The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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MANAGING PUBLIC EMPLOYEE SPEECH IN THE AGE OF SOCIAL MEDIA – INSTITUTING POLICIES REGULATING PUBLIC EMPLOYEE CONDUCT WHILE BALANCING ACCESS TO THE “DEMOCRATIC FORUMS OF THE INTERNET”

By Roxana M. Underwood

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RECENT DEVELOPMENTS

By Student Editorial Board:
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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the equal employment opportunity laws.

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MANAGING PUBLIC EMPLOYEE SPEECH IN THE AGE OF SOCIAL MEDIA – INSTITUTING POLICIES REGULATING PUBLIC EMPLOYEE CONDUCT WHILE BALANCING ACCESS TO THE “DEMOCRATIC FORUMS OF THE INTERNET”

By Roxana M. Underwood

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Roxana has been selected to the 2017 and 2018 Illinois Rising Stars list, which recognizes no more than 2.5 percent of the attorneys in each state.

Roxana is also an active member of the Ravinia Associates Board.
I. INTRODUCTION

Attorneys quickly learn the trials and tribulations of counseling employers on managing their employees. Among other things, employers often seek advice on employee hiring, discipline, and performance accountability. In providing such advice, attorneys must consider a variety of discrimination and retaliation laws, wage and hour statutes, and other legislation that regulates the workforce. Assisting public sector employers on managing their workforce raises additional, and often more complicated, considerations involving the U.S. Constitution. Constitutional complications are perhaps most apparent when public employers attempt to manage their employees’ off-duty speech.

The need for employers to regulate their employees’ off-duty conduct is critical, if not always obvious. What employees do outside of work can have a significant impact on the employer’s business, even when the employer’s business is providing public services. Public employers are just as susceptible to negative press as any private sector corporation. Citizens often expect their public servants to be above reproach. Thus, it remains a significant interest of all public employers to regulate their employees to maintain their irreproachable status. “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”[1] Nevertheless, the First Amendment often serves as a significant legal stumbling block for public employers who attempt to modify their employees’ behavior.

Unlike the private sector, regulating public employee speech may violate the First Amendment. The U.S. Supreme Court has made it clear that public employees do not surrender their Free Speech rights the moment they accept public employment.[2] “[T]he First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”[3] At the same time, those rights are not unfettered or consequence free. When a citizen enters public service, that citizen “by necessity must accept certain limitations on his or her freedom.”[4]

Public employers arguably had a much easier time regulating their employees’ speech several decades ago. Employees’ access to mass news
outlets was extremely limited. By contrast, technological advancements and the explosion of social media in the public sphere now provide employees a nearly unfettered ability to publicize their opinions on any number of topics ranging from the mundane to the inflammatory.

Social media permeates and influences the lives of most Americans – and the public sector workforce is no exception. Social media usage even percolates to the highest rung of the governmental ladder. At the federal level, President Donald Trump is notorious for using Twitter to convey information to his 55.1 million followers, including what pundits may describe as incendiary political and social opinions. According to the Pew Research Center, approximately 79 percent of Internet users (or 68 percent of all U.S. adults) use Facebook. The ease with which individuals can access the world and each other through social media has led to sharing, oversharng, commentary on hot-button political and social issues, and workplace grievances.

It therefore should come as no surprise that the accessibility of social media, coupled with public employers’ desire to appear above reproach to those they serve, has led to an increase in disciplinary matters involving public employees who post commentary (either publicly or privately, to a few hundred of their closest friends and followers) about high-profile controversies, or content that incites strong, perhaps inflammatory, political opinions. The following is a small sample of recent employee discipline examples based on employee speech on social media:

- **Des Moines, Iowa**: the Iowa Department of Public Safety terminated a laboratory criminalist after the employee posted public comments on Facebook stating, among other things, “If you are supporting ‘Black Lives Matters’ – You are supporting, even applauding a cop-killer.”

- **Tupelo, Mississippi**: the Tupelo Police Department terminated a police officer after making a comment on Facebook about the use of body cameras, indicating that police administrators have forgotten about life on patrol, identifying City officials as “Monday Morning Quarterbacks,” and stating that “[s]ometimes you have to
use profanity and threaten a person’s well-being [sic] to get their attention; sometimes you have to kill them.”[7]

- **Belding, Michigan**: the Belding Fire Department terminated a firefighter who posted a remark on Facebook in response to another Facebook user’s comment about Collin Kaepernick kneeling during the national anthem and the Black Lives Matter movement.[8]

- **Philadelphia, Pennsylvania**: the Jefferson University Hospital terminated an employee after the employee took to Facebook to post an incendiary comment about a Black Lives Matter protest while also praising police officers.[9]

- **Chicago, Illinois**: two police officers were disciplined after a community activist posed a photo to Instagram of two on-duty police officers kneeling in apparent support of Colin Kaepernick and against the idea of police brutality and racism, in violation of a rule that prohibited uniformed officers from “participating in any partisan political campaign or activity.”[10]

- **Nashville, Tennessee**: the Metropolitan Nashville Police Department terminated a 911 operator after she posted on Facebook following the 2016 presidential election, proclaiming her support for President Trump. The former employee has filed a lawsuit against the City for violating her First Amendment Rights.[11]

Even social media powerhouses like Facebook and Twitter have taken to restricting access for those users who have violated terms of service by posting content that they deems offensive.[12]

Typically, an attorney’s first bit of advice to an employer who wishes to regulate its employees’ speech is to create and implement effective policies detailing what is and is not acceptable conduct. Particularly with public
sector employees (a large percentage of whom are subject to statutory or collectively bargained “just cause” standards), it is important to place employees on notice of employer expectations. Thus, the recent explosion of social media usage has led many public employers to promulgate policies that limit or regulate speech in an attempt to prevent their employees from engaging in the types of potentially detrimental speech noted above.

Determining how to manage the workplace without impermissibly restricting employees’ First Amendment rights can be a daunting task for most employers. This is best exemplified by several recent cases where public employer policies have been deemed unconstitutionally overbroad with respect to the conduct they regulate. Part of the difficulty arises from rather vague legal standards that courts have developed based on imprecise guidance from the U.S. Supreme Court. This begs the question—how can a public employer put its employees on notice of what is and is not appropriate if the employer itself cannot discern clear demarcations between what is and is not an impermissible prior-restraint on speech? This article suggests a more “user friendly” legal standard for determining the constitutionality of employer speech policies.

Before discussing more “user friendly” legal standards, it is important to understand the development of federal case law regarding restrictions on public employee speech. Only then can we truly understand the difficulties in drafting compliant employer policies, as well as discern how the law needs to develop going forward to properly adapt to our new social media world.

Part two of this article will address the legal framework surrounding public employee speech. Part three will discuss cases addressing a public employer’s ability to limit a public employee’s speech depending upon the employee’s role in a governmental agency. Part four will discuss case law addressing employer policies restricting speech. Part five will address the practical difficulties of applying the law in its current form to manage the workplace follows as well as suggestions for crafting narrowly tailored policies consistent with case law.
II. LEGAL FRAMEWORK FOR ESTABLISHING PROTECTIONS FOR PUBLIC EMPLOYEE SPEECH

A. Pickering

In *Pickering v. Board of Education*, the U.S. Supreme Court set forth a two-part test to determine whether a public employee’s speech is protected: (1) did the employee speak as a citizen on a matter of public interest; if so (2) did the public employer have adequate justification to treat the public employee differently than a member of the general public.[13]

The Court acknowledged that even as public employees, individuals retain their rights to comment on matters of public interest. The Supreme Court also acknowledged that public employers have a governmental interest to regulate their employees’ speech. Thus, when it comes to employee free speech issues, a balance must be struck by weighing “interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees.”[14]

Within this framework, the Supreme Court analyzed whether a Chicago suburban school district had improperly terminated a high school teacher after the teacher wrote a letter to a local newspaper criticizing the Board of Education. In the letter, the teacher addressed the Board’s handling of bond proposals and the allocation of financial resources, which seemingly favored athletics over academics.[15] The Court ultimately concluded that the employer’s decision to terminate the employee was improper.[16] In applying the so-called “Pickering” test, the Court’s majority found that the employee’s criticisms involved subjects of public attention and concern.[17] The Court further found that the employer failed to demonstrate that the employee’s statements impeded the employee’s job performance or otherwise interfered with the school district operations.[18] In considering the public importance of the speech, the Court reasoned, the interest of the employer in limiting the employee’s opportunity to contribute to public debate was not significantly greater than the interest in limiting a similar contribution by any member of the public.[19]
B. Connick

In *Connick v. Myers*, the U.S. Supreme Court identified a limitation on the protection afforded to public employee speech when such speech does not impact matters of public concern.[20] The Court stated that when a public employee speaks as an employee upon matters of personal interest, “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 an employee’s behavior.”[21] Whether a public employee’s speech addresses a matter of public concern is determined by the content, form, and context of a statement, and the record as a whole.[22]

In *Connick*, an assistant district attorney faced transfer to a different section of criminal court.[23] She strongly opposed the transfer and expressed her views to several supervisors.[24] Shortly after, the assistant district attorney distributed a questionnaire to other employees seeking input on working conditions, the office transfer policy, office morale, confidence in supervisors, and, among other things, whether employees felt pressure to work in political campaigns.[25] The employer terminated the assistant district attorney for refusal to accept the transfer and because it deemed circulating the questionnaire an act of insubordination.[26]

The Court concluded that the termination of the assistant district attorney did not violate her constitutionally protected right of free speech. While one aspect of the questionnaire touched upon a matter of public concern, pressure to work on political campaigns, the Court concluded that the remainder of the questionnaire reflected personal gripes and distaste with the *status quo*. “While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of [the assistant district attorney’s] questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors.”[27] The questions in the questionnaire “reflect[ed] on employee’s dissatisfaction with a [job] transfer and an attempt to turn that displeasure into a cause célèbre.”[28] Because these questions did not touch on a matter of public concern, the first Amendment did not apply to protect the assistant district attorney’s job.[29]

Because one aspect of the questionnaire for which the employee was discharged touched on a matter of public concern, the Court engaged in the *Pickering* balancing test.[30] The Court recognized that while the
questionnaire did not impede the assistant district attorney’s ability to perform her job responsibilities, the questionnaire was viewed by her superiors as a “mini-insurrection.”[31] Thus, when, as here, “close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.” Critically, the Court stated that it was not necessary for the 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.”[32] In addition, the Court found the context within which the assistant district attorney’s speech rose (i.e. on the heels of her transfer notice) relevant: “When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor’s view that the employee has threatened the authority of the employer to run the office.”[33]

C. Garcetti

The U.S. Supreme Court held in Garcetti v. Ceballos 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 communication from employer discipline.”[34] Thus, if a public employee is disciplined for speech made pursuant to his or her job duties, that speech may not be constitutionally protected (although, it may enjoy legal protection under a host of other federal, state and local employment laws).[35]

The Court recognized the well-established competing interests between (1) the government’s need to restrict speech in its role as the employer to ensure the effective functioning of its enterprise, and (2) the First Amendment rights of citizens who also happen to be government employees.[36] The Court explained public employees must accept limitations on their First Amendment rights because “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”[37] Given the position in society public employees occupy, when they “speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.”[38]
In *Garcetti*, a defense attorney contacted a deputy district attorney for the Los Angeles County District Attorney’s office about a pending criminal matter. The defense attorney explained that an affidavit used to obtain critical search warrants contained inaccuracies and that he would be challenging the warrant. The deputy district attorney investigated the affidavit and believed it contained significant misrepresentations. Thereafter, the deputy district attorney wrote internal memorandums to his supervisors, explaining his concerns with a pending criminal matter and recommending dismissal of that particular criminal case. Despite the deputy district attorney’s recommendation to dismiss the case, it proceeded to a suppression hearing. The defense subpoenaed the deputy district attorney to testify for the defense regarding his observations about the affidavit. Despite Ceballos’ testimony, the court rejected the challenge to the search warrant.[39]

After the suppression hearing, the deputy district attorney alleged that he had been reassigned, denied promotions, transferred to a less desirable office and given less desirable cases, all in retaliation for his previously expressed concerns. He filed an internal grievance over the matter, which, the employer denied.[40] Subsequently, the deputy district attorney filed suit alleging violations of his First Amendment free speech rights.

The Court concluded that the deputy district attorney’s speech did not touch on a matter of public concern, because his expressions were made pursuant to his official duties.[41] Thus, because he wrote the memorandums as part of his job duties and not as a public citizen, the First Amendment did not protect the speech.[42]

**D. Lane v. Franks**

In *Lane v. Franks*, the Supreme Court addressed whether “public employees may be fired – or suffer other adverse employment consequences –for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.”[43] The dispute arose from the termination of the Director of a state-funded program at a community college. The Director, Lane, discovered that a State Representative was on the payroll but was not reporting for work. He confronted the State Representative and reported the issue to his superiors. Lane ultimately terminated the State Representative who was subsequently tried and convicted of mail fraud and theft. Lane provided subpoenaed testimony
against the State Representative both before the federal grand jury and in the jury trial against her. Lane’s employment was subsequently terminated, and Lane sued under 42 U.S.C § 1983, specifically seeking relief for retaliation against Lane for exercising his protected right under the First Amendment to speak on matters of public concern.[44]

The Defendants argued, and the lower court concurred, that because Lane’s testimony pertained to information gained from the performance of his official duties, it was a part of those duties and was not made in his capacity as a citizen speaking on a matter of public concern.[45] The Supreme Court unanimously rejected this argument.[46] First, the Court held that truthful testimony under oath by an employee is speech as a private citizen, even if the testimony pertains to that person’s employment or information related to employment.[47] Second, the Court determined that Lane’s testimony was speech on a matter of public concern—public corruption and misuse of state funds.[48] Finally, the Court applied the Pickering balance test and found no governmental interest in favor of restricting the speech at issue: “There is no evidence, for example, that Lane’s testimony . . . was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.”[49]

III. EMPLOYEE’S JOB POSITION/ROLE IN GOVERNMENTAL AGENCY MAY Dictate ABILITY TO DISCIPLINE FOR SPEECH

As discussed above, a public employee’s speech rights are balanced against the right of the public employer to control its workforce. Nevertheless, this balancing act becomes complicated when one considers the employee’s position in the public employer’s hierarchy. It is well-recognized that because all public employees occupy trusted positions in society, “[w]hen they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental function.”[50] However, certain employees hold more influential positions within a public employer’s hierarchy than others. As a practical matter, the more managerial responsibility and discretion a public employee possesses, the greater the risk that the employee’s speech may adversely impact the public employer’s operations. Public safety employees, regardless of where they are positioned in a public employer’s chain of command, are particularly
capable of impacting their employer’s operations with their speech, which in turn can easily trigger public ire.

Thus, while the context of an employee's speech is important, so too is the employee's managerial role and public visibility within the government agency. This role and visibility naturally must be considered when determining whether speech stands to disrupt the operation and mission of the agency.[51] For the agency to be effective, taxpayers must be able to trust its public safety officers and those in positions of exalted power and influence.

In theory, public employers should be able to promote stricter regulation of these higher level managerial employees and public safety personnel because, particularly in the public safety context, a governmental employer “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.”[52] So, while social media has increasingly become a popular avenue to express personal beliefs, public safety personnel and higher level managerial employees must understand that there are very real consequences to their behavior.

In balancing the public employee's interest in speaking on matters of public concern against the government's interest in providing effective and efficient government through its employees, the context of the employee's speech, including the employee's role in the government agency, and the extent to which it disrupts the operation and mission of the agency, must all be taken into account.[53]

A prime example of this multi-factored approach was seen in Rankin v. McPherson, where, a probationary clerical employee working in a county constable’s office was terminated for stating, after hearing of the attempt on the life of President Ronald Reagan, “If they go for him again, I hope they get him.”[54]

The Supreme Court in Rankin looked to Connick v. Meyers for guidance in determining the threshold question of whether the clerical employee’s speech touched on a matter of public concern. The Rankin Court concluded that the county clerk’s statement dealt with a matter of public concern and that “[t]he inappropriate or controversial character of a statement is
irrelevant to the question whether it deals with a matter of public concern.”[55]

Next, the Rankin Court engaged in the Pickering balancing test to determine how the clerical employee’s interest in making her statement weighed against the governmental employer’s interest in promoting the efficiency of its public services.[56] The Court concluded that the employer failed to prove its governmental interest outweighed the former employee’s First Amendment rights. There was “no evidence that [the comment] interfered with the efficient functioning off the office. The Constable was evidently not afraid that [the clerk] had disturbed or interrupted other employees – he did not inquire to whom respondent had made the remark and testified that he ‘was not concerned who she made it to.’”[57] There was also no evidence that the former employee “had discredited the office by making her statement in public. [The clerk]’s speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee.”[58] The Court went on to state the termination for the content of her speech was “unrelated to the functioning of the [constable’s] office, [and] it was not based on any assessment by the Constable that the remark demonstrated a character trait that made respondent unfit to perform her work.[59]

The Rankin Court held that the employee’s job and level of authority within the governmental organization plays a role in determining “[t]he burden of caution employees bear with respect to the words they speak.”[60] The Court placed great emphasis on the clerical nature of her job stating:

> Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal. We cannot believe that every employee in Constable Rankin’s office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.[61]

*Rankin* was decided by a 5 to 4 split Court. Justice Antonin Scalia authored the dissenting opinion, noting at least two critical areas of disagreement. First, the dissent took issue with the majority’s conclusion that the
statement uttered by the clerk dealt with a matter of public concern. According to the dissent, “the majority failed to explain how a statement expressing approval of a serious and violent crime – assassination of the President – can possibly fall within that category.”[62] Justice Scalia stated:

Surely the [majority] does not mean to adopt the reasoning of the court below, which was that [the clerk]’s statement was ‘addressed to a matter of public concern’ within the meaning of Connick because the public would obviously be ‘concerned’ about the assassination of the President. That is obviously untenable: The public would be ‘concerned’ about a statement threatening to blow up the local federal building or demanding a $1 million extortion payment, yet that kind of ‘public concern’ does not entitle such a statement to any First Amendment Protection at all.[63]

The dissent stated that the clerk’s comment crossed the line where she “stopped explicitly criticizing the President’s policies and expressed a desire that he be assassinated.”[64] Therefore, the discipline for the speech should have presumably been upheld.

Second, the dissent explained that even if it concurred that the statement touched on a matter of public concern, the majority’s holding that the government’s interest did not outweigh the speaker’s interest was misplaced based upon the consideration of the clerk’s role in the law enforcement agency. The dissent stated that the majority’s sweeping assertion (and apparent holding) that where an employee ‘serves no confidential, policymaking, or public contact role, the danger to the agency’s successful functioning from that employee’s private speech is minimal’ is simply contrary to reason and experience. Nonpolicy making employees (the Assistant District Attorney in Connick, for example) can hurt working relationships and undermine public confidence in an organization every bit as much as policymaking employees.[65]

In other words, the dissent took issue with the proclamation that non-policy making, non-executive type employees could never presumably impact negatively taxpayer confidence in a public employer or relations among coworkers. Given that the clerk worked for a law enforcement agency, the dissent stated that “[a]s a law enforcement officer, the Constable obviously had a strong interest in preventing statements by any of his employees approving, or expressing a desire for, serious violent crimes –regardless of whether the statements actually interfere with office
operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work.”[66]

The dissent further compared this matter to Connick, where the Court upheld the termination of an assistant district attorney for circulating a questionnaire criticizing her supervisors. Assuming the public concern element was satisfied here as it was in Connick, the dissent noted that the discharge of the clerk should not have violated the First Amendment either because the comment, like the questionnaire, “carrie[d] the clear potential for undermining office relations.”[67] This was true because the clerk worked in an office devoted to law enforcement and because one of the constable’s deputies brought the statement to the constable’s attention.[68]

In light of Rankin, it seems fair to conclude that speech made by public employees who work in “confidential, policy making, or public contact role[s]” may be entitled to less protection than speech of non-policy making employees who do not have contact with the general public. However, the Rankin dissent strongly criticized this position, noting that employees in non-policy making positions can just as easily undermine public confidence and harm governmental operations. The Rankin dissent even suggested that any employee that works for a law enforcement agency, regardless of position within the organization, may lack First Amendment protection even though the employee’s comments involve matters of public concern. Regardless, subsequent courts have adopted the majority’s approach in Rankin by drawing lines between employees with and without policy making authority. Such a distinction often devolves into what appears to be artificial “line-drawing.”

For example, in Pappas v. Giuliani, the Second Circuit explored the impact of Rankin with respect to law enforcement employees who had little (if any) public visibility or contact.[69] A former police officer (Pappas) alleged that he was terminated in violation of the First Amendment after anonymously disseminating racist and bigoted materials.[70] At the time of his termination, Pappas was working in the Department’s Management Information Systems Division, which was a “behind-the-scenes” department responsible for maintaining computer systems.[71] In other words, Pappas worked in a non-policy making, non-public contact position. The Police Department initiated an investigation into Pappas’ conduct.
Pappas eventually admitted to sending the bigoted materials to friends as well as to another police department in New York. However, Pappas stated that he circulated the materials in protest because he was “tired of being shaken down for money by these so-called charitable organizations.”[72]

In a 2-1 decision, the Second Circuit affirmed the lower court’s determination that the termination did not violate Pappas’s rights under the First Amendment.[73] The majority noted that, in her dissent, then-Judge Sotomayor attached “great importance to the fact that [the employee] did not occupy a ‘high level ‘supervisory’ ‘confidential’ or ‘policy-making’ role’ in the Police Department.[74] Judge Sotomayor pointed out that Pappas’s specific work assignment involved perfunctory computer work as opposed to frequent public interaction, and that his statements were made in a manner that did not reveal him to be a police officer.[75] However, the majority rejected this distinction. “Given the nature of Pappas’s statements and their very high capacity to inflict serious harm on the employer's mission if it were discovered that they came from a police officer, the fact that Pappas acted anonymously, at home, and on his own time does not alter the ultimate conclusion that the Department was entitled to dismiss him because of the harm to the Department that his statements risked to inflict.”[76] In apparent agreement with the Rankin dissent, the Second Circuit also noted:

While it is undoubtedly the case that ill-considered public statements of a high policy-making executive often have a higher likelihood of harming the employer’s accomplishment of its mission than similar statements made by a file clerk, laborer or a janitorial employee, it by no means follows that rank and file employees are incapable of harming the employer’s effectiveness by their speech, or that governmental employers are powerless to sanction lower level employees when their statements do have the capacity to harm the employer’s performance of its mission.[77]

The court further opined that “Rankin certainly did not mean that only high level, policy making employees may be removed by reason of their speech” and, “[b]y no means does it follow that an ordinary police officer is immune from disciplinary discharge for public statements that carry a high potential to impair the police department’s performance of its mission.”[78]

The Fourth Circuit in McVey v. Stacy, applied the Rankin decision to an airport manager.[79] The airport manager (McVey), publicly aired the tensions between herself and the airport commission. Specifically, Plaintiff
received a FOIA request from the local newspaper, requesting reports detailing sexist and racist remarks made by commissioners. The commission’s chairman allegedly instructed McVey to “buy time” through improper tactics, and to not generate any new documents.[80] When McVey refused to certify the FOIA response because of alleged misconduct by the commissioners and sent a disclaimer letter to the newspaper that stated as much, she was suspended for a month, and thereafter terminated.[81]

The Fourth Circuit remanded the matter to the lower court to determine (per Rankin) whether McVey’s job position was equivalent to a confidential, policymaking, or public contact role. The court stated that “[d]epending on the response to these inquiries, airing publicly the tensions between her and the Airport Commission might well be the type of disrupting and confidence destroying speech that the Supreme Court in Connick held must be subservient to the agency’s interests.”[82]

In its decision, the Fourth Circuit recognized and listed a number of circuit courts of appeals that have denied department heads or other high-ranking officials First Amendment protection.[83] These decisions appear to reaffirm the principle that executives, directors, and high level managers serve at the pleasure of the governmental body and, more importantly, the tax payers. Therefore, they must be held to a different and heightened standard than lower-level “front line” staff.

**IV. EMPLOYER POLICIES AIMED AT REGULATING SOCIAL MEDIA “SPEECH”**

The above-described decisions did not involve social media. Only recently has the U.S. Supreme Court begun to address the relationship between the First Amendment generally and the Internet as we currently know it.[84] Lower courts have only recently begun to address the practical realities of balancing expanded speech opportunities with a public employer’s growing concern over the ubiquitous nature of employee commentary on a variety of matters involving mundane and significant matters of public concern. In some of these cases, courts have held that some speech made via social media outlets may enjoy protection depending upon the breadth of the employer’s promulgated policy.
A. United States v. National Treasury Employees Union

In a decision not involving the Internet, United States v. National Treasury Employees Union (“NTEU”), the Supreme Court addressed how courts should apply the Pickering balancing test when a generally applicable statute or regulation operates as a prior restraint on employee speech as opposed to assessing the legality of post-hoc disciplinary action (à la Pickering, Connick, or Garcetti).[85]

NTEU involved a statute prohibiting federal employees from giving speeches or writing articles in exchange for compensation, even when the topic at issue did not relate to an employee’s job duties.[86] The Court held that the statute in question violated the First Amendment. The Court stated that “the Government’s burden is greater with respect to this statutory restriction on expression than with respect to isolated disciplinary action[s]” in cases like Pickering and its progeny.[87] The Court emphasized that such statutes impede a “broad category of expression” and “chill[] potential speech before it happens.”[88] Thus, in order to promulgate and enforce policies restricting speech, a public employer:

must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s necessary impact on the actual operation of government.[89]

The government must also “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”[90]

B. Liverman v. City of Petersburg

In Liverman v. City of Petersburg, two police officers challenged their discipline after their employer determined they violated the Police Department’s social media policy.[91] The U.S. Court of Appeals for the Fourth Circuit stated that the court was “sensitive to the Department’s need for discipline throughout the chain of command, [but] the policy here and the disciplinary actions taken pursuant to it would, if upheld, lead to an utter lack of transparency in law enforcement operations that the First Amendment cannot countenance.”[92]

In April 2013, the Police Chief revised the Police Department’s policy governing police officers’ use of various social media platforms.[93] The
policy prohibited the dissemination of any information “that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees.”[94] The policy also included the following provisions:

- “Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public’s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.”[95]

- “Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer. The instances must be judged on a case-by-case basis.”[96]

- “[The Department] strongly discourages employees from posting information regarding off-duty activities” and provides that violations will be forwarded to the Chief of Police for “appropriate disciplinary action.”[97]

After the Department promulgated the social media policy, Herbert Liverman, an off-duty police officer, posted the following comment on Facebook:

Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in today’s (sic) world of instant gratification and political correctness we have rookies in specialty units, working as field training officer’s (sic) and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing.[98]
Vance Richards, another off-duty officer, responded as follows:

Well said bro, I agree 110 percent . . . Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. It's disgusting and makes me sick to my stomach DAILY. LEO Supervisors should be promoted by experience . . . And what comes with experience are “experiences” that “they” can pass around to the Rookies and younger less experienced Officers. Perfect example, and you know who I'm talking about . . . How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit (sic) waiting to happen. And you know who will be responsible for that Law Suit (sic)? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll to begin with. Im with ya bro . . . smh [Shaking My Head].[99]

Liverman responded to Richards on the same post stating:

There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been “devalued” . . . and when something has no value, well it is worthless.[100]

Richards replied:

Your (sic) right . . . The next 4yrs can't get here fast enough . . . From what I've been seeing I don't think I can last though. You know the old “but true” saying is . . . Your Agency is only as good as it's (sic) Leader(s) . . . It's hard to “lead by example” when there isn't one . . . smh.[101]

Liverman’s and Richards’ supervisors learned about this social media exchange and notified the Police Chief. The Chief concluded that the behavior violated the Department’s social media policy, because the postings contained “negative comments.”[102] Each officer received a verbal reprimand and six months’ probation, although they were advised this discipline would not impact their eligibility for promotion.[103] However, several weeks later, the Chief altered the Department’s promotional qualifications by excluding all officers on probation from participating in the process.[104]

After the officers challenged their probation, both officers faced several complaints and investigations within the Department. Based on the findings of the investigation, the Chief decided to terminate Liverman’s employment; but Liverman resigned before receiving the notice.[105]
Liverman and Richards sued seeking relief for various violations of the First Amendment, including allegations that the Department’s social media policy infringed upon their free speech rights.

The court opined that while regulations on social media usage seemed to present novel issues, the traditional analysis set forth in *Connick* and *Pickering* nevertheless applied:

> Indeed, the particular attributes of social media fit comfortably within the existing balancing inquiry: A social media platform amplifies the distribution of the speaker's message – which favors the employee’s free speech interests – but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer’s interest in efficiency.[106]

The threshold question for the Fourth Circuit was whether the Department’s policy limited an officer’s right to speak on matters of public concern.[107] To this, the court responded:

> There can be no doubt that it does: the restraint is a virtual blanket prohibition on all speech critical of the government employer. The explicit terms of the Negative Comments provision prevent plaintiffs and any other officer from making unfavorable comments on the operations and policies of the Department, arguably the “paradigmatic” matter of public concern.[108]

Turning its focus to the balancing of competing interests, the court again noted the “astonishing breadth” of the police department’s social media policy:

> The policy seeks to prohibit the dissemination of any information on social media that would tend to discredit or reflect unfavorably upon the [Department].[109] In particular the Negative Comments Provision proscribes [n]egative comments on the internal operations of the Bureau” – which could be just about anything or on the “specific conduct of supervisors or peers” – which, again, could be just about anything . . . .[110]

As held in *NTEU*, the interests of “present and future employees” and their “potential audiences” in such speech is “significant.”[111] The court recognized the “capacity of social media to amplify expressions of rancor and vitriol, with all its potential disruptions of workplace relationships. . . ”[112] However, it also observed that social networking sites have “emerged as a hub for sharing information and opinions with one’s larger community.”[113] Speech that is prohibited by an employment
policy “might affect the public interest in any number of ways, including whether the Department is enforcing the law in an effective and diligent matter, or whether it is doing so in a way that is just and evenhanded to all concerned.”[114] Law enforcement policies could become the subject of public debate between law enforcement employees and citizens, and these public employees may be “in the best position to know what ails the agencies for which they work.”[115] Thus, the court found that the social media policy “squashes speech on matters of pubic import at the very outset” as it prohibits speech that might impact the Department’s ability to enforce laws effectively, diligently and in an evenhanded manner.[116]

Finding that the policy “unmistakably imposes a significant burden on expressive activity,” the Fourth Circuit next considered whether the Department demonstrated “real, not merely conjectural” harm to its enterprise.[117] The Chief’s primary concern in issuing the policy was to maintain camaraderie among officers and build trust within the community. The court recognized these as legitimate interests, particularly in a police department. However, the Department failed to demonstrate “actual disruption to its mission” arising from the patrol officers’ or any other officers’ comments on social media.[118] The court noted that officers’ use of social media might present divisiveness within the department; however, it indicated that the “speculative ills targeted by the social media policy [were insufficient to] justify . . . sweeping restrictions on freedom of debate on matters of public concern.”[119]

The court also addressed the employer’s argument that even if one part of the policy was overbroad, another part of the policy, dubbed the “Public Concern Provision,” significantly narrowed the reach of the social networking policy.[120] The Public Concern Provision, the employer argued, “permits comments on issues of general or public concern . . . so long as the comments do not disrupt the workplace.” The court noted that such language appeared more aligned with the analysis in Pickering and its progeny; however, “milder language in a single provision does not salvage the unacceptable overbreadth of the social networking policy taken as a whole.”[121]

C. Moonin v. Tice

The Ninth Circuit’s decision in Moonin v. Tice provides public employers with yet another basic rubric for analyzing whether their employment
policies comply with the First Amendment.[122] In *Moonin*, the Nevada Highway Patrol (“NHP”) ran a canine drug interdiction program (“K9 program”) which was, by several accounts, under political attack from government and private organizations. One of the commanding officers of the NHP sent an email to all patrol officers and several other employees, stating that they were not to discuss the K9 program with anyone unless they received express permission. In particular, the email provided that “to ensure appropriate flow of communication” there would be

NO direct contact between K9 handlers, or line employees[,] with ANY non-departmental and non-law enforcement entity or persons for the purpose of discussing the Nevada Highway Patrol K9 program or interdiction program . . . or direct and indirect logistics therein.[123]

The commanding officer’s email went on to provide that violation of the directive would be considered insubordination and “dealt with appropriately.”[124] The NHP argued that the policy did not violate the First Amendment. The Ninth Circuit disagreed.

Relying on *Pickering* and its progeny, including *NTEU*, the court applied a three-step approach. First, the court asked whether the policy only applied to the employees’ official duties or extended to the employees’ speech as private citizens. Second, the court asked whether the policy implicated or restricted speech that would address a matter of public concern. If the policy extended to employees’ speech as private citizens that touched on matters addressing public concern, then the Ninth Circuit would proceed to determine whether the employer had a sufficient justification for implementing the policy.[125]

At the first step, citing *Lane v. Franks*, the Ninth Circuit noted that “[t]he critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”[126] The NHP argued that troopers were required to report certain misconduct internally. But the court found that the email was so broad that it could also be reasonably construed to encompass all speech, including the troopers’ speech as citizens.[127] The Ninth Circuit noted the lack of any limiting language such as “official agency business” or “information that would harm pending investigations or expose sources or methods,”
which could have provided employees with better clarity as to what types of speech were covered by the policy.[128]

At the second step, the Ninth Circuit analyzed whether the policy touched on matters of public concern. The Supreme Court has found that matters of public concern include issues “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.”[129] Given these guidelines, the Moonin court found that the K9 policy restricted speech on matters of public concern.[130]

Moonin alleged in his complaint that the policy could be interpreted as prohibiting speech regarding the “NHP’s misuse of funds, promoting and condoning of unconstitutional searches, and sabotage of the K-9 Program.”[131] The K9 policy also flatly prohibited all unapproved discussions of the K9 program. The Ninth Circuit stated that although there were matters that may not fall within the auspices of public concern, the lack of any sort of limitation eliminated this argument from the NHP’s arsenal.[132] For example, the NHP could have limited the scope of the policy to internal or confidential logistical matters, or personnel disputes. But, without language limiting its scope, the court concluded that the K9 policy encompassed matters of public concern, including the misuse of funds or sabotage of the K9 program.[133]

Moving to the third step, the Ninth Circuit balanced the rights of the employee with the interests of the employer. In other words, the Ninth Circuit determined whether the NHP provided a sufficient justification for enacting the K9 policy. In short, it had not.

In finding that the NHP’s policy failed the balancing test, the court noted that “the government’s burden when seeking to justify a broad deterrent on speech that affects an entire group of its employees is greater than when it is defending an individual disciplinary decision.”[134] The NHP proffered several “justifications” for the email, including concerns that private interest groups had the ability to shape NHP policies, the protection of sensitive law enforcement information, and controlling official communications about the K9 program. The court found the NHP’s arguments unpersuasive.[135]
The NHP’s concern over the private interest groups “which the record suggests was the primary impetus for [the commanding officer’s] email” was not a sufficient justification for the policy.[136] Although the NHP may not like the “hassle” of dealing with outside organizations and the potential influence these groups may have over the NHP, the record failed to demonstrate that these outside organizations were actually exerting any improper influence “other than successful persuasion of policy-making officials.”[137] To use the interest groups as a sufficient justification, the NHP needed to provide specific evidence of “direct, improper interference in specific investigations.”[138] “[V]ague allegations about the ‘potential for disruption in operations, unethical practices, and favored treatment towards . . . special interest groups’ are insufficient to legitimize an interest in avoiding outside ‘meddling.’”[139]

As to the other stated justifications, even if they were legitimate, the court found they did not “support the sweeping policy” in the commanding officer’s email.[140] As noted above, the policy was devoid of any language limiting its application to confidential information that was part of an ongoing investigation, or information conveyed within the officer’s official capacity. Given the sheer breadth of the policy and the lack of any real anticipated harm the policy was designed to prevent, the NHP’s policy unlawfully restricted employees’ free speech in violation of the First Amendment.

**D. Grutzmacher v. Howard County**

In *Grutzmacher v. Howard County*, a Fire Department Battalion Chief was terminated for violating departmental policy after posting commentary on his Facebook account.[141] He filed suit, alleging that he was discharged in retaliation for exercising his First Amendment free speech rights and that the fire department’s social media policy (which he supposedly violated) was facially violative of the First Amendment.

In November 2012, the Fire Department issued a general order setting forth the policy for social media usage by departmental personnel. The “Social Media Guidelines” prohibited employees from:

- “posting or publishing any statements, endorsements, or other speech, information, images or personnel matters
that could reasonably be interpreted to represent or undermine the views or positions of the Department, Howard County, or officials acting on behalf of the Department or County.”

- “posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission.”

- “post[ing] any information or images involving off-duty activities that may impugn the reputation of the Department or any member of the Department.”[142]

In December 2012, the Fire Department also issued a general order addressing the “Code of Conduct.” In part, the Code of Conduct provided that:

- Employees were prohibited “intentionally engag[ing] in conduct, through actions or words, which are disrespectful to, or that otherwise undermines the authority of, a supervisor or the chain of command” and “publicly criticiz[ing] or ridicul[ing] the Department or Howard County government or their policies.”

- Employees were prohibited “from engaging in ‘[c]onduct unbecoming’ to the Department, which it defined as “any conduct that reflects poorly on an individual member, the Department, or County government, or that is detrimental to the public trust in the Department or that impairs the operation and efficiency of the Department.”
• Employees were required to “conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the Department.”[143]

On January 20, 2013, while on duty, the Battalion Chief posted the following comment to his Facebook page:

My aide had an outstanding idea . . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its almost poetic . . .[144]

A county volunteer paramedic replied to the Battalion Chief’s post as follows:

But . . . was it an “assault liberal”? Gotta pick a fat one, those are the “high capacity” ones. Oh . . . pick a black one, those are more “scary”. Sorry had to perfect on a cool idea![145]

A few minutes later, the Battalion Chief “liked” the volunteer paramedic’s comment and replied “Lmfao! Too cool Mark Grutzmacher!”[146]

Departmental employees sent a screen shot to the Fire Chief. After conducting an investigation, the Battalion Chief was directed to review his Facebook posts and remove anything inconsistent with the Social Media policy. On January 23, 2013, after the Battalion Chief removed the posts, he posted the following commentary to Facebook:

To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I’m not scared or ashamed of my opinions or political leaning, or religion. I’m happy to discuss any of them with you. If you’re not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.[147]

A Facebook friend of the Battalion Chief’s replied to the above comment and said “As long as it isn’t about the [Department], shouldn’t you be able to express your opinions?” To which Plaintiff responded the same day:

Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Government recently
published a Social media policy, which the Department then published it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain ... sad day. To lose the First Amendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.[148]

In February 2013, a member of the Department-affiliated volunteer company posted a photo to his Facebook page of “an elderly woman with her middle finger raised. Overlaid across the picture was the following caption: “THIS PAGE, YEAH THE ONE YOU’RE LOOKING AT IT'S MINE[..] I’LL POST WHATEVER THE FUCK I WANT[..]” Above the photo, the individual wrote “for you Chief.” The Battalion Chief “liked” the photo.[150]

The Battalion Chief was ultimately terminated for (1) January 20 and January 23 Facebook posts; (2) “like” of and reply to Grutzmacher's January 20 comment; (3) replies to comments on Plaintiff’s January 23 post; and (4) “like” of Donnelly's February 17 post.[151] The conduct was deemed to have violated the Department’s Code of Conduct and Social Media Guidelines.

The court first addressed whether Plaintiff’s speech addressed matters of public concern. The court deemed some of the conduct to address matters of public concern while other conduct did not. For example, the discussion about “liberal[s]” and “assault liberal[s]” implicated matters of public concern as it addressed the gun control debate. Similarly, the post describing the department’s social media guidelines infringing on free speech rights also addressed a matter of public concern.[152] However, Plaintiff’s “like” of the elderly woman raising the middle finger and titled “for you Chief” amounted to a personal gripe not protected by the First Amendment.[153] While some speech was protected speech and other speech was not, the court proceeded to the Pickering balancing test and left unresolved the question of whether the series of related posts and “likes” over several weeks constituted a “single expression of speech” and therefore appropriate to consider it in its entirety, despite encompassing both matters of public and purely personal concerns.[154]

The Court concluded that the Department’s interest in efficiency and preventing disruption outweighed the plaintiff’s interest in speaking about gun control and the Department’s social media policy. The court also
accorded “substantial weight to [the] fire department’s interest in limiting
dissension and discord within the ranks.”[155] In addition, the Court placed
emphasis on the fact that the Battalion Chief’s speech “significantly
conflicted” with his responsibilities as a supervisor. “As a leader within the
Department, Plaintiff was responsible for acting as an impartial decision
maker and ‘enforcing Departmental policies and taking appropriate action
for violation of those policies.”[156] Here, he was positioned on the lower
end of the chain-of-command, but was responsible for directly supervising
first responders. The court cautioned that the balancing test is a
“particularized” inquiry and that “a fire department’s interest in
maintaining efficiency will not always outweigh the interests of an
employee in speaking on matters of public concern.”[157]

The Fourth Circuit in *Grutzmacher* did not reach “prior restraint” issues
posed by the employer’s social media policy as it had in *Liverman*. *Liverman*
also differs from *Grutzmacher*, in that *Liverman* involved non-
supervisory police officers as opposed to a first-line management
representative. The Fourth Circuit in *Grutzmacher* indicated the case
turned on the content of the speech made by the battalion chief as opposed
to his organizational rank. It differed from the speech in *Liverman* because
there the police officers raised concerns that more directly impacted the
public, i.e. training and officer supervision. In *Grutzmacher*, the social
media activity had more to do with the national gun control debate as well
as the battalion chief’s displeasure with the fire chief and the decision to
have him remove the posts. This difference seemingly creates, at least in the
Fourth Circuit, yet another subtle layer for employers to consider. That is,
even if a matter is of significant public concern, the level of protection
afforded those public concerns will differ depending on whether the subject
directly involves an employer’s operations (i.e. training and supervision of
law enforcement officials), as opposed to speech involving a more
generalized societal debate (e.g., gun control). Also, without analyzing the
case within the *Rankin* parameters, the Fourth Circuit in *Grutzmacher* may
have inadvertently recognized a greater need to hold a public safety
supervisor accountable for his actions versus the front line law enforcement
officers before it in *Liverman*.

However, it is unknown whether, had the fire department in *Grutzmacher*
not modified its social media policy to curtail its application, the Fourth
Circuit would have struck the policy and, therefore, remanded the decision to deal with the disciplinary issue. Or, perhaps the court would have compelled the employer to reinstate the battalion chief because he was disciplined for violating an unconstitutional policy.

V. Regulating Public Employee Speech Through Policies, Rules, and Regulations – Suggestions for the Future

It is well settled that a public employer has a legitimate interest and need to control and manage its workforce that, by definition, entails placing certain restrictions on employees, including their off-duty speech and conduct on social media. However, as evidenced by *Moonin* and *Liverman*, employers run the risk of curtailing free speech rights if their policies are too broad or too vague. Such risk could result in significant litigation costs and damages. While it is not yet clear, it is possible that a public employee who is terminated in violation of an unconstitutionally broad policy may be reinstated. To mitigate against such risks and to protect the ability to regulate the workplace, public employers must avoid crafting overly broad policies that implicate matters of public concern under the First Amendment. For example, in *Moonin*, the court identified the lack of specificity in the K9 policy that limited the scope of the policy to work-related communications. In *Liverman*, the court indicated that while a part of the social media policy permitted comments on issues of public concern so long as it did not disrupt the workplace, the policy as a whole was overbroad and therefore unacceptable. In addition, the employer aimed the overbroad policy at correcting speculative ills, which are insufficient to justify “sweeping restrictions” on an employee’s freedom to debate matters of public concern.

Thus, employers should conduct a review of their policies while considering the following questions: how specific or vague are the policies; are policies limited in scope to only “official duties”; are prohibitions on certain speech limited to “confidential” matters; why is the speech being limited, or what is the policy intended to correct? Perhaps limiting language or defining the scope of prohibitions would give employees a better idea of the intention behind the restriction. Relatedly, employers may be best served to consider an employee’s expectation of privacy when crafting policies aimed at curtailing speech. Another method of attempting to narrowly tailor restrictions on speech is to apply different expectations to managerial and executive level employees (on the one hand) and rank-and-file non-public
safety employees (on the other hand). Such a strategy may serve to protect employers from constitutional challenges. However, this may create difficulty in administration that would hinge on the sophistication of the human resources professionals to administer multiple related policies. Policies should also consider exceptions for the lengths an employee takes to privatize or publicize the speech on social media. For example, a non-supervisory non-law enforcement office staff person who limits access to her social media account to some of her closest friends may be entitled to more leniency for her speech. Whereas, the same non-supervisory law enforcement officer who posts and comments on a “hot button topic” via a public setting for her social media account should be subject to stricter scrutiny under an employment policy.

Moonin and Liverman highlight yet another issue that employers should consider, particularly those employers with policies falling toward the broad end of the spectrum. As noted above, First Amendment discipline cases (Pickering) and prior restraint cases (Moonin and Liverman) generally use the same analytical framework; however, there are some notable differences. Chief among the distinctions is the public employer’s burden for justifying its actions. Public employers seem to have a greater burden defending themselves in restraint cases as compared to discipline cases. Moreover, an employer cannot defend its policy by arguing that it is meant to prevent “anticipated harms” when the harms do not actually exist (as opposed to some decisions like Pappas v. Giuliani, where even anticipated harm was sufficient to justify an employee termination). Employers will also have a difficult time defending their policies if the policies will not “in fact alleviate these harms in a direct and material way.”

How to apply the Pickering balancing test and “real” versus “anticipated” harms in a written policy is anything but a small feat. It is seemingly altogether unworkable, at least until the courts better define actual harms that exist at the hands of employee speech on social media. In that respect, courts should consider harmonizing case law involving discipline and overbreadth cases in the following manner: Discard the apparent distinction between an employer’s burden in justifying the need for discipline based on actually “uttered” speech versus the burden in justifying the breadth of a speech policy in the first instance. Courts appear more willing to defer to a public employer’s judgment when it comes to assessing
the nature of actually spoken speech as opposed to policies intended to define limits on that same speech in the first instance (not unlike Justice Stewart’s old adage about knowing “obscenity” when he sees it). However, such a distinction may create the potential for absurd results, where a policy may be found invalid ab initio due to its overbreadth, yet an employee’s discipline found legitimate due to the unprotected nature of the “uttered” speech. Short of abandoning the Pickering balancing test altogether, courts could avoid such an “I will know it when I see it” approach by more readily embracing the principle first articulated in Pickering that public employees must understand that their free speech rights as citizens are necessarily curtailed (but not entirely abandoned) once they accept public employment. By embracing this more common sense approach, courts could analyze employer policies in a way that is more similar to the discipline context by assuming that public employees will not be chilled in their First Amendment expression simply because “inartful words” may have been used by a public employer in a good faith attempt to clarify the boundaries of acceptable employee speech. More explicitly acknowledge the reality that even non-policy making employees can embroil their public employers in public relations nightmares with their publicized speech, such that even non-policy making employees can sometimes lose the protections of the First Amendment by commenting on matters of public concern. Consider adding an explicit “distribution” or “extent of publication” element to the Pickering balancing test, which takes into account the lengths to which an employee publicizes his or her comments on a matter of public concern. The extent of publication, coupled with greater stress on the principle that public employees cannot reasonably expect unfettered freedom when it comes to First Amendment protection, will help employers establish clearer parameters in both the policy-making and discipline contexts. Whether these concepts will be adopted by future courts remains to be seen. Only recently has the Supreme Court begun to delve into the realities and structures of human communication and recognized that social media has become the “most important forum for exchanging ideas.”\[158\] “While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot yet appreciate its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.”\[159\] As the case law and analysis on the topic of social
media deepens and evolves, so too must the structure for analyzing prior restraints on speech. At some point, the courts will catch up with the realities of the workplace and social media.

2. Id. at 417.
3. Id.
4. Id. at 419.


14. Id.
15. Id. at 578.
16. Id. at 565.
17. Id. at 571.
18. Id. at 572-72.
19. Id. at 573.
21. Id. at 147.
22. Id. at 147-48.
23. Id. at 140.
24. Id.
25. Id. at 141.
26. Id. at 154.
27. Id. at 148.
28. Id.
29. Id. at 146 ("Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").
30. Id. at 149.
31. Id. at 151.
32. Id. at 151-52.
33. Id. at 153.
35. Id.; but see Lane v. Franks, 134 S.Ct. 2369, 2379-380 (2014) (truthful testimony under oath by an employee is speech as a private citizen, even if the testimony pertains to that person's employment or information related to employment).
36. Garcetti, 547 U.S. at 423.
37. Id. at 418.
38. Id. at 419.
39. Id. at 413-15.
40. Id. at 415.
41. Id. at 421.
42. Id. at 423-424.
43. Lane, 134 S. Ct. at 2377.
44. Id. at 2375-76.
45. Id. at 2736.
46. Id.
47. Id. at 2380.
48. Id.
49. Id. at 2381.
52. Shands v. City of Kennett, 993 F.2d 1337, 1344 (8th Cir. 1993) (internal quotations marks and citations omitted).
53. Rankin, 483 U.S. at 388-91.
54. Id. at 379-80.
55. Id. at 387.
56. Id. at 388.
57. Id. at 389.
58. Id.
59. Id.
60. Id. at 390.
61. Id. at 390-91.
62. Id. at 398 (Scalia, J. dissenting).
63. Id.
64. Id. at 398.
65. Id. at 400.
66. Id. at 395.
67. Id.
68. Id. at 399-400.
69. 290 F.3d 143 (2d Cir. 2002).
70. Id. at 145.
71. Id. at 144.
72. Id. at 145.
73. Id. at 151.
74. Id. at 148.
75. Id. at 157 (Sotomayor, J., dissenting).
76. Id. at 150.
77. Id. at 148.
78. Id. at 149.
80. Id. at 274.
81. Id.
82. Id. at 279.
83. Id. (citing Weisbuch v. County of Los Angeles, 119 F.3d 778, 783–84 (9th Cir.1997) (medical director of department of health services); Rash–Aldridge v. Ramirez, 96 F.3d 117, 119–20 (5th Cir.1996) (city-council appointee on a metropolitan planning board); Sims v. Metropolitan Dade County, 972 F.2d 1230, 1236–38 (11th Cir.1992) (member of office of black affairs in county community affairs office); Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 995–96 (5th Cir. 1992) (public school superintendent); Hall v. Ford, 856 F.2d 255, 264–65 (D.C. Cir.1988) (public university athletic director).
86. Id. at 457.
87. Id. at 468.
88. Id. at 467-68.
89. Id. at 468.
90. Id. at 475.
91. 844 F.3d 400 (4th Cir. 2016).

92. Id. at 404.

93. Id.

94. Id.

95. Id.

96. Id.

97. Id.

98. Id. at 405.

99. Id.

100. Id.

101. Id.

102. Id.

103. Id.

104. Id. at 406.

105. Id.

106. Id. at 407.

107. Id.

108. Id. at 407-08.

109. Id. at 408.

110. Id.

111. Id.

112. Id.

113. Id.

114. Id.

115. Id. (quoting Walters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion)).

116. Id.
117. Id. (quoting NTEU, 513 U.S. at 475).

118. Id.

119. Id. at 408-09.

120. Id. at 409.

121. Id.

122. 868 F.3d 853 (9th Cir. 2017).

123. Id. at 858-59.

124. Id.

125. Id. at 861.

126. Id. at 862.

127. Id. at 862-63 (“The policy . . . covers speech outside the troopers’ official duties, whether or not some speech within those duties is also covered.”).

128. Id. at 862.

129. Lane, 134 S. Ct. at 2380 (internal citations omitted).

130. Moonin, 868 F.3d at 864.

131. Id.

132. Id.

133. Id.

134. Id. at 865.

135. Id.

136. Id. at 866.

137. Id.

138. Id.

139. Id.

140. Id.


142. Id. at 337.
143. Id. at 337-38.
144. Id. at 338.
145. Id.
146. Id.
147. Id.
148. Id. at 338-39.
149. Id. at 339.
150. Id.
151. Id. at 339-40.
152. Id. at 343-44.
153. Id. at 344.
154. Id. This particular issue is not expounded on further in this article and is left for another day.
155. Id. at 345.
156. Id. at 346.
157. Id. at 348.
159. Id. at 1736.
RECENT DEVELOPMENTS

By Student Editorial Board:
Johnny D. Derogene, Patrick J. Foote, Miranda L. Huber, and Matt Soaper

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the equal employment opportunity laws.

I. IELRA DEVELOPMENTS

A. Interference with Protected Activity

In *Bakul Davé and Board of Trustees of Southern Illinois University Carbondale*, 35 PERI ¶ 75 (IELRB 2018), the IELRB dismissed Mr. Davé’s unfair labor practice complaint where he alleged that the university violated Section 14(a)(1) of the IELRA by failing to process his grievance. Davé alleged that because the university did not respond to his email, it violated Section 14(a)(1) which states an employer cannot discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Davé, a faculty member at Southern Illinois University Carbondale, an email to the Dean of the College of Science with the subject line “Grievance - workload assignment.” In the email, Davé requested an informal meeting about his grievance. No one responded to Davé’s request.

The collective bargaining agreement that governed the faculty allowed individual faculty members to file grievances. The contract stated that “If the Board does not answer a grievance within the specified time limit or any agreed extension thereof, the grievance may be considered to be denied at the level and immediately moved to the next level.” The structure allowed for an informal meeting and if the grievance was not resolved, the faulty member could file a formal grievance. The ALJ found that was the responsibility of the faulty member to advance the grievance from the informal to the formal stage.
The IELRB held Dave’s claim was insufficient. The contract stated that it was the claiming party’s responsibility to advance the claim to the next stage of grievance process if the board did not respond. Davé claimed that his email was the start of the informal process so he had not had a chance to advance the claim yet. The IELRB rejected this argument, stating the university’s lack of response was not a refusal to process his grievance. Therefore, the IELRB denied Dave’s claim.

**B. Mandatory Subjects of Bargaining**

In *AFSCME. Council 31 and Western Illinois University*, 35 PERI ¶ 60 (IELRB 2018), the IELRB held that the university violated Sections 14(a)(5) and (1) of the IELRA when it unilaterally laid off 110 clerical employees without giving the union a meaningful opportunity to bargain over the effects of the layoffs. The IELRB applied the test from *Central City Education Ass’n v. IERLB*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992), and held that the employer’s economically motivated decision to lay off the employees was a mandatory subject of bargaining.

Western Illinois University faced financial difficulties in 2016 because of declines in State appropriations and student enrollment. In an online news release, the university announced its decision to lay off clerical, non-instructional, employees and the union demanded bargaining over the layoffs. Over roughly four months, from March 30, 2016 through July 28, 2016, the union and the university met three times to negotiate and bargain. In their first meeting, the parties only discussed employees’ furlough days and wage increase. The union was not aware of the university’s decision to lay off the employees until after that first meeting.

In their second meeting, the union made three proposals to the university in an attempt to minimize the layoffs’ effects on the bargaining unit members. First, the union proposed that if a position was vacated due to the layoff, and the laid off employee was still employed with the university, that employee would be given the option to return to the vacated position before the employer used its recall list. The university responded that it reserved its right to reassign staff as necessary. Second, the union proposed that employees who dropped in classification would be red-circled—they would maintain the pay rates they had prior to the layoffs. The university responded that it would not red-circle wages or rates. Third, the union
proposed that student workers would not perform bargaining unit work. The university responded that student workers simply worked in conjunction with employees; they did not displace or replace bargaining unit employees. The university contended that there were no proposals the unions representing its employees could have made that would have completely avoided its need to layoff the clerical employees.

In holding that the university violated Sections 14(a)(5) and (1) of the IELRA, the IELRB found that the university did not give the union notice or a meaningful opportunity to bargain before it announced its decision to lay off the employees. The university argued that it reached impasse with the union when they first met on March 30, 2016, because the union did not offer any concessions. The IELRB reasoned that the university and the union could not have reached impasse because in that meeting, the union was unaware that the university was considering laying off the employees. In that meeting, the parties only negotiated over the employees’ furlough days and wage increase.

The university made at least six arguments to support its position that it did not violate the IELRA. First, the university argued that the layoffs were not a mandatory subject of bargaining. The IELRB applied the Central City test and held that the university’s economically motivated layoffs were a mandatory subject of bargaining because the layoffs concerned “wages, hours, and terms and conditions of employment.” The IELRB rejected the university’s position consistent with its prior decision and the Illinois Appellate Court’s decision that layoffs are “inextricably connected” with wages, hours, and terms and conditions of employment because laid off employees lose their wages, hours and terms and conditions of employment. *Central City School District 133*, 9 PERI ¶ 1051 (IELRB 1993); *AFSCME v. ISLRB*, 274 Ill.App.3d 327, 653 N.E.2d 1357 (1st Dist. 1995).

Second, The IELRB rejected the university’s argument that it was not required to bargain over its decision to lay off the clerical employees because decisions to layoff are not a mandatory subject of bargaining under Section 4.5(b) of the IELRA. The IELRB agreed with the union that Section 4.5(b) does not apply to the university. The IELRB found that, pursuant to Section 4.5(a), Section 4.5(b), would apply only if the university’s territorial boundaries were coterminous with those of a city with a population that exceeds 500,000; a City like Chicago. The IELRB decided that Section
4.5(b) does not apply to employers that are not covered under Section 4.5(a).

Third, the IELRB rejected the university’s argument that it was not required to bargain over the layoffs because there were no concessions that the union could have made to avoid the layoffs. The IELRB found that whether a union offers concessions is not part of the Central City test. Accordingly, whether or not the union offered concessions did not mean that the layoffs were not a mandatory subject of bargaining.

Fourth, the IELRB also rejected the university’s argument that it was excused from the duty to bargain because of its economic exigency. The IELRB reasoned that the university began facing financial difficulties in early 2016, but it waited until April 13, 2016, to notify the union of its decision to lay off the employees. The IELRB held that, since the university’s alleged economic exigency were caused by its own delay in notifying the union of its decision to layoff the employees, the university could not use the economic exigency defense.

Fifth, the IELRB rejected the university’s argument that it did not violate Sections 14(a)(5) and (1) of the IELRA by failing to bargain the effects of the layoffs in good faith. The university argued that the union waived its right to bargain various matters when it agreed to incorporate the State University Civil Service System (SUCSS) rules in the collective bargaining agreement. The IELRB decided that, while the parties agreed in their CBA that the SUCSS’ rules governed layoffs, the university admitted that “benefits issues such as separation pay, insurance continuation, assistance with unemployment, and similar matters” were left to bargain. The IELRB held that, since the union made certain proposals concerning the effects of the layoffs, the university had a duty to bargain because the SUCSS rules did not preclude such bargaining.

Lastly, the university argued that it engaged in good faith bargaining over the effects of the layoffs. However, the issue in contest was whether the university gave the union a meaningful opportunity to bargain over the effects of the layoffs before it implemented its decision to lay off the employees. The IELRB found that it did not. The IELRB decided that the bargaining session that occurred shortly before the university implemented
its layoff decision was insufficient to provide the union with a meaningful opportunity to bargain over the effects of the layoffs.

II. IPLRA DEVELOPMENTS

A. Duty to Bargain

In *Dept. of Central Mgmt. Svcs. v. ILRB.*, 2018 Ill. App. (4th) 160827 the Fourth District Appellate Court reversed the ILRB State Panel where the ILRB deviated from its usual five-factor impasse test to use the “single critical issue” impasse test without explanation. The Department of Central Management Services (“CMS”) and AFSCME Council 31 were negotiating their 2015-2019 collective bargaining agreement.

Negotiations were challenging from the start because the State had billions of dollars in unpaid bills. AFSCME was the first to present any substantive proposal, intended as a broad set of policies; its proposal sought to ensure the State did not work to diminish employees’ rights on the job. In response, the State submitted its first set of noneconomic issues; its proposals aimed to change several of the bargaining unit’s contractual rights for “efficiency and flexibility” in the State’s work and reducing operating costs. The court noted that these initial proposals, along with AFSCME’s concern that Governor Rauner wanted to break the union, “set the tone” for the negotiation process. The ALJ held a 25-day hearing and subsequently issued a 250-page recommended decision that covered the impasse issues, along with some unfair labor practice allegations. In it, she recommended that CMS implement some aspects of its last, best, and final offer and return to bargaining on other issues. The ILRB adopted the ALJ’s ruling in part, but rejected the ALJ’s impasse analysis, implementing a different impasse test.

CMS and AFSCME had agreed on some issues, such as a grievance procedure package. However, the parties still did not agree on key issues. In a negotiation meeting, CMS declared that they were at an impasse and gave AFSCME its last, best, and final offer. AFSCME disagreed; while CMS wanted to go to the ILRB over whether the parties were at impasse, AFSCME thought this was unnecessary because it believed that they had not yet reached an impasse. After the 25-day hearing, the ALJ found that the parties had reached impasse on some, but not all, issues, including wages, health insurance, vacation, mandatory overtime, a management
rights clause, and subcontracting. When this case came before the State Panel, it held that subcontracting was a single, critical issue that lead to a break in the entire bargaining process and that CMS thus permissibly presented its last, best, and final offer.

On appeal, AFSCME argued that the ILRB erred by using the “single critical issue” impasse test without explaining why it no longer used the five-factor test from a prior decision, known as the Taft factors, for the NLRB’s decision in *Taft Broadcasting Co.*, 163 N.L.R.B. 465 (1967). Those factors account for: 1) the parties’ bargaining history; 2) whether they negotiated in good faith; 3) how long negotiations have gone on; 4) the importance of the issues on which the parties cannot agree; and 5) what the parties understood about the state of negotiations while they were ongoing. The appellate court agreed with AFSCME, noting that the National Labor Relations Board used the Taft factors in most cases; indeed, the court noted that even when the NLRB used a “single critical issue” analysis, it was guided by the above-listed factors.

Further, the court noted that the ILRB was free to change course if it was appropriate to do so, but that there must be an explanation. Such a burden is consistent with the Supreme Court’s admonition that “an agency must cogently explain why it has exercised its discretion in a given manner.” *Motor Vehicle Manufacturers Ass’n of the U.S. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 48 (1983). The ILRB, according to the court, failed to do this; it simply undertook a single critical factor analysis and merely stated in a footnote that it was unnecessary to apply the five-factor test at all. This unexplained shift was critical because, as the ALJ noted in her recommendation, the Taft factors would bring about a different result. Specifically, the record plainly showed that AFSCME did not understand the parties to be at an impasse. Considering that difference in understandings between the parties would seriously undermine the notion that the parties were at an impasse in negotiations, thereby making it more difficult to find in favor of CMS. As such, the Fourth District Appellate Court remanded back to the ILRB for an explanation or for application of the five-factor impasse analysis.
B. Retaliation for Protected Conduct

In *Travis Koester and County of Sangamon and Sheriff of Sangamon County*, Case No. S-CA-16-133 (ILRB State Panel 2018), the State Panel rejected an Administrative Law Judge’s recommendation that respondents violated Sections 10(a)(1) of the Act when they removed the charging party from its Tactical Response Unit (TRU) in retaliation for engaging in protected activity.

The charging party alleged that he was dismissed for filing two grievances, one in 2014 and one in 2016, challenging the promotion of three individuals. He claimed that he was entitled to promotion over those who received them according to Sangamon County Merit Rules and Regulations. Neither grievance was advanced by the Illinois Fraternal Order of Police, the charging party’s exclusive bargaining representative.

After the filing of the 2016 grievance, TRU members Darric Miller and Travis Dalby approached Lieutenant John Hayes, commander of TRU, to voice their concerns about the charging party. A subsequent meeting revealed that several team members were concerned about the impact of the charging party’s grievances and FOIA requests on TRU members’ morale. Hayes directed Miller to draft a memo of their concerns. Hayes then wrote and submitted his own memo to Captain Cheryllynn Williams who oversaw TRU. Hayes’ memo did not mention the grievances or specific events leading to the loss of trust but recommended the removal of the charging party to “maintain the effectiveness and efficiency” of TRU.

The ALJ found that the charging party had established a *prima facie* case for retaliation in violation of Section 10(a)(1). To establish a *prima facie* case for retaliation, a charging party must show that: (1) the charging party engaged in protected activity (the filing of the grievances), (2) the respondent was aware of that activity (the Miller memo, which Hayes read, mentioned the grievances), and (3) that the respondent took adverse action because of that activity (removal from TRU constituted an adverse action because it affected his ability to earn overtime, among other things). The ALJ further concluded that the respondents’ business reasons for removing Charging Party were pretextual.

After a review of the respondents’ exceptions, the State Panel held that the charging party failed to establish that his filing of the 2014 and 2016
grievances were a substantial or motivating factor in respondents’ decision to remove him from TRU. The ILRB further held that the reason for the removal from TRU was charging party’s fellow TRU members’ lack of trust in him. It was not that the TRU members were upset because the charging party filed grievances; they simply took issue with the subject of those grievances. They felt that the subject of the grievances showed that the charging party would look out for himself at the expense of his comrades; something they felt was antithetical to the ethos of TRU.

Furthermore, the ALJ found that Lieutenant Hayes had an improper motivation because he failed to conduct an investigation and bring his recommendation for removal to the whole team before submitting it up the chain of command. The State Panel held that, absent evidence that Hayes regularly sought agreement from the whole unit when deciding to remove members, Hayes’ failure to do so in this instance did not indicate an improper motive. The State Panel dismissed the complaint.

III. EEO DEVELOPMENTS

A. Age Discrimination

In Mount Lemmon Fire District v. Guido, 139 S. Ct. 22 (2018), the Supreme Court held that a unit of local government is subject to the Age Discrimination in Employment Act regardless of the number of employees it has. The ADEA defines “employer” to mean, “a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State.” 29 U.S.C. § 630. The Court reasoned that the requirement of having at least 20 employees for coverage applied only to: a person engaged in commerce.” The following sentence, that “employer” also means “a State or political subdivision of a State” is an addition to persons engaged in an industry affecting commerce who has at least 0 employees. Accordingly, the Court concluded, the numerosity requirement for coverage of persons engaged in industries affecting commerce does not apply to political subdivisions of states. The decision was unanimous except of Justice Kavanaugh who did not participate in consideration of the case.