FIRST AMENDMENT AND GOVERNMENT EMPLOYEES AND CONTRACTORS[1]

Congress shall make no law. . . abridging the freedom of speech. . .

U.S. Const. amend. I

I. DUAL ROLES OF PUBLIC EMPLOYER

The government serves dual roles. The government is the sovereign, as such it provides structure and services for its citizens and is obligated to respect the First Amendment rights of its citizens. The government is also an employer with the same interests as any employer in efficiently furthering its values, mission and interests. For instance, the government employer has interests in promoting the efficiency of the public services it performs through its employees. The question is how do we strike the proper balance between protecting the interests of the employee – as a citizen – in commenting upon matters of public concern and the interest of the government employer – as an employer – in promoting its mission, values and the efficiency of the public services it performs through its citizen-employees. The framework for determining the proper balance has evolved over the decades.

II. PREVAILING VIEW OF FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES PRIOR TO 1968

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable," *McAuliffe v. Mayor*, 155 Mass. 216, 29 N.E. 517, 517-518 (Mass. 1892)(Massachusetts Supreme Court Justice Oliver Wendell Holmes).

III. MODERN DAY UNDERSTANDING OF FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES AND CONTRACTORS

The modern day understanding of the First Amendments Rights of government employees and contractors is largely the product of four pivotal U.S. Supreme Court cases.

A. *Pickering v. Board of Education*, 391 U.S. 563 (1968)

Public employees are protected by the First Amendment when they speak on matters of public concern. Their rights, however, are not absolute. A public employee's right to speak on matters of public concern must ultimately be balanced against the public employer's interest, if any, in regulating the speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In *Pickering*, a teacher was discharged after writing a letter to the newspaper critical of the Board of Education's proposed allocation of funds between educational and athletic programs. The Court ruled that government employees do not relinquish their First Amendment rights upon accepting government

[1] The author/speaker is appearing in his personal capacity. The views and opinions are his own and nothing written or spoken should be interpreted to reflect the views or opinions of any past, present or future employer.

employment. "[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering*, 391 U.S. at 574.

The Court recognized that the government has considerably interests in regulating the speech of its employees. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568.

Pickering Balance Test - In striking the appropriate balance, the Court weighed whether the teacher's comments impaired "discipline by immediate superiors or harmony among coworkers;" harmed "close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning;" negatively impacted "the teacher's proper performance of his daily duties in the classroom;" or "interfered with the regular operation of the schools generally." *Pickering*, 391 U.S. at 570-573. The Court ultimately decided that on the facts presented the interests of the teacher and the public in having "free and unhindered debate on matters of public importance" outweighed the Boards interests in regulating the speech. *Id.* at 573.

B. *Connick v. Myers*, 461 U.S. 138 (1983)

Matters of personal interest are not necessarily matters of public concern, and thus are not deserving of similar First Amendment protection. *Connick v. Myers*, 461 U.S. 138 (1983).

"[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (citations omitted). Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

"When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. at 146- 147.

C. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

In *Garcett*i, the Court clarified "citizen" speaking on a matter of public concern and established the "official duty" analysis. If employee is speaking pursuant to official duties, he/she is not speaking as "a citizen" on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

"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." *Garcetti v. Ceballos, 547 U.S. at 421 (emphasis added).*

The Court reemphasized that if an employee speaks as a citizen on matters of public concern, the public employer needs to assert adequate justification (i.e., some disruption in the workplace) for treating the citizen-employee differently than other members of the general public. "This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti,* 547 U.S. at 418.

D. *Board of County Comm'r Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996)

Government contractors are entitled to First Amendment protection when they speak on matters of public concern. *Board of County Comm'r Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996).

There is no "difference of constitutional magnitude" between independent contractors and employees. *Board of County Comm'r Wabaunsee County v. Umbehr*, 518 U.S. 668, 684 (1996)(citation omitted). "Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically – though not always – somewhat less strong in the independent contractor case. We therefore conclude that the same form of balancing analysis should apply to each." *Umbehr*, 518 U.S. at 684-685.

IV. DETERMINING THE LEVEL OF FIRST AMENDMENT PROTECTION OF SPEECH BY A GOVERNMENT EMPLOYEE OR GOVERNMENT CONTRACTOR[2]

In the Eighth Circuit, to determine whether a public employee's speech is protected by the First Amendment, a court must first determine whether the employee/contractor spoke as a citizen on a matter of public concern.[3] Next, the court must determine whether the public employer put forth sufficient evidence to indicate the speech had an adverse impact on the efficiency of its operations. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000)(citing *Sexton v. Martin*, 210 F.3d 905, 911-12 (8th Cir. 2000). If the government does not provide sufficient justification, the court will conclude that the employee engaged in protected speech.[4] If the government does put forth sufficient justification, the court then performs the Pickering Balance test. The court must weigh the employee's interest in commenting upon matters of public concern against the interest of the government employer in promoting the efficiency of the public services it performs. *Pickering*, 391 U.S. at 568.

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[2] Most of the cases reviewed were in the context of a public employee's claim of retaliation for the exercise of First Amendment rights. In order to establish a prima facie case of First Amendment retaliation a public employee must show: (1) she engaged in activity protected by the First Amendment; (2) the defendants took an adverse employment action against her; and (3) the protected conduct was a substantial or motivating factor in the defendants' decision to take the adverse employment action. *Lyons v. Vaught*, 875 F.3d 1168, 1172 (8th Cir. 2017). There is also the issue of whether the decisionmaker has Qualified Immunity. My discussion will primarily address whether the public employee engaged in speech protected by the First Amendment.

[3] "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises." *Nagel v. City of Jamestown*, 952 F.3d 923 (8th Cir. 2020), quoting, *Garcetti v. Ceballos*, 547 U.S. at 418; *Anzaldua v. Ne. Ambulance & Fire Prot. Dist*., 793 F.3d 822 (8th Cir. 2015).

[4] "Where there is no evidence of disruption, resort to the Pickering factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests." *Hemminghaus v. Missouri,* 756 F.3d 1100 (8th Cir. 2014), quoting, *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir.2000).

The more the employee's speech reflects matters of public concern, the greater the employer's showing must be that the speech was disruptive before the speech can be punished. *Sexton v. Martin*, 210 F.3d 905 (8th Cir. 1999).

In performing this fact-intensive inquiry, key factors the court will consider are: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties. *Belk v. City of Eldon*, 228 F.3d 872, 880-881 (8th Cir. 2000).

A. Speaking as a Citizen on a Matter of Public Concern

A court must first determine whether the public employee spoke "as a citizen" on a "matter of public concern." If the employee has not engaged in what can "be fairly characterized as constituting speech on a matter of public concern," it is not necessary for the court to scrutinize the adverse action, because there is no First Amendment protection." *Connick*, 46 U.S at 146.

1. Speaking as a Citizen

a. Post-Garcetti

"[W]hen 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." *Garcetti v. Ceballos*, 547 U.S. at 421 (2006). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcett*i, 547 U.S. at 421-22. "It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.*

"A public employee's speech is not protected by the First Amendment if it 'owes its existence' to his professional responsibilities." *McGee v. Public Water Supply, District #2*, 471 F.3d 918, 920, 921 (8th Cir. 2006).

The focus, however, is on the employee/contractor's official duties, not necessarily what the employee/contractor may have obtained through their official duties. "The mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks,* 573 U.S. 228, 240 (2014).

"The question under Garcetti is not whether the speech was made during the employee's work hours, or whether it concerned the subject matter of his employment. . . Rather, it is whether the speech was made pursuant to the employee's job duties, or in other words, whether it was 'commissioned' by the employer.") *Minten v. Weber*, 832 F.Supp.2d 1007 (N.D. Iowa 2011), quoting, *Thomas v. City of Blanchard, 548 F.3d 1317, 1323–24 (10th Cir.2008).*

b. Joint Venture Employers/Contractors

Who is the employer? A non-employer is not entitled to control the speech of another entity's employee. *Dempsey v. City of Omaha*, 633 F.3d 638 (8th Cir. 2011).[5]

> "We can envision many situations where a public employee might speak in a manner deemed objectionable by governmental actors other than his or her actual employer. Examples include statements made by members of state—federal crime task forces or any multi-government or multi-agency organizations. In these types of joint ventures, it is possible that personnel oversight may be distributed or delegated, and governmental actors other than the speaker's actual employer may be in a position to retaliate against, or otherwise chill, speech. In such situations, where an employee who asserts First Amendment rights speaks against an entity other than his or her actual employer, a hard question arises: should courts analyze the purportedly protected speech and alleged adverse action under the standards that apply when a state actor has denied a government benefit based on a normal citizen's speech or under the standards for less-protected speech as per *Garcetti* and *Pickering*.
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> Here, however, we need not and do not purport to resolve this question in any context other than the limited facts at hand. The present case simply does not involve a situation where governments have come together in an ongoing cooperative spirit to achieve a common goal or where ongoing supervision of employees is delegated to a cooperating agency or government. . . We simply do not view the present case as analogous to the more difficult example of public joint ventures.

Dempsey v. City of Omaha, 633 F.3d 638, 647-648 (8th Cir. 2011).

c. Employee Providing Testimony

The First Amendment protects public employees who provide truthful sworn testimony outside the course of their ordinary job responsibilities. *Lane v. Franks*, 573 US 228, 231 (2014); *Minten v. Weber*, 832 F.Supp.2d 1007 (N.D. Iowa 2011).

It is not as clear, whether First Amendment protects public employees who provide truthful testimony pursuant to their official job duties. "It is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings. (citation omitted) For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. . .We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today. *Lane v. Franks*, 573 U.S. at 247 n4.

Also, take notice of Justice Thomas' concurrence in *Lane*, joined by Justice Scalia and Justice Alito:

> This case presents the discrete question whether a public employee speaks "as a citizen on a matter of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951,

[5] This is relatively important, because if a public entity takes action against someone not employed, it is likely the public entity would have to show that its actions were narrowly tailored to serve a compelling interest.

> 164 L.Ed.2d 689 (2006), when the employee gives "[t]ruthful testimony under oath ... outside the scope of his ordinary job duties," ante, at 2378. Answering that question requires little more than a straightforward application of Garcetti. . . The petitioner in this case did not speak "pursuant to" his ordinary job duties because his responsibilities did not include testifying in court proceedings. . . We accordingly have no occasion to address the quite different question whether a public employee speaks "as a citizen" when he testifies in the course of his ordinary job responsibilities. See ante, at 2378, n. 4. For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers. See Fed. Rule Civ. Proc. 30(b)(6). The Court properly leaves the constitutional questions raised by these scenarios for another day.

Lane, 573 at 247 (Thomas, J., concurring).

In *Ohlson v. Brady* (9th Cir. 2021), the Ninth Circuit had an opportunity to address the "laboratory analyst" referenced in Justice Thomas' concurrence. Ohlson testified pursuant to her job duties. She testified truthfully, albeit contrary to her boss' desires. She was terminated and filed suit. The lower court dismissed her claim, but interestingly, it engaged in the Pickering Balance Test. On appeal, the Ninth Circuit seemed to indicate that the district court was correct to engage in the Pickering Balance Test. The Ninth Circuit affirmed the lower court, finding since the law was not clearly established defendants would nonetheless be entitled to qualified immunity.

In *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013), the Seventh Circuit found that the reasoning of Garcetti was not applicable to situations in which a public employee—prosecutor, police officer, or anyone else—is compelled to give testimony pursuant to a subpoena. "First, the individual person has a strong interest in complying with the demands of a subpoena: apart from whatever desire a public employee might have to assist in the administration of justice, failure to comply with a subpoena can result in lengthy incarceration. . . It would be strange to have a constitutional rule that prohibits the State from conditioning public employment on a basis that restricts an employee's right to speak freely, (citation omitted*)* yet allows the State to condition public employment on an employee's willingness to impede the judicial process. . ." *Chrzanowski v. Bianchi*, 725 F.3d 734, 741-742 (7th Cir. 2013). "[A] government has no right to tell its employees what to say in court." *Chrzanowski,* 725 F.3d at 739, quoting, *Fairley v. Andrews*, 578 F.3d 518, 524–25 (7th Cir. 2009).

d. Perceived Speech

If a public employer wrongfully, but reasonably, believes employee spoke on matters of personal nature, employer may avoid liability for subsequent disciplinary action). *Waters v. Churchill*, 511 U.S. 661 (1994)(Employer reasonably believed employee spoke on matters of personal interests, rather than public concerns).

If, however, public employer terminates employee it mistakenly believes engaged in protected activity, eventhough no protected activity actually occurred, employer may be held liable. *Heffernan v. City of Paterson*, 578 U.S. --, 136 S. Ct. 1412, 194 L. Ed. 2d 508 (2016)(Employee who was perceived to have engaged in protected activity may establish a First Amendment claim, although employee never engaged in protected activity). See also, *DeCrane v. Eckart* (6th Cir. 2021).

e. Facebook "Like"

Facebook "Like" is speech and depending upon the context could amount to speech on a matter of public concern. *Vincent v. Story Cnty*. (S.D. Iowa 2014); See, also G*rutzmacher v. Howard Cnty*., 851 F.3d 332 (4th Cir. 2017) and *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).

2. Matter of Public Concern

Speech involves matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." (citation omitted). *Lane v. Franks,* 573 U.S. 228, 241 (2014), citing, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

The "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

"[W]here speech primarily serves personal interests of the speaker, it warrants no protection because it has little value to the public at large. (citations omitted) More specifically, a statement is personal where it does "nothing to inform the public about any aspect of the [government entity's] functioning or operation." *Morgan v. Robinson*, 881 F.3d 646, 652-653 (8th Cir. 2018)(citations omitted).

Examples of speech ordinarily considered matters of public concern:

- Corruption in a public program and misuse of state funds. *Lane,* 573 U.S. at 228.
- Exposing governmental inefficiency and misconduct. *Garcetti*, 547 U.S., at 425; *Sexton v. Martin*, 210 F.3d 905, 910 (8th Cir. 2000).
- Environmental and public safety issues are matters of public concern to the general public. *McGee v. Public Water Supply, Jefferson Co. Mo.*, 471 F.3d 918 (8th Cir. 2006).
- Speech that criticizes a public employer in his/her capacity as a public official. *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000).
- '[E]xposure of official misconduct, especially within the police department, is generally of great consequence to the public.' *Minten v. Weber*, 832 F.Supp.2d 1007, 1019-1020 (N.D. Iowa 2011)(citation omitted).
- Heightened public interest in a particular issue, while not dispositive, may also indicate that the issue is one of public concern. *Belk v. City of Eldon,* 228 F.3d 872, 879 (8th Cir. 2000), citing, *Bowman v. Pulaski County Special School Dist*., 723 F.2d 640, 644 (8th Cir.1983) (holding that media coverage and citizen activism " . . . are a good indication of the public's interest").

3. Disruption in Workplace

Once the court determines a public employee spoke as a citizen on a matter of public concern, the public employer must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the employee's performance or impaired working relationships. *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892 (8th Cir. 2007); *Washington v. Normandy Fire Prot. Dist*., 272 F.3d 522, 527 (8th Cir.2001). "Absent such a showing, 'there are no government interests in efficiency to weigh against First Amendment interests' and [the court] need not engage in the Pickering balancing test." *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2007)(citation omitted).

It is not enough for the employer to merely assert that alleged protected speech is disruptive, the employer must come forward with specific evidence that the speech substantially disrupted the work environment. *Washington v. Normandy Fire Prot. Dist*, 272 F.3d at 526-27. Mere allegations the speech disrupted the workplace or affected morale, without evidentiary support, are insufficient. *Belk v. City of Eldon*, 228 F.3d at 881; *Sexton v. Martin*, 210 F.3d at 912.

However, there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. . . a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern. *Connick v. Myers*, 461 U.S. 138 (1983).

4. Pickering Balance Test

If the public employer provides adequate justification for treating the citizen-employee differently, the court must engage in the Pickering Balance Test. The Pickering Balancing Test helps the court weigh the interests of the employee as a citizen commenting on public matters and the interests of the governmental employer in promoting the efficiency of its public services through such employees. *Pickering*, 391 U.S. at 568.

The factors a court will consider when conducting the Pickering Balance Test are: (1) the need for harmony in the office or workplace; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the speech 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. *Belk v. City of Eldon*, 228 F.3d 872, 880-881 (8th Cir. 2000).

V. Special Considerations

A. Law Enforcement and Fire Protection

Law enforcement entities because of their particular roles in society are given more deference than other public employers when it comes to controlling speech on matters of public concern. "[L]aw enforcement agencies, more than other public employers, have special organizational needs that permit greater restrictions on employee speech." *Henry v. Johnson*, 950 F.3d 1005 (8th Cir. 2020); *Morgan v. Robinson*, 920 F.3d 521, 526 (8th Cir. 2019); *Buzek v. Cty. Of Saunders,* 972 F.2d 992, 995 (8th Cir. 1992). Courts give "'considerable judicial deference' to government determinations that a public safety employee's speech 'had caused or would cause dissension and disruption.'" *Nagel v. City of Jamestown*, 952 F.3d 923, 931 (8th Cir. 2020); *Anzaldua*, 793 F.3d at 834 (citations omitted).

Courts will give substantial weight to a public safety employers' "reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Henry v. Johnson*, 950 F.3d 1005 (8th Cir. 2020), quoting, *Waters v. Churchill,* 511 U.S. 661, 673 (1994).

"[B]ecause police departments function as paramilitary organizations, their members may be subject to stringent rules and regulations that could not apply to other government agencies." *Mercer v. City of Cedar Rapids*, 104 F.Supp.2d 1130 (N.D. Iowa 2000), quoting, *Tindle v. Caudell*, 56 F.3d 966, 973 (8th Cir.1995).

A public safety 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." *Tyler v. City of Mountain Home, Ark.*, 72 F.3d 568 (8th Cir. 1995), quoting, *Tindle v. Caudell*, 56 F.3d at 972 (citation omitted).

A fire department has a more significant interest than the typical government employer in regulating the speech activities of its employees in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in its ability. "When lives may be at stake in a fire, an espirit de corps is essential to the success of the joint endeavor." *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.,* 793 F.3d 822, 834 (8th Cir. 2015), quoting *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir.1979). Thus courts give considerable deference to "managements determination that firefighter's speech caused or would cause dissension and disruption." *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.,* 793 F.3d 822, 834 (8th Cir. 2015).

If prosecutors will no longer press charges from a particular police officer, this would seriously impede the agency's ability to perform its function. *Nagel v. City of Jamestown*, 952 F.3d 923 (8th Cir. 2020); *Henry v. Johnson*, 950 F.3d 1005 (8th Cir. 2020).

Impediments to law enforcement entity's ability to maintaining chain of command and a close working relationship with other law enforcement entities are reasonable concerns. *Tyler v. City of Mountain Home, Ark.*, 72 F.3d 568 (8th Cir. 1995).

"Shunning" by other officers impedes an officer's ability to perform job effectively by adversely affecting the close working relations essential in a police department. *Nagel v. City of Jamestown*, 952 F.3d 923 (8th Cir. 2020).

Speech that affects the morale of the work force and damages the program's reputation, may affect the efficiency of the operation of the public service. *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 1999).

Generally, no "difference of constitutional magnitude" between regulating speech of public law enforcement officer/fire personnel and contracted law enforcement/fire personnel. *Umbehr*, 518 U.S. 668 (1996).

B. "Official Duty" Analysis in Academic Setting

In *Garcetti*, the Court purposely left unaddressed whether the more onerous "official duty" analysis would apply in cases involving speech related to scholarship or teaching. "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

Several circuits have concluded that the "official duty" analysis does not apply in the academic setting, at least not at the college level. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Demers v. Austin,* 746 F.3d 402, 411 (9th Cir. 2014); and *Adams v. Trustees. of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir.2011).

Thus, when a professor teaches or writes pursuant to his/her official duties, the professor would presumably only need to establish that the speech concerned a matter of public concern (as existed pre-Garcetti) to warrant First Amendment protection (at least in the Fourth, Fifth and Sixth Circuits). Of course, in such a case, the professor's speech/writing would still have to be balanced against the university's interests. See, *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

VI. Uncharted Waters

A. Laws, Regulations and Orders Censoring Academic Teaching and Scholarship

1. Executive Order 13950

2. House File 802

3. *Black Response Team, et al. v. Johnson, et al.*, Case No. CIV-21-1022-G, (WD Okla. 2021)

B. Restricting Public Employees from Testifying

1. *Florida Rising Together, et al., v. Laurel Lee, et al.*, Case No. 4:21-CV-201-MW/MJF)(N.D. Fla. 2021)

2. *Ron DeSantis, et al., v Allison Scott, et al.*, CASE NO.: 1D21-2685 L.T. No.: 2021-CA-1382 (Fla. 1st DCA 2021)