protected under the Circumstances: *Garcetti/Pickering* test.

The Eighth Circuit conducts a three-step analysis to determine whether government employee speech is entitled to First Amendment protection. First, the court must determine whether the employee "'spoke as a citizen on a matter of public concern.'" *Hemminghaus v. Missouri*, 756 F.3d 1100, 1110 (8th Cir. 2014) (quoting *Garcetti*, 547 U.S. at 417). If the answer is yes, then the possibility of a First Amendment claim arises. *Id*. (quotation omitted). Once the possibility of a First Amendment claim arises, the court asks whether the employer "'has produced evidence to indicate the speech had an adverse impact on the efficiency of the employer's operations.'" *Id*. (quoting *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007)). However, the employer does not always need to present specific evidence of actual disruption, just that there is a reasonable prediction of disruption. *Anzaldua v. Northeast Ambulance and Fire Protection Dist.*, 793 F.3d 822, 834 (8th Cir. 2015).

If the employer has produced this evidence, "'the court engages in the *Pickering* balancing inquiry.'" *Id*. The *Pickering* balance requires consideration of "six interrelated factors":

> (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (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.

Id. at 835 (citation omitted). "The *Pickering* balance is flexible and the weight to be given to any factors varies depending on the circumstances of the case. *Germann v. City of Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985).

IV. "Speaking as a Citizen . . ."

Determining whether an employee has spoken as a "citizen" is normally a very straightforward inquiry. If the employee made the speech pursuant to their official duties, then it is typically not protected First Amendment speech. *Garcetti*, 547 U.S. at 421. For example, in *Foley v. Town of Randolph*, the First Circuit ruled that Plaintiff, the Chief of the town's fire department, was speaking in his official capacity when he made public statements at the scene of a fatal fire in which he criticized inadequate funding and staffing of his department. 598 F.3d 1, 6-9 (1st Cir. 2010). Although the chief was not required to speak to the press as part of his job, the Court reasoned that he was speaking in his official

capacity because he was in uniform and on duty at time and there was "'no relevant analogue to speech by citizens.'" *Id*., at 6-7 (quoting *Garcetti*, 547 U.S. at 424); *see also Nagel v. City of Jamestown, N.D.*, 952 F.3d 923, 929-31 (8th Cir. 2020) (city police officer was not speaking as a private citizen when he gave a TV interview about allegations that a member of the county sheriff's office had misused county property, where he agreed to be interviewed as representative of police union, he was identified as a police officer, his issued gun and handcuffs were visible, and the story's subject was about a feud and fraud at county courthouse).

One trap to avoid in making this analysis is to solely rely on the employee's job description. For example, in *Chrazanowski v. Bianci*, the Seventh Circuit ruled that an assistant state attorney was speaking outside the duties of his employment when he testified before a grand jury about his employment with the county state's attorney's office and about allegations that his supervisor had improperly influenced and arranged a negotiated plea in a case for which the assistant state's attorney was principally responsible. 725 F.3d 734, 739-41 (7th Cir. 2013). The district court ruled that plaintiff had been speaking as part of his official duties and responsibilities because the job description for an assistant state attorney stated that he was to "serve the people of McHenry County in the proper administrative justice . . . including testifying as a material witness if necessary." *Id*. at 739. But the Seventh Circuit, in reversing the district court's grant of a motion to dismiss looked past the "excessively broad job description" and instead looked at what he was "'task[s] [he] was paid to perform' in the course of his 'daily professional activities,'" which was to prosecute felonies. *Id*. at 739 (quoting *Garcetti*, 361 F.3d at 422). Since providing eyewitness testimony about potential wrongdoing did not fall under the task of prosecuting felonies, the Court determined that he was not speaking in his official capacity. *Id*. at 740.

Ultimately, whether an employee was "speaking as a citizen," is a "practical" inquiry. *Id.*, 725 F.3d at 738 (quotation omitted). In determining whether the employee at issue was speaking as a private citizen, the government attorney should get a list of the employee's "daily professional activities" and see if the post could arguably be part of those activities. Also likely important to the inquiry is whether the employee made the post from a social media account in which they name themselves as an employee.[1]

V. ". . . on a matter of public concern."

Generally, "public concern," in context of a First Amendment retaliation claim, means speech fairly related to a matter of 'political, social, other concern to the community' or when 'it is subject of legitimate news interest; that is, a subject of general interests and of

[1] Also worth noting: independent contractors are entitled to First Amendment protection under the same *Garcetti/Pickering* analysis. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty., KS. v. Umbehr*, 518 U.S. 668, 678-79 (1996).

value and concern to the public.'" *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 467 (3d Cir. 2015) (first quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983), then *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam)).

Employee speech at issue in First Amendment retaliation lawsuits will almost always be on a matter of public concern. This includes speech that is patently offensive and vulgar. For example, in *Fenico v. City of Phila.*, the Third Circuit determined that a fact issue existed, precluding grant of the city's motion to dismiss, of whether several Philadelphia police officers were speaking on matters of public concern when they made Facebook posts that endorsed the use of police violence against protesters, child molesters, Muslims, and refugees; ridiculed, belittled, and threatened violence against members from the LGBTQ+ community; and mocked may ethnic and religious groups. 70 F.4th 151, 154, 162-63 (3d Cir. 2023); *see also Gustilo v. Hennepin Healthcare Sys., Inc.*, 122 F.4th 1012, 1019-20 (8th Cir. 2024) (finding triable issue of fact, precluding summary judgment, as to whether OBGYN chair spoke on matters of public concern when she made Facebook posts calling COVID-19 the "China Virus" and voiced opposition to Black Lives Matter and critical race theory).

The limited time when the speech at issue in these lawsuits are not matters of public concern are limited to intraoffice disputes or other issues. *See Adams v. Cnty. of Sacramento*, 143 F.4th 1027, 1035-37 (9th Cir. 2025) (employee's act of texting copies of racist text messages to co-workers that she complained of receiving did not constitute speaking on "matters of public concern").

VI. Proving Evidence of Disruption

Because the first two factors will almost always be in favor of the employee, the most important part of the analysis is proving that the speech at issue has disrupted the government's operations. If Plaintiff shows that they spoke on a matter of public concern, the court then tasks defendants with "the burden of putting the *Pickering* balancing test into play by submitting evidence . . . to indicate the speech had an adverse impact on the efficiency of the employer's operations." *Mayfield v. Missouri House of Representatives*, 122 F.4th 1046, 1055 (8th Cir. 2024) (citation omitted). This requires the employer to, "'with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff's performance, or impaired working relationships.'" *Henry v. Johnson*, 950 F.3d 1005, 1012 (8th Cir. 2020) (quoting *Lindsey*, 491 F.3d at 900). However, it is not necessary to show actual disruption: an employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152. Rather, courts will give "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

a. Cases with No Public Reaction

The easier cases in this area are where there is documentation specifically linking the employee's social media post to the creation of intraoffice strife.

For example, in *Palmer v. The County of Anoka*, a former spokesperson for the Anoka County Attorney sued the county, alleging that she was fired after making several Facebook posts that caused tension between the county attorney and sheriff's office. 200 F.Supp.3d 842, 845-46 (D. Minn. 2016). Plaintiff's job duties included "communicating on the Office's behalf to community leaders, the media, and the public. *Id*. at 845. Plaintiff had performed well in her role and received no negative feedback until she made the following post on her private Facebook account:

> To my conservative friends decrying the violent riots in #Baltimore:
>
> We live in a violent society:
>
> The NRA says so—it's one of their main tenants [sic] to supporting (read: pushing) conceal/carry and open carry laws.
>
> We answer global violence with war and when we don't, John McCain yells and stomps, and Ted Cruz says diplomacy is a waste of time.
>
> Violence is okay in movies like Divergent, The Hunger Games[,] Transformers, and other PG–13 movies. But, if you throw sex in there, forget your PG–13 rating; it's R. That sh*t's not for kids, you know. (?!)
>
> Call of Duty is not just for your average teenager and his X–Box. It's also for training our soldiers.
>
> The US spends 20 cents of every tax dollar on military and just 2 cents on education. You do the math.
>
> So when youth in Baltimore who live in worse conditions than youth in Nigeria, finally break down in the face of police-sanctioned HOMICIDE, is anyone surprised that violence is the result? ? ? According to the GOP that's just business as usual in every other part of our society.

Id. Plaintiff alleged that shortly thereafter, the County Sheriff left the County Attorney a voicemail stating, "that he did not want Palmer in his office if she had such an attitude toward police." *Id*. The County Attorney told plaintiff that her post was "not okay" and showed her, for the first time, the office's social media policy. *Id*. In relevant part, the policy prohibited employees from "posting comments that have the potential for causing embarrassment to the Office or disruption in the workplace, or that otherwise detrimentally affect the office's reputation or the work that it does." *Id*. (cleaned up). At the County Attorney's behest, Plaintiff apologized to the sheriff for the post but then made a similar post less than two months later that linked to an article by then-Congressman Keith Ellison entitled "The Link Between Police Tactics and Economic Conditions Cannot Be Ignored" and quoted the following:

> I know I'm not supposed to talk politics anymore, but this opinion piece nails it. Please—no comments ... but if you like it, share it.
>
> "Working in high poverty areas doesn't excuse officers who use excessive force, but police officers are dealt an unfair hand: communities with inadequate and unaffordable housing, few jobs and weak schools need more help than even the best–trained police service. Police officers can't help people make ends meet at the end of the month."

Id. at 845-46. The article also said that "harsh police tactics in black communities and a history of high rates of unemployment and poverty go hand in hand. *Id*. at 846 (quotation omitted) (cleaned up). The County Attorney fired plaintiff shortly thereafter. *Id*. There were no allegations that members of the public complained to the county about plaintiff's posts.

The Court granted the County's motion to dismiss, ruling in relevant part, that Plaintiff's own complaint alleged that her Facebook posts created actual or foreseeable disruption to the office. *Id*. at 847-48. In making this determination the court noted that because the County Attorney's "job is, in part to give confidential legal advice to [the sheriff] and his deputies, and to represent them in litigation; it is extremely important that any client have full trust and confidence in his attorney." *Id*. at 847. Ultimately, the Court found that the posts caused "major disruption" because it caused the County Sheriff to tell the County Attorney that Palmer, the very person who was supposed to act as the liaison between them, that she was no longer welcome in his office. *Id*. at 848.

In *Henry v. Johnson*, plaintiff, a former member of the Missouri State Highway Patrol (MSHP), alleged that he was disciplined after he made public statements, including a statement on his private Facebook account, making claims of corruption within MSHP and that it had covered up a drowning of an inmate. 950 F.3d at 1009. The Eighth Circuit affirmed the district court's order granting defendants summary judgment, ruling, in

relevant part, that MSHP demonstrated that plaintiff's statements had adverse impact on governmental efficiency. *Id*. at 1012-13. This evidence included the fact that, after plaintiff had made the public statements, two prosecutors refused to take his cases, citing to a lack of trust and integrity issues with him. *Id*. at 1012. Also, an internal investigation concluded that plaintiff violated three MSHP General Orders, two relating to workplace disruption and inefficiency. *Id*. The report specifically concluded that plaintiff's behavior "violated a General Order prohibiting the spread of malicious rumors or lies, disrupt[ing] the workplace, or destructively criticizing or maliciously ridicule[ing] the Patrol." *Id*. (quotation marks omitted). The Eighth Circuit highlighted that law enforcement officers had a heightened need for good working relationship amongst its members because they might have to rely on one another in life-threatening circumstances. *Id*. at 1012-13.

b. Cases with Public Reactions to Employee Post: Balance between Preserving Public Trust with Avoiding Heckler's Veto

The harder cases in this area involve a public reaction to an employee's controversial social media post. While there is always a plausible argument that public backlash to an employee's post could undermine the public's trust in government, thereby affecting its operations, Courts still require the government to show some evidence that the post caused an adverse impact on the efficiency of the employer's operations.

In *Melton v. City of Forrest City, Ark.*, Plaintiff, a fireman, was fired after he posted the following image to his personal Facebook page.

147 F.4th 896, 900 (8th Cir. 2025). While plaintiff deleted the post immediately after learning that it had upset a retired fire-department supervisor, the mayor put him on administrative leave while conducting an investigation. *Id*. at 900-01. The mayor ultimately fired plaintiff because he was concerned about the "huge firestorm it created, which took the form of the fire chief's phone "blowing up" with calls and texts, "several" police

officers becoming "very upset," and the city's phone lines being jammed with calls from angry city-council members and citizens. *Id*. at 901. Some calls said that plaintiff "should not be a part of the fire department responding to calls" and others said that they did not want "him coming to their house for a medical call or fire emergency." *Id*. (cleaned up). Despite the public outcry, the Eighth Circuit agreed with the district court that there was a genuine dispute of material fact of whether the city presented sufficient evidence disruption. Importantly, the Court found that the evidence of disruption was "thin" because everyone agreed "that there was no disruption of training department, or of any fire service calls, because of the post or the controversy surrounding it." *Id*. at 903. While the mayor stated that his decision to fire plaintiff was based on his worry that the post conveyed a racist message that would affect the public's trust with firefighters, there was no evidence that the post had actually affected the government's ability to deliver public services by fighting fires and protecting public safety. *Id*. at 903. The Eighth Circuit ruled that granting the city summary judgment based off the mayor's vague and conclusory concerns, without more, would run the risk of "constitutionalizing a heckler's veto." *Id*. (quoting *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000).

The "heckler's veto" principle is likely to loom large in coming instances where there is a public campaign to have a government employee fired for their private social media post. The concept of a heckler's veto is best illustrated in *Bible Believers v. Wayne County, Mich.*, 805 F.3d 228 (7th Cir. 2015). In that case, Bible Believers, an evangelical Christian group, went to the Arab International Festival in Dearborn, Michigan, holding signs with several Islamophobic messages such as "Islam Is A Religion of Blood and Murder" and "preaching" messages with Islamophobic language *Id*. at 238. The group soon drew a crowd who expressed their anger by pelting the group with plastic water bottles and other debris. *Id*. at 239. After a few minutes of on-and-off instances of the crowd booing and throwing items at the group, a squad of officers told the group to leave on threat of arrest for disorderly conduct. *Id*. at 239-41. The group sued the county, alleging, among other things that the officers' actions constituted a "heckler's veto" in violation of their First Amendment rights. *Id*. at 241-43.

The Eighth Circuit, en banc, agreed and reversed the district court's grant of defendants' summary judgment motion. The Court noted that "[i]n a balance between two important interests—free speech on one hand, and the state's power to maintain the peace on the other—the scale is heavily weighted in favor of the First Amendment. *Id*. at 252 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). Because of this "[w]hen a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals." *Id*. at 252-53 (citing *Watson v. City of Memphis, Tenn*., 373 U.S. 526, 535-36 (1963)).

> Nor can an officer sit idly by on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian

> rule—only later to claim that the speaker's removal was necessary for his or her protection. "Uncontrolled official suppression of the privilege of free speech cannot be made a substitute to maintain order in connection with the exercise of that right."

Id. at 253 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939)) (cleaned up).

The Sixth Circuit explained the rationale for the rule against a heckler's veto in context of the basic First Amendment principle applying strict scrutiny to government actions that are content- or viewpoint discriminatory. In the Court's view, the Bible Believers were free to exercise their First Amendment rights to spread their religious message, although that view was vile and offensive to others. *Id*. at 254-55. But the County sheriff's deputies engaged in content-based discrimination by instructing the Bible Believers to leave because their message was offensive to the crowd and causing an unruly situation. *Id*. at 257. However, the deputies' action was not the least restrictive means available in keeping the peace because they did try alternative means such as dispersing the crowd or cordoning the Bible Believers. *Id*. at 253.

The "heckler's veto" made an appearance in what appears to be the first opinion from a case where the employee challenged the legality of their firing based on a social media post commenting on the assassination of Charlie Kirk. In *Hook v. Rave*, plaintiff, a professor at the University of South Dakota, sought a temporary restraining order to restrain the university board of regents from retaliating against him for his post and to place him on administrative leave, alleging that he was fired after he made the following post on his private Facebook account when he was at home and off work:

> Okay. I don't give a flying f*** about this Kirk person. Apparently he was a hate spreading Nazi. I wasn't paying close enough attention to the idiotic right fringe to even know who he was. I'm sorry for his family that he was a hate spreading Nazi and got killed. I'm sure they deserved better. Maybe good people could now enter their lives. But geez, where was all this concern when the politicians in Minnesota were shot? And the school shootings? And Capitol Police? I have no thoughts or prayers for this hate spreading Nazi. A shrug, maybe.

No. 4:25-CV-04188-KES, 2025 WL 2720978, at *1 (D.S.D. Sept. 24, 2025). He removed the first post and made a second post three hours, while still at home and off work.

> Apparently my frustration with the sudden onslaught of coverage concerning a guy shot today led to a post I mow [sic]

> regret posting. I'm sure many folks fully understood my premise but the simple fact that some were offended, led me to remove the post. I extend this public apology to those who were offended. Om Shanti.

Id. The Court granted plaintiff's TRO, finding that he had a "fair chance of prevailing" on his First Amendment retaliation claim. *Id*. at *5.[2] Of note, the Court ruled that the defendants did not demonstrate any evidence of disruption, even though they alleged that they had received "hundreds of calls and message[s]" regarding the comment or calling for the Plaintiff's firing. *Id*. at *4. "Defendants have not demonstrated that there was any disruption to on-campus activities, Hook's teaching lessons, or the University's operations. And without more, such vague and conclusory concerns run the risk of constitutionalizing a heckler's veto." *Id*. (quotation omitted).

That's not to say that public outcry to an employee's post could is irrelevant. In fact, public outcry could actually be sufficient evidence of disruption if the government department's functions rely on trust within the community. For example, in *Fenico v. City of Phila*., 20 current and former city police officers sued the city, alleging that they were disciplined or fired after news reporting uncovered over 500 controversial social media posts from them. 755 F.Supp.3d 602, 613 (E.D. Pa. Oct. 28, 2024). These posts concerned a "multitude of topics, including race, religion, immigration, sex, gender, policing, penology, just deserts, and others." *Id*. News of these posts were broadcasted on CNN, The Philadelphia Inquirer, and Buzzfeed News. *Id*. at 614. This led to protesters picketing outside police headquarters, the city council to order investigations, and leaders from the Islamic, Hispanic, and Black communities to meet with police department leadership and the Mayor's office. *Id*. The posts also caused "some degree of internal turbulence as well." *Id*. For example, some officers were offended by the posts made by their fellow officers, and described how such division puts officers' lives at risk and hampers recruiting efforts." *Id*. The police department set up internal "healing forums" so that officers could speak freely about the fallout from the posts' revelation. *Id*.

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[2] *See also Brown v. Young*, No. 4:25-cv-419-MW/MJF, 2025 WL 3640389 (N.D. Fla., Dec. 16, 2025) (denying defendant's motion to dismiss for failure to state a claim, finding that Plaintiff, a state employee, stated a First Amendment retaliation claim based on allegation she was fired from her position solely because she made an Instagram post criticizing Charlie Kirk after his death); *but see Shirinian v. Plowman*, No. 3:25-cv-528-KAC-JEM, 2025 WL 3680503 (N.D. Tenn. Dec. 18, 2025) (denying Plaintiff's TRO motion after she was fired for making a Facebook comment substantively similar to Professor Rave's comment, finding, *inter alia*, her speech was not political speech that was entitled protection and that employer reasonably found that Plaintiff's comment negatively impacted academic environment).

The Court granted the city summary judgment, finding that the city's interest in preventing disruption outweighed the police officers' and publics' interests in the posts. The Court's 98-page opinion conducts a *Pickering* analysis for each individual plaintiff and examined each post that they made and how it disrupted the city police department's functions. Most of these poses are explicitly racist, Islamophobic, sexist, homophobic, transphobic, or xenophobic, or call for, or condone, extralegal violence against protestors, crime suspects, and others. The Court found sufficient evidence of disruption because the posts would be likely to "jeopardize the 'relationship of trust between the police and the communities they serve' because they suggest that members of those communities will not receive fair treatment or adequate protection from police officers who speak in this matter." *Id*. at 637 (quoting *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006)).

Reading *Fenico* and similar cases, the consensus appears that there is no heckler's veto so long as there is some evidence or prediction that the public outcry will affect the employer's ability to function within the community. The Second Circuit articulates this principal in *Locurto*,

> [w]here a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations.

447 F.3d at 179 (2d Cir. 2006); *see also Hussey v. City of Cambridge*, 149 F.4th 57, 72 n.7 (1st Cir. 2025) (finding police department's suspension of police officer after he made post to his Facebook account, which was on "restricted" mode, criticizing the naming of a federal police reform act after George Floyd did not constitute a "heckler's veto" mainly because police department depended on its positive relationship with public to function effectively).

Other Circuit Courts have made similar rulings when cases arise from a public school teacher being fired or disciplined for making controversial social media posts. For example, in *Hedgepeth v. Britton*, a white former public high school teacher, which had mostly Black students, sued the school district and school board members, alleging that she was fired after students, alumni, another teacher, and a parent complained her Facebook posts. 152 F.4th 789, 792-93 (7th Cir. 2025). The Court summarized the posts at issue:

> on May 31 and June 1, 2020, during nationwide protests following the police killing of George Floyd, Hedgepeth made a series of posts on Facebook. At the time, she was vacationing in Florida. The first post, evidently in response to media reports about the ongoing protests, included pictures from her vacation with the caption, "I don't want to go home tomorrow. Now that

> the civil war has begun I want to move." A Facebook friend commented on her post, "Follow your gut! Move!!!!!!!!" to which Hedgepeth replied, "I need a gun and training."
>
> In another Facebook post, Hedgepeth reposted a viral meme evoking the high-pressure water hoses used against civil rights protestors in the early 1960s that read, "Wanna stop the Riots? Mobilize the septic tank trucks, put a pressure cannon on em ... hose em down ... the end." Hedgepeth commented on her own post, "You think this would work?"
>
> Finally, Hedgepeth engaged in an online debate with a former PHS student about race in America. Over the course of that debate, Hedgepeth wrote in a Facebook comment, "I find the term 'white privilege' as racist as the 'N' word."

Id. The Seventh Circuit affirmed the district court's summary judgment ruling that Hedepeth's posts were not entitled to First Amendment protection because there was ample evidence that the posts caused disruption within the school district. *Id*. at 799. The Court ruled that Hedgepeth's argument that "termination on the grounds of workplace disruption" amounts to a "heckler's veto" over the content of the speech was foreclosed by precedent. *Id*. at 798-99.

> Most significantly, "this argument does not account for the unique relationship" that Hedgepeth has to her audience as a public school teacher and therefore a role model for others in the PHS community. We have repeatedly recognized that public school teachers occupy a unique position of trust. PHS community members, including current students who predictably saw her posts, "are not 'outsiders seeking to heckle [Hedgepeth] into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function.

Id. (citations and quotations omitted). The Second and Third Circuits have made similar rulings. *See Munroe v. Cent. Bucks Sch. Dist.,* 805 F.3d 454, 475 (3d Cir. 2015), as amended (Oct. 25, 2019) (neither parents nor students could be considered as outsiders seeking to "heckle" an educator into silence rather they are participants in public education, without whose cooperation public education as a practical matter cannot function). (quotations omitted) (cleaned up); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 199 (2d Cir. 2003) ("[a]ny disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be

accounted for in the balancing test and which may outweigh a public employee's rights. In consequence, we do not perceive an impermissible heckler's veto implicated in this case.").

VII. *Pickering* Balancing

If the defendant has put the *Pickering* balancing factors into play by producing evidence to indicate the speech had an adverse impact on the efficiency of the employer's operations, then there is a strong likelihood that the court will find that the *Pickering* balancing factors weigh in favor of the employer. Research into relevant Eighth Circuit case law has revealed no case where a defendant produced sufficient evidence of disruption but failed in the *Pickering* balancing analysis. This is unsurprising since every other circuit does not require defendant to make a threshold showing of evidence of disruption before getting to *Pickering*. *See, e.g., MacRae v. Mattos*, 106 F.4th 122, 133 (1st Cir. 2024) (stating that test to determine if government employee speech is protected under First Amendment requires showing that employee spoke as citizen on a matter of public concern and then going to *Pickering* balancing factors); *Long v. Byrne*, 146 F.4th 282, 290 (2d Cir. 2025) (same); *Fenico v. City of Phila.*, 70 F.4th 151, 162 (3d Cir. 2023) (same); *Porter v. Bd. of Trustees of North Carolina State Univ.*, 72 F.4th 573, 582 (4th Cir. 2023) (same); *Hamilton v. City of Wilmer, Texas*, 140 F.4th 650, 660 (5th Cir. 2025) (same); *Josephson v. Ganzel*, 115 F.4th 771, 783-84 (6th Cir. 2024) (same); *Schneiter v. Carr*, 148 F.4th 438, 447 (7th Cir. 2025) (same); *Roberts v. Springfield Utility Bd.*, 68 F.4th 470, 474 (9th Cir. 2023) (same); *Brown v. City of Tulsa*, 124 F.4th 1251 (10th Cir. 2025) (same); *Wood v. Florida Dep't of Edu.*, 142 F.4th 1286, 1289-90 (11th Cir. 2025) (same); *LeFande v. District of Columbia*, 841 F.3d 485, 494 (D.C. Cir. 2016) (same).[3] And, as demonstrated below, the factors themselves concern issues of disruptiveness in the office.

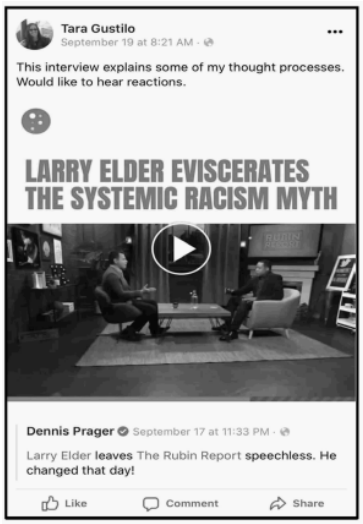
a. Need for Harmony in the Office or Workplace.

"'[W]hen close working relationships are essential to fulfilling public responsibilities,' an employer's judgment may be given a 'wide degree of deference.'" *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) (quoting *Connick*, 461 U.S. at 151–152, 103 S.Ct. 1684). The degree of deference is especially wide for "public safety organization[s]" like fire

[3] Procedural note: federal employees seeking enjoin the type of action as discussed in this handout may seek an injunction pursuant to the federal court's inherent power to enjoin federal officials from violating the law. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England"). Damages for constitutional violations, however, are likely not available. *See Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (noting that recognizing implied causes of action for money damages is a "disfavored" judicial activity (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

departments and police departments, which "'ha[ve] a more significant interest than the typical government employer in regulating the speech activities of [their] employees in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence' in [their] ability.'" *Anzaldua*, 793 F.3d at 834 (quoting *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993)).

The best kinds of evidence for this step are information about the functions of the office and testimony from the employee's coworkers about how trust is central to their mission and/or function. For example, in *Gustilo v. Hennepin Healthcare Sys., Inc.,* the former OBGYN department head at the Hennepin County Medical Center sued after she was demoted for making several controversial posts on her private Facebook account. 2025 WL 2539116, at *5-6. Some of these posts are provided below.



Id. After finding that the employer had submitted sufficient evidence that the posts caused disruption, the Court proceeded to conduct the *Pickering* analysis, starting with the first factor. *Id*. at *25. In finding that the need for harmony in the office or workplace factor weighed in favor of the employer, the court found that there was litany of evidence that plaintiff's place a work, an OB-GYN department in a busy, crowded urban county hospital, heavily relied on close working relationships and confidence. *Id*. at 25-26.

b. 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.

Helpful evidence at this step would be coworker testimony about how the employee's speech resulted in extra time dedicated to addressing how the speech is affecting the office. This includes things such as listening sessions to employees affected by the post and

leadership meetings on how to address the situation. *See, e.g.*, *Bennett v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 977 F.3d 530, 540 (6th Cir. 2020) (sufficient evidence of deteriorating relationship where employee's Facebook posts "prompted a 'nonstop conversation' in the office that lasted for days"); *Gustilo*, 2025 WL 2539116, at *26 (evidence included spending significant time and energy discussing posts with co-workers, testimony about how posts destroyed trust and morale, and doctors threatening to quit).

c. Time, Place, and Manner of the Speech.

This factor has a lot of overlap with the inquiry into whether the employee spoke as a private citizen. Normally, "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee" because it carries little "danger that [the employee] ha[s] discredited the office," *Rankin v. McPherson*, 483 U.S. 378, 388–89 & n.13 (1987) and "the risk that [it] will disrupt the work place and lower morale is low," *Shands*, 993 F.2d at 1346. Public comments, in contrast, tend to favor the employer because they carry a greater risk of disruption and disrepute. *Cf. id*. (finding in favor of public employer where firefighters "had to expect" their request for a city councilman "to take public action" of "tabl[ing] the hiring of [a firefighter] would raise questions and could potentially disrupt the fire department"). Public comments on social media, which often "amplifies the distribution of the speaker's message" and thereby "increases the potential, in some cases exponentially, for departmental disruption," usually favor the employer. *Grutzmacher v. Howard County*, 851 F.3d 332, 345 (8th Cir. 2017).

Important here is whether the employee identified themselves as an employee on the account where they made the post. A key consideration here is whether the "manner of the posts created a serious risk of attribution and disrepute [that undermines a] 'compelling and legitimate government interest' in maintaining public confidence." *Gustilo*, 2025 WL 2539116 at *28 (quoting *Anderson v. Burke County*, 239 F.3d 1216, 1221-22 (11th Cir. 2001)). It appears that deleting the post or the employee making their social media account private after they made the post does not make a difference. *See id*. (noting that coworkers were able to see screenshots of the post after it was deleted); *see also Grutzmacher*, 851 F.3d at 339 (employer received complaint that included screenshot of deleted post), *Bennett*, 977 F.3d at 534-35 (similar).

It seems like courts have yet to deal with the situation where the employee did not identify themselves as an employee where they made the controversial post, but an online campaign was able to match that social media account with another social media account where the employee *does* identify themselves as a government employe (e.g. LinkedIn). *See e.g.*, Stephany Matat, *Former FWC biologist sues after firing over post on Charlie Kirk*, TALLAHASSEE DEMOCRAT, Sept. 30, 2025, available at https://www.tallahassee.com/story/news/local/state/2025/09/30/lawsuit-filed-after-

florida-firing-tied-to-charlie-kirk-post/86448955007/ (noting that "hard-right social media account known as LibsofTikTok posted [employee's] LinkedIn page and a screenshot of her Instagram story," where the employee made the post, and said "Your tax dollars pay her salary. She should be fired ASAP."). As exemplified by this news story, the courts will eventually have to consider this issue as part of the *Pickering* analysis.

d. The Context in which the Dispute Arose.

This factor examines the broader context of the dispute, if any, that motivated the speech. *Gustilo*, 2025 WL 2539116, at *29. If the speech arose from "a personal dispute with [the] government employer," it is entitled to less protection than if it arose from the employee's "purely academic interest" outside of work. *Shands*, 993 F.2d at 1346.

This factor is self-explanatory. If the post at issue is just an airing of an intraoffice issue, this factor will likely weigh in favor of the employer. *See, e.g.*, *Anzaldua*, 793 F.3d at 834 (noting that plaintiff's "email also attacked [the fire department chief] personally"). If it is not, then this factor will weigh in favor of the employee. *See, e.g.*, *Gustilo*, 2025 WL 2539116, at *29 (finding context factor weighed in favor of employee where employee's posts arose from her "academic interest in matters of public concern outside of work.").

e. The Degree of Public Interest in the Speech.

This factor looks at whether the speech should receive heightened protection because it has some quality or perspective that gives it "special value" to the public. *Gustilo*, 2025 WL 2539116 at *30 (quoting *Lane v. Franks*, 573 U.S. 228, 240, (2014)). For example, "speech by public employees on subject matter related to their employment" is entitled to heightened protection "because those employees gain knowledge of matters of public concern through their employment." *Lane*, 573 U.S. at 240; *see also Waters*, 511 U.S. at 674 (plurality opinion) ("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."). Similarly, "an employee's first amendment interest is entitled to more weight where he is acting as a whistle-blower exposing government corruption." *Noon*, 94 F.4th at 765-66 (citation omitted); *see also Sexton*, 210 F.3d at 913 ("speech alleging potentially illegal misconduct of public officials occupies the 'highest rung of First Amendment hierarchy.'" (citation omitted)).

This factor is also self-explanatory. If the speech just adds the speaker's view to the views to countless others, then this factor will weigh in favor of the employer. *See Palmer*, 200 F.Supp.3d at 848 (finding Facebook posts by county attorney's spokesperson unentitled to heightened protection because she "d[id] not have any particular expertise on the issues on which she was commenting, nor was she acting as a whistleblower or contributing previously unknown facts or insights to the public debate").

f. Whether the Speech Impeded the Employee's Ability to Perform His or Her Duties.

"Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin*, 483 U.S. at 388.

Helpful evidence here is testimony from coworkers stating that the employee's speech created tension in the office and a loss of confidence in the employee who made the post. *See, e.g.*, *Gustilo*, 2025 WL 2539116, at *30 (OBGYN employees at HHS testified that they could no long trust department chair after she made posts calling COVID-19 the "China Virus," complaining about "welfare queens," and other controversial posts).

VIII. Practical Advice

Providing legal advice to a government entity that is the target of an online campaign demanding that it fire an employee for their private social media post can be a daunting task. In these situations, the lawyer will likely be roped in to an emergency meeting filled with panicking leadership and staff who are feeling the pressure to act quickly. It is possible that some of leadership and staff are unaware that they cannot fire a government employee just because of the public pressure or because they dislike the employee's social media post.

The first thing everyone should do when meeting about an employee's social media posts is to determine whether the post itself or the reaction to it puts anyone in danger. If so, then everyone should take immediate action to set up security measures.

If there is no threat of violence or anything about the post or its reaction that puts anyone in harms' way, then it is important to take a step back and not give in to the pressure to act immediately. It is also important that the lawyer try their best to put their personal politics aside when examining whether the employee's social media post is entitled to First Amendment protection. If the post targets a political belief that the lawyer supports or targets a group of people of which the lawyer identifies, it can be easy to have a gut reaction to it that can impair a legal analysis.

For example, let's say that the lawyer identifies as a transgender woman. That lawyer gets called into a meeting with government leadership to address an employee's social media post that says something like "transgender ideology is a threat to this country." It's understandable if the lawyer would feel unsafe and scared because of this post. Because of this, an initial reaction to the post would be to think that the post is not entitled to First Amendment protection because it's a true threat of violence or is calling for violence because the logical conclusion of the belief espoused in the post is that violence against transgender people is necessary to protect the country. But at both the motion to dismiss

and summary judgment stages of a hypothetical lawsuit brought by the employee who was fired or disciplined for the post, the court will look at the facts most favorably to plaintiff. If the lawyer looks at the post through this lens, there is a strong argument that the post is not making a threat or calling for violence. The court could say that the employee is just expressing a political belief that would likely be protected by the First Amendment.

Another example: let's say that they lawyer is a supporter of Donald Trump and likes his policies. The lawyer gets called into a meeting to determine how to react to an employee's social media post that says: "MAGA supports are all fascists that are an existential threat to democracy." Again, the lawyer could make an argument here that the logical conclusion to this statement is that people should act violently toward Donald Trump supporters to preserve American democracy. But the court, looking at the facts most favorably to the employee, could rule that the post is merely calling for people to show up at the ballot box and vote to protect American democracy.

If the lawyer determines that the post could be entitled to First Amendment protection, then it is time to start setting up documentation procedures if the employee ends up disciplined or fired for the post. As explained above, the strongest evidence supporting an argument that employee speech is not protected by the First Amendment is that the speech caused intraoffice disruption. Evidence of this disruption could come from statements from the employee's co-workers about how the post offended them, led to them distrusting the employee, or affected the employee's work in anyway. The employer could collect these statements by directly interviewing employees pursuant to its internal investigation procedures or just ask employees if they have any concerns or questions about the post at issue.

Because public reaction could be relevant to the question of whether the employee's post is First Amendment protected speech, the employer should start documenting every call, email, social media post, etc. in which a member of the public expresses concerns about the employee's post. Documentation of each of these interactions should at least identify from what town and state the person is calling from, what is the substance of their complaint, and when the interaction occurred. Any other information that a member of the public provides in their interaction would also be helpful.

Finally, in addition to doing their own legal research below is a list of considerations that could be helpful in determining whether the employer can (1) present sufficient evidence that the post disrupted government function and (2) prevail on a balancing of the *Pickering* factors:

- Determine whether the post is real and that employee actually posted it (very important in age of AI).
- Who reported the post?
- How bad is the backlash?

- When and where did employee make post?
- Does the post concern a matter of public concern?
- Where does the employee work?
- What are the employees actual work duties?
- Does the employee's job involve contact with public?
- Is it reasonably likely that the post will cause internal strife? Is it already happening?
- Is it reasonably likely that the post will erode public trust in a specific government function? How important is public trust in that function?

IX. Conclusion

Given the current political, technological, and social landscape, it is only a matter of time until an employer is confronted with an online pressure campaign to fire one of its employees because of something they posted on their private social media account. Because government employers naturally want to be accountable to its constituents and have the appearance of being politically neutral when delivering its services, it is understandable that there would be some internal pressure to discipline or fire an employee for speech that undermines its mission. Hopefully, this CLE has provided government attorneys with the legal background and practical guidance to properly advise their client of the potential liability that could come from firing or disciplining an employee for their private speech.

Feel free to contact me if you have any questions.

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