Presented:
27th Annual Labor Law Institute

August 25-26, 2017
San Antonio, TX

SAFE PLACE TO TALK

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I. INTRODUCTION

As a general rule, employees of private employers have no First Amendment right of free speech in the workplace, and political affiliation is not generally recognized as a protected category under any of the statutes governing private employers (*e.g.*, the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Texas Commission on Human Rights Act, etc.). By contrast, employees of public (*i.e.*, government) employers are entitled to some degree of First Amendment protection and generally cannot be targeted as a result of political affiliation (subject to certain exceptions). Moreover, employees of private employers may yet be protected, if their political speech takes the form of speech that would otherwise constitute protected activity under the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, or any of the other statutes governing private employers.

Given the relative unfamiliarity of many practitioners with the rules governing public employers, this paper provides an overview of many of the cases and concepts the panel will be referencing during the presentation. This paper likewise provides an overview of the standards for protected activity under the more general statutes applicable to private employers that the panel will be discussing.

II. FIRST AMENDMENT SPEECH IN THE PUBLIC WORKPLACE

A. Overview of the Law and Key Supreme Court Decisions

The right of free speech under the First Amendment (and analogous provisions of the Texas Constitution) creates significant protections for public employees who speak out on matters of public concern. In many situations this means that disciplining or discharging a public employee based on the employee's speech (or other form of First Amendment expression) is unlawful retaliation for exercising First Amendment rights and actionable under 42 U.S.C. §1983.

However, not all speech by a public employee is protected. To prevail on a free speech retaliation claim a public employee must establish that: (1) he/she was *not* speaking pursuant to their official job duties; (2) he/she *was* speaking as a citizen on a matter of public concern; (3) the employee's interest in speaking outweighed the employer's interest in promoting workplace efficiency; (4) he/she suffered an adverse employment action; and (5) the adverse action was substantially motivated by the protected speech. See, *e.g., Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. 2014); *Hurst v. Lee County, Miss.*, 764 F.3d 480, 484 (5th Cir. 2014), cert. denied, 135 S. Ct. 1179 (2015); see also, *Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. 2011).

A number of Supreme Court and key Circuit Court decisions over the last half century have defined the current parameters of the law on each element of this claim.

- **Was the employee speaking pursuant to their official duties?** In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), the Supreme Court held that speech by a public employee made "pursuant to official duties" is not constitutionally protected – no matter how great its social significance. In that case a lawyer in the Los Angeles Co. District

Attorney's Office employed as a "calendar deputy" was demoted for writing a memo suggesting that a police officer did not have probable cause when entering a suspect's house. The Court held that the fact that the attorney "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes [the attorney's] case from those in which the First Amendment provides protection against discipline." Since the attorney's speech was made as part of his actual job duties, the disciplinary action based on that speech did not raise a First Amendment issue.

In *Lane v. Franks*, 573 U.S. 13, 124 S. Ct. 2369 (2014), the Supreme Court refined the test from *Garcetti* to clarify the line between unprotected speech pursuant to official job duties and protected speech that is based on information learned in performing the employee's job. In that case the public employee was an auditor who was subpoenaed to testify before a grand jury (and later in a criminal trial) about an audit he had conducted of a state-funded program. He was later discharged from his position, and alleged in his lawsuit that he had been fired in retaliation for the testimony he gave in those proceedings. The Supreme Court held the court testimony was protected speech, reversing lower court holdings that had relied on the fact that the testimony was about information he learned solely by virtue of performing his job. The Court in *Lane* made the distinction between employment duties and the separate duty to appear and testify in a judicial proceeding pursuant to a subpoena:

> "Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer." 425 U.S. at 563.

The Court in *Lane* also clarified that *Garcetti* did not hold that all speech about matters learned as a result of public employment is unprotected. Rather, the *Garcetti* exception to First Amendment protection applies only to speech that was made as part of the public employee's actual job duties. Clearly, the employee's speech in *Lane* was not a part of his official duties, so the *Garcetti* exception did not apply in that case.

- **Was the employee speaking on a matter of public concern?** In *Connick v. Myers*, 461 U.S. 138, 143 (1983), the Court held that a public employee's speech is constitutionally protected if it "addresses a matter of 'public concern.'" As used here, matters of public concern are those which can be "fairly considered as relating to any matter of political, social, or other concern to the community." See, *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir.2001). However, even when speech relates to a topic of public interest, as is often the case in the public employment setting, it is not considered to be a "matter of public concern" if the speaker spoke as an employee rather than as a citizen. See, *Connick*, 461 U.S. at 147.

  Development of the law since *Connick v. Myers* had not fully clarified this element of the claim to date. For example, speech that is purely on a matter of personal interest is spoken

as an employee and is not constitutionally protected. *Benningfield v. City of Houston,* 157 F.3d 369, 375 (5th Cir.1998). However, "[t]he existence of an element of personal interest on the part of an employee in the speech does not prevent finding that the speech as a whole raises issues of public concern." *Dodds v. Childers,* 933 F.2d 271, 273 (5th Cir.1991). Speech that touches both matters of public and personal interest – referred to as "mixed speech" – is protected by the First Amendment if it was made "*predominantly* 'as a citizen." *Id.,* 933 F.2d at 273.

In determining whether a plaintiff spoke primarily as a citizen on a matter of public concern or as an employee on a matter of personal interest, the court will consider "the content, form, and context of a given statement, as revealed by the whole record." See, *Connick,* 461 U.S. at 147–48, 103 S.Ct. 1684; see also, *Fiesel v. Cherry,* 294 F.3d 664, 668 (5th Cir.2002). These factors "must be considered as a whole package, and [their] significance ... will differ depending on the circumstances of the particular situation." *Moore v. City of Kilgore,* 877 F.2d 364, 370 (5th Cir.1989). The Fifth Circuit has recognized "three reliable principles" to determine whether public employee speech is made as a citizen on a matter of public concern:

> "First, the content of the speech may relate to the public concern if it does not involve solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager's status as an arm of the government. If releasing the speech to the public would inform the populace of more than the fact of an employee's employment grievance, the content of the speech may be public in nature. Second, speech need not be made to the public, but it may relate to the public concern if it is made against the backdrop of public debate. And third, the speech cannot be made in furtherance of a personal employer-employee dispute if it is to relate to the public concern."

Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359, 372 (5th Cir.2000), *abrogated on other grounds by Cuvillier v. Taylor,* 503 F.3d 397, 401 (5th Cir.2007). Finally, the Fifth Circuit has noted that speech regarding "internal personnel disputes and working conditions" will not ordinarily be a matter of public concern. See, *Alexander v. Eeds,* 392 F.3d 138, 142 (5th Cir.2004).

- **Did the employee's interest in speaking outweigh the employer's interest in workplace efficiency?** This is a balancing test called the "Pickering Balance," named for the Supreme Court's decision in *Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1703 (1968). In that case the Court held that even if a public employee speaks on a matter of public concern, his speech is not protected unless the employee's interest in expressing himself on the matter outweighs the government's interest in promoting the efficiency of its public services. To resolve this issue the court should perform a balancing test that "in reality is a sliding scale or spectrum upon which 'public concern is weighed against disruption'" to the public employer's interest in efficient operation. See, *Vojvodich v. Lopez,* 48 F.3d 879, 885 (5th Cir.1995) (quoting *Click v. Copeland,* 970 F.2d 106, 112 (5th Cir.1992) (internal quotations omitted)). "The more central a matter of public concern is to the speech at issue,

the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin v. Lee,* 946 F.2d 1152, 1157 (5th Cir.1991).

In weighing the competing interests of the employee and employer, the Court considers: (1) the degree to which the employee's activity involved a matter of public concern; (2) the time, place, and manner of the employee's activity; (3) whether close working relationships are essential to fulfilling the employee's public responsibilities and the potential effect of the employee's activity on those relationships; (4) whether the employee's activity may be characterized as hostile, abusive, or insubordinate; and (5) whether the activity impairs discipline by superiors or harmony among coworkers. See, *Jordan v. Ector County,* 516 F.3d 290, 299 (5th Cir.2008).

- **Did the employee suffer an adverse employment action?** Terminations, demotions, and refusals-to-hire clearly are adverse employment actions, just as they are under statutory employment discrimination analysis. The Fifth Circuit has held that for purposes of a Section 1983 claim a transfer that serves as a demotion qualifies as an adverse employment action. *Sharp v. City of Houston,* 164 F.3d 923, 933 (5th Cir.1999). "To be equivalent to a demotion, a transfer need not result in a decrease in pay, title or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." *Id.* (citing *Forsyth v. City of Dallas,* 91 F.3d 769, 774 (5th Cir.1996)); *Click,* 970 F.2d at 109. It is not enough to show that the employee had a personal belief that a demotion has occurred. Rather, the employee must show that the transfer caused some objective harm "sufficiently serious to constitute a constitutional injury." *Serna v. City of San Antonio,* 244 F.3d 479, 483 (5th Cir.2001); *Breaux v. City of Garland,* 205 F.3d 150, 152 (5th Cir.2000). Whether a transfer is objectively worse is generally a question of fact. *See, e.g., Sharp,* 164 F.3d at 933.

- **Was the adverse action substantially motivated by the protected speech?** This is the causation element of the free speech retaliation claim under Section 1983. In *Monell v. Dept. of Social Services of New York,* 436 U.S. 658, 694, 98 S. Ct. 2018 (1978), the Court held that a public employer is not automatically liable under a theory of *respondeat superior*. Rather, a public employer may be held liable for the deprivation of rights guaranteed by the Constitution or federal law only if the deprivation was the result of an official policy, which may be represented either by a policy or custom. Id., 436 U.S. at 693. The employee must show that: (1) the public employer had a custom or practice, of which (2) a policymaker of that employer can be charged with actual or constructive knowledge, and (3) a constitutional violation was the moving force behind the policy or custom. See also, *World Wide St. Preachers Fellowship v. Town of Columbia,* 591 F.3d 747, 752–53 (5th Cir.2009). Where the custom or practice at issue is unwritten, the employee must demonstrate that the practice is so "persistent and widespread" as to constitute "permanent and well settled" policy. See, *Monell,* 436 U.S. at 691, 98 S. Ct. 2018. Fifth Circuit cases have held that the pattern of wrongs should be both sufficiently numerous and sufficiently similar and specific to the one that caused the plaintiff's injuries. See, *Estate of Davis ex rel. McCully v. City of N. Richland Hills,* 406 F.3d 375, 383 (5th Cir.2005); *Piotrowski v. City of Houston,* 237 F.3d 567, 581–82 (5th Cir.2001);

McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir.1989). An isolated incident is typically not enough. *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir.2002).

Courts do recognize that a "single decision" by a policymaker can sometimes constitute official policy, but only in the "extremely narrow" circumstance in which the decision maker is also a "final policymaker." See, *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir.2008). A policymaker has "the responsibility for making law or setting policy in any given area of local government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); see also, final policymaking authority. *Id.*

B. Case Summaries Involving First Amendment Free Speech Issues

During the past 12 months there have been no U.S. Supreme Court decisions in cases involving First Amendment free speech issues in the public workplace. Following are summaries of significant decisions on a variety of First Amendment free speech issues decided within the past several years (listed generally in reverse chronological order):

***Haverda v. Hays Co.*, 723 F.3d 586 (5th Cir. 2013).** Employee/Capitan of Corrections who was demoted to Corrections Officer claimed retaliation for a letter he wrote to the editor of the local newspaper supporting the incumbent sheriff, who lost the election. The 5th Circuit reversed the lower court's grant of summary judgment because Plaintiff presented a genuine dispute as to a material fact related to his First Amendment claim. The Court found that Plaintiff was speaking as a citizen when he wrote the letter to the editor because he "received no compensation to pen the letter to the editor, . . . the letter was public and not an internal publication, . . . [and] it was not part of Haverda's job duties to speak to the media or write letters to the editor." The court noted that "[l]etters to the editor, supporting a candidate during a campaign, are a unique form of speech that embody the very essence of the First Amendment and require its full protection."

***Gibson v. Kilpatrick*, 734 F.3d 395, (5th Cir 2013)**. Employee/Police Chief who reported mayor's misuse of the city gasoline card to outside law enforcement agencies claimed retaliation after mayor, who was found to have misused the city gas card, issued several written reprimands to Police Chief and recommended his termination. The lower court held that the mayor violated Gibson's First Amended rights, but the Fifth Circuit reversed and found that "Gibson acted pursuant to his official job duties in making the reports" of misuse of the gas card to other law enforcement officials. In so holding, the court considered Mississippi's statutory description of a law enforcement officer, and noted that while Garcetti warns against relying solely on written job descriptions, they can be used as one of many factors to determine the scope of an employee's official duties.

***Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).** A police chief won reelection and several employees/police officers who had supported the opponent alleged retaliation for protected speech because they were not reappointed after the election. One officer claimed retaliation for using the "like" button on Facebook to support the opponent, and Defendants argued this was not constitutionally protected speech. The court held that using the Facebook "like" button is constitutionally protected speech analogous to displaying a campaign sign in your front yard, and

understood by viewers to have the same meaning. The court explained that "[o]n the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

***Lee-Khan v. AISD,* 2013 WL 3967853 (W.D. TX 2013).** The employee/public school counselor was impacted by a reduction in force and was neither subsequently rehired nor placed on list of priority candidate for rehire. Plaintiff argued that she was retaliated against after she (1) filed complaints with district administrators about testing violations, management issues, and the RIF policy, and (2) testified against AISD. The Court held that none of Plaintiff's speech qualified as matters of public concern, with the exception of her testimony against AISD, "because it was not part of her official duties to testify, and honest testimony is of great concern to the public." The court further reasoned that "her interest in testifying as a citizen by far outweighs AISD's interest in the efficient provision of public service." The Court, however, dismissed the retaliation claim because Plaintiff did not "allege a policy or custom that was the moving force behind her alleged constitutional violation."

***Colbert v. City of McKinney,* 2013 WL 3368237 (E.D. TX 2013).** The employee/police officer was terminated as a result of policy violations related to his association with a motorcycle club and statements he made to a Dallas Morning News reporter regarding motorcycle clubs. The Court denied Defendants' motion to dismiss the retaliatory discharge claim, finding that "motorcycle clubs or gangs are a matter of social or other consequence to the community and may be considered matters of public concern." In holding that the employee spoke on a matter of public concern the court noted that (1) the employee did not initiate the speech but rather responded to an invitation to speak to a reporter following the death of a fellow club member, (2) the employee used only his riding name and not his real name, and (2) the employee did not discuss him employment with the City of McKinney.

***Johnson v. Hurtt,* 893 F. Supp.2d 817 (S.D. Tex. 2012).** The employee was an officer in the Houston Police Department (HPD) during a time when HPD was a sanctuary city for undocumented aliens. HPD adopted a General Order that officers were not to contact the federal Immigration and Customs Enforcement (ICE) on detentions or arrests unless the officer knows the individual is an illegal alien. The employee wanted to contact ICE in her own discretion differently from the HPD General Order, and filed an action seeking to enjoin the General order on First Amendment grounds. The Court dismissed the action, holding that the officer's speech was clearly work-related speech under *Garcetti* and, therefore, not protected First Amendment expression. The court rejected the officer's argument that her desire to contact ICE was "related to" but not "required by" her job. Under *Garcetti*, that distinction is immaterial.

***Briscoe v. Jefferson County,* 2012 Westlaw 6082694 (5th Cir. 2012) (unpublished).** Court affirmed dismissal of claims by county employee who alleged she was fired for reporting concerns about fuel shortages to county auditor and district attorney's office. The employee claimed that

her statements were not part of her official duties because the county auditors were not in her "chain of command." The court reasoned that because the plaintiff alleged in her complaint that she "worked regularly" with the auditors, her complaints to them were part of her official duties even though they were not part of her management chain of command.

***Singer v. Ferro,* 2013 WL 1285275 (2nd Cir. 2013).** The issue in this case is whether the employee's communication was about a matter of public concern. The employee created a parody of an Absolut vodka ad that showed pictures of managers at his work location and the caption, "Absolut corruption." He showed the parody to co-workers and intended then to dispose of it, but the parody found its way to the managers pictured in it. In his deposition, the employee identified as the corruption he referenced in the picture issues concerning promotions and payroll irregularities at that work location, his manager's arrest 16 years earlier for soliciting prostitution, and a complaint that another manager was a "womanizer." The court held that the issues themselves did not rise to the level of a "political, social, or other concern to the public." The court stated: "It is possible that corruption in these respects, if sufficiently egregious or widespread, might implicate the proper stewardship of the public fisc, or the effective operation of important and sensitive public institutions, and thus would constitute matters of public concern. But we do not think that the public has a substantial interest in minor payroll discrepancies amongst corrections department staff, an isolated promotion to middle management, an arrest sixteen years prior, or rumors of womanizing. Each of these falls far from the kind of legitimate and understandable concerns that the public would have as to these public institutions and their missions." The court also held that the manner the employee publicized his criticism – i.e. a parody shown only to others in his office, then discarded – undermined the potential seriousness of his claims. While acknowledging that the employee may have had a legitimate issue of public concern, the Court held that the employee had not raise it as such under the facts of the case. ("But under the circumstances of this case, the defendants' alleged overreaction to the parody is not a constitutional issue for this Court to address. . . .We, as a federal court, are under instructions not to 'constitutionalize the employee grievance,' *Connick,* 461 U.S. at 154, 103 S.Ct. 1684, lest we 'compromise the proper functioning of government offices,' *Roe,* 543 U.S. at 82, 125 S.Ct. 521."

***Dahlia v. Rodriguez,* 689 F.3d 1094 (9th Cir. 2012).** The employee/ police officer was disciplined for disclosing allegedly abusive interrogation tactics by other police officers, in violation of an instruction by his chain of command not to disclose the information. The Ninth Circuit affirmed dismissal of his free speech retaliation claim, finding that his "whistleblowing" activity was actually part of his job duties as a police officer. Since the activity was an official duty under binding precedent of the Ninth Circuit, the court held it was not constitutionally protected speech under *Garcetti*. In dictum, the court further held that placing an officer on administrative leave could be deemed an "adverse action" for free speech retaliation purposes.

***Dixon v. University of Toledo,* 703 F.3d 269 (6th Cir. 2012).** The employee, an associate vice president of human resources at for the employer/ university, was fired shortly after publishing an op-ed column in the local newspaper rebuking comparisons between the civil rights movement and the gay rights movement. The court framed the issue for decision as: "whether the speech of a high-level Human Resources official who writes publicly against the very policies that her government employer charges her with creating, promoting, and enforcing is protected." The court

analyzed this issue under a special line of cases applicable to employee free speech cases that applies to high level policymaking positions. Under this analysis, if the individual falls into one of four "policymaker" categories, the balancing test under *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1703 (1968), for balancing the interests of the employee and those of the employer is presumed *as a matter of law* to weigh in the employer's favor. The four categories of policymaking employees are: (1) positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted; (2) positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions; (3) confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; and (4) positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies." See also, *Latham v. Office of Attorney Gen. of Ohio,* 395 F.3d 261, 267 (6th Cir.2005). In determining whether an employee falls into one of these categories, the court examines the inherent duties of the position, rather than the actual tasks undertaken by the employee. Applying this test, the court held under the facts that the employee's op-ed column was unprotected speech because she was a policymaking employee who was speaking on an issue related to her job position.

***Ricci v. Cleveland Independent School District,* 2012 WL 2935200 (S.D. Tex. 2012).** The employee was a payroll clerk in a school district office. She had a lunchtime conversation with a co-worker shortly before a school board election in which she encouraged the co-worker to vote for specific candidates in the upcoming election, and was later fired for violating an "employee participation" policy in the school district's handbook. In her lawsuit to regain her job, the Court found her speech to be protected First Amendment expression, and not unprotected "job-required speech," after analyzing the following factors: (1) the employee job description; (2) whether the employee spoke on the subject matter of their employment; (3) whether the employee was raising complaints up the chain of command; and (4) whether the speech resulted from special knowledge gained as an employee.

***Petrie v. City of Grapevine,* 2012 WL 5199181 (N.D. Tex. 2012).** In this case a City of Grapevine police officer complained that the Grapevine Police Department (GPD) transferred him to a less desirable position because he spoke to the chief of a neighboring police department about potential loss of funding for a drug awareness program for students that was a part of his assigned duties at a middle school where he was assigned. In ruling on the employer's summary judgment, the Court held that it could not say as a matter of law that the speech was unprotected "job-required" speech under Garcetti. The Court noted that the officer's job could be "tangentially related" to his speech, but cited a number of specific factors suggesting the relationship was remote. Even though the drug awareness program was part of the officer's duties the Court could not conclude as a matter of law that it was job-required.

***Clancey v. City of College Station*, 2011 WL 335148 (S.D. Tex. Jan. 31, 2011)**. The Court denied the defendants; 12(b) motions to dismiss in this case involving a city manager's statements to the city council. Judge Ellison ruled that the plaintiff stated sufficient facts to show adverse employment action (more on this below in §I.D.) even though the City Manager resigned rather than be fired. Here is the Court's discussion of the facts that may constitute an Adverse Employment Action: Plaintiff pleaded that "Defendant Brown stopped seeking his counsel on important issues and began ignoring his requests. Defendants Brown and Merrill gave Clancey a poor performance review and, during a budget review, indicated that he would get very little of what he sought. Clancey states that he was subjected to baseless accusations by Defendants Brown and Merrill of violating City policy, untruthfulness, and unbecoming conduct. He states that, after increasing pressure by Defendants Brown and Merrill, he entered Defendant Brown's office one day to find a mock-up of the local newspaper's front page with a photo of himself and the caption "Police Chief Steps Down." Brown allegedly told Plaintiff, "Things are not working out. We need to make a change and are going to let you go." Plaintiff told Brown that he would prefer to retire than be fired, which, after consultation with other city officials, was deemed permissible. Plaintiff's letter of resignation was drafted for him and he was asked to sign the letter. These facts, taken as true, make out a plausible claim that Plaintiff was terminated by Defendant Brown, which is undisputedly an adverse employment action under Fifth Circuit law. Plaintiff's resignation appears to have been only an alternative to the predetermined termination, rather than Plaintiff's voluntary choice. Alternatively, even if Plaintiff was not terminated, the hostile and aggressive situation created by Defendants Brown and Merrill was calculated to lead to Plaintiff's resignation and constitutes a constructive discharge. *See Faruki*, 123 F.3d at 319 (the intolerableness of working conditions can be demonstrated through evidence of "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation.") Thus, the Court finds that the FAC and Rule 7(a) Reply has set forth additional and sufficient facts to state a claim for an adverse employment action." *(Internal citations to record omitted).*

***Dowdy v. Coll. of Mainland*, (S.D. Tex. July 28, 2011) *aff'd sub nom. Wilson v. Coll. of the Mainland*, 11-40963, 2012 WL 1080536 (5th Cir. Apr. 2, 2012).** This is a case involving both free speech and due process issues with the due process issues discussed below. The case involved two employees who sued for procedural, substantive and free speech violations arising out on investigation for making threats regarding other employees (which one plaintiff said was merely "venting"). The Court granted the defendants' motion for summary judgment because Judge Hoyt ruled the threatening statements that the plaintiff made about a co-worker was not protected speech on a topic of public concern (including that the co-worker's statements made the plaintiff want to "barf on her." The Court ruled that the plaintiff could not establish "causation" that they were fired for any protected remarks and also that the remarks in question were not protected: " Moreover, there is no evidence that Dowdy spoke or sought to speak at a public forum about his concerns and was prevented from doing so. Moreso, he was not terminated for any statement that he made about being overpaid. Instead, it was the threats that he lodged against Johnson that triggered the investigation and subsequent termination. Considering the content, form and context, the Court determines that the plaintiff's comments were words of hate, not debate, and that were not intended for public consumption because they were made in a private setting." *Id.*

***Bonillas v. Harlandale Indep. Sch. Dist.*, 2011 WL 2173620 (W.D. Tex. 2011)**. This case was brought under both the Texas Whistleblower Act (this aspect of the case is discussed in more detail below) involving comments made by a teacher that students were being taken from gym class to

spend more time prepping for standardized tests, which the plaintiff stated was not proper and also violated a Texas statute governing the amount of time per week students must spend doing physical exercise. Judge Rodriguez, in this long and thoughtful opinion, denied the defendants' motion to dismiss. With regard to the plaintiff's *free speech* claim, the Court ruled that the plaintiff's comments were made to the media and thus were not made solely as an employee: "Plaintiff clearly alleges that she made a statement to the media on this issue; her complaint was not made only internally or through the employee grievance process. Defendant also argues that Plaintiff has not alleged any connection between her public complaints and the termination of her job, asserting that it was the Board who terminated her contract while her grievance was submitted only to the Superintendent. This argument ignores Plaintiff's allegations that she reported the activity to the Board as well as the Superintendent, and that she reported the activity to the media. Furthermore, Defendant's arguments regarding the context and timing essentially seek this Court to resolve a fact issue which is inappropriate at the motion to dismiss stage. Although the Court may take judicial notice of the school district's grievance policy ("DGBA"), the Court need not resolve the difference in interpretations between the parties as to the alleged facts. Construing all factual allegations in favor of the Plaintiff, she has stated a First Amendment claim sufficient to survive the motion to dismiss." Id. at *9.

***Westmoreland v. Sutherland,* 662 F.3d 714 (6th Cir. 2011)**. A firefighter responded to the drowning death of a young boy by speaking out about the disbanding of the department's dive team during the public comment segment of a city council meeting. The fire fighter was then suspended for three shifts, on the grounds that his statements at the city council meeting constituted insubordination, malfeasance, misfeasance, dishonesty, failure of good behavior, and conduct unbecoming an officer. The Sixth Circuit held that the fire fighter's speech was protected under *Garcetti*. Although the fire fighter identified himself as a public employee, he appeared off duty, out of uniform, and at a public meeting to address the mayor and city council during the public comment period. There was nothing in the record to support the city's claim that his expression was made pursuant to a task that was within the scope of his official duties.

***Foley v. Town of Randolph,* 598 F.3d 1 (1st Cir. 2010).** Fire chief made statements made to the media after a fatal house fire. During his interview, he commented on what he considered inadequate funding and a related lack of staffing for the fire department. The chief was later suspended for 15 days without pay. The First Circuit held that this speech was not protected under *Garcetti*, reasoning that the chief was in uniform and on duty, and he spoke from the scene of a fire where he had been in command as fire chief. Although he made his speech in public and not in the workplace, he was still speaking in his official capacity in a forum he only had access to because of his position.

***Elizondo v. Parks,* 2010 WL 2756557 (W.D. Tex. 2010).** Plaintiff Elizondo was terminated by his employer, the University of Texas at San Antonio, after fifteen years as a Business Development Specialist at the UTSA Minority Business Development Center. This position was dependent on funding through a federal grant from a subdivision of the U.S. Department of Commerce. After budgetary issues forced a reorganization of the UTSA staff, plaintiff initially refused to accept an assignment that would have seen him maintain his job description while receiving funding from a different source. Plaintiff questioned the legality of the reorganization, and after ultimately refusing to accept the reassignment, was terminated for "failure to cooperate

with supervisor, refusal to follow instructions and [his] refusal to perform [his] assigned duties." *Id.* Following a series of summary judgment motions by both parties on several issues, the only surviving claim was plaintiff's First Amendment retaliation claim. Defendant filed an interlocutory appeal, but the Fifth Circuit remanded in light of the fact that *Garcetti v. Ceballos*, 126 U.S. 1951 (2006) had been decided after the District Court's rulings. Here, the trial court examined plaintiff's case in light of *Garcetti* and held that, much like the plaintiff in *Williams v. DISD*, 480 F.3d 689 (2007), the speech in question was made pursuant to plaintiff's official duties despite not being part of his formal job description. The court deemed all of Elizondo's concerns, expressed internally in the department, to relate either to his job duties and possible transfer, or to have taken place in meetings called pursuant to his job duties. Plaintiff's other three bases for retaliation, which included communications with a Regional Office of the MBDA, communications to his superiors regarding his intention to seek legal counsel, and a nascent fraud claim with the Department of Commerce, were all held to have been unknown to his superiors at the time of termination and thus could not form the basis of retaliation. As this was only remaining claim in the case, the court held that defendants were entitled to summary judgment on the defense of qualified immunity.

***Kast v. Greater New Orleans Expressway Commission*, 719 F.Supp.2d 662 (E.D. La. 2010).** A former supervisory officer with the enforcement division of the city's expressway commission filed suit against former supervisors alleging First Amendment retaliation and violation of Louisiana whistleblower statute following a traffic stop involving a mayor. Plaintiff Kast had been off-duty when the mayor was stopped by two traffic police officers after the mayor had barreled through a toll-both arm while under the influence of alcohol. Ultimately the two cops allowed the mayor to go without a field sobriety test upon the advice of Kast and another supervisor that the cops make their own determination. The Commission later conducted an investigation that found Kast had abdicated his responsibility in his handling of the incident. Plaintiff's amended complaint alleged that he was terminated at least in part because he voiced opposition several times to constant preferential treatment of politically connected individuals. Plaintiff also cited his refusal to participate in a cover-up and his complaint to a Commission panel member about the panel's interpretation of a department regulation. Analyzing the First Amendment claim under the *Garcetti* framework, the court held that Plaintiff's, the court dismissed each of Plaintiff's contentions as unprotected speech. His refusal to participate in a cover-up was dismissed as unsolicited in the first place and, even so, pursuant to his official duty of participating in internal investigations. For similar reasons, the court refused to accept Plaintiff's complaint to a Commission panel member as protected speech. Finally, as to the complaints about preferential treatment for connected politicians, the court noted that a department regulation required reporting of misconduct, so any internal complaints were unprotected under *Garcetti's* job duty standard. Although Plaintiff had also complained to friends and family at social gatherings about these issues, the court ruled that this speech did not rise to the level of speech on a topic of public concern because it was not to the media or general public. Even if the complaints at social gatherings were speech on a topic of public concern, the court found that the Plaintiff had failed sufficiently to plead that Plaintiff's superiors knew about the speech or that it constituted a substantial motivating factor for his termination.

***Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009)**. The question in this case was whether the speech of elected state and local government officials made pursuant to official duties is less protected by the First Amendment than other speech. Analyzing the case under *Garcetti*, the district court held that the First Amendment provides no protection to such officials when made pursuant to official duties, but the Fifth Circuit disagreed. Because the case had been dismissed without applying a strict scrutiny analysis to the speech-regulating state statute at issue in the case, the Fifth Circuit reversed and remanded. Plaintiffs were elected city council members indicted in state court for violations of the criminal provisions of the Texas Open Meetings Act by acting as a quorum in exchanging private emails about whether to call a council meeting on a public contract matter. Plaintiffs brought this §1983 action against the District Attorney and state Attorney General's office for declaratory and injunctive relief, despite the District Attorney dismissing the charges without prejudice, fearing future prosecutions and speech restriction. After finding that Plaintiffs had standing to bring the case, the Fifth Circuit addressed the First Amendment issues. The court first found that the logic of *Garcetti* entails a different treatment of elected public officials than public employees, since the employer's interest in an efficient workplace was a factor in the decision. On a related note, the court indicated that the standard is altered when the state is acting as a sovereign in enforcing a statute rather than merely acting as an employer: namely the state as sovereign warrants strict scrutiny. The court cited Supreme Court and its own precedent for the proposition that elected officials garner no less free speech protection than the average public employee and indeed requires more insofar as a compelling state interest must be advanced to restrict such speech. The Fifth Circuit thus remanded for reconsideration of the case in light of its holding to apply the strict scrutiny standard to the statute in question.

***Cutrer v. McMillan*, 308 Fed. Appx. 819, 2009 WL 221254 (5th Cir. 2009).** Plaintiffs were all over the age of 40 and were supervisory employees for the Mississippi Department of Rehabilitation Services ("MDRS"), a state agency. In November 2005, plaintiffs filed a charge with the EEOC alleging age discrimination. The EEOC issued a determination letter in April 2007 finding impermissible discrimination by MDRS. Plaintiffs also filed a second charge with EEOC in February 2006 alleging retaliation for the first EEOC charge, to which Defendants also declined the offer of conciliation and the EEOC again issued a right to sue letter. Finally, Plaintiffs filed suit against Defendants in their individual capacity alleging Title VII, ADEA, and §1983 claims. The district court granted summary judgment to Defendants on all counts and Plaintiffs only appealed on the §1983 claim. The appeal turned on whether Plaintiffs could convince the court on appeal that their EEOC charges constituted speech on a topic of public concern. Using the classic three-step analysis (Context, Form and Content) for such a claim, the court here held that although the speech was not pursuant to Plaintiffs' official duties, it was not on a topic of public concern. The court dismissed Plaintiff's argument that the fact that the complaint was filed *as a class* rather than individually made the speech public. The speech still only implicated the private employment interests of plaintiffs and was not supplemented by any further public airing of their employment grievances. Summary judgment for Defendants was affirmed.

***Shumpert v. Johnson*, 621 F.Supp.2d 387 (N.D. Miss. 2009**). A sheriff's department employee brought suit against the county sheriff alleging First Amendment retaliation in response to Plaintiff's discussion of a prison assault with her attorney. Plaintiff worked at a juvenile detention center where she had witnessed several Tupelo police officers beating an arrestee to the point

Plaintiff was concerned for arrestee's safety. Plaintiff then reported the incident to her supervisor, a major in the Tupelo Police Department and a Tupelo city councilwoman, who referred Plaintiff to an attorney. Plaintiff was terminated when she was told that the meeting with an attorney violated a Sheriff's Department written policy. At trial, Plaintiff won a jury verdict, after which the court submitted interrogatories to the jury that tracked the *Pickering* balancing test. *See Pickering v. Board of Ed.*¸88 S.Ct. 1731 (1968). Satisfied that the weight of those answers tipped the balance in favor of Plaintiff, the trial court entered judgment on the verdict. The decision here was on the Defendant's motion for judgment as a matter of law or alternatively for a new trial. Upholding the jury verdict, the court reasoned that the jury was free to decide on the credibility of witnesses as to the Plaintiff's pretext claim ("departmental efficiency"), the suspicious circumstantial evidence (chronology of termination), and whether there was "no reason for retaliation" since the Sheriff was not affiliated with TPD. For similar reasons, the court dismissed the claim for a new trial, holding that the evidence was sufficient and the jury instructions, if deficient in any way, were harmless error.

***Cooley v. Grimm*, 272 Fed. Appx. 386, 2008 WL 900912 (5th Cir. 2008).** This case involved a fire fighter's claim that his First Amendment free speech rights were violated based on his role in collective bargaining negotiations. Finding material fact questions to exist concerning the causal connection between the plaintiff's union activity and his loss of promotion, the court denied the city's interlocutory appeal based on qualified immunity. In its ruling, the court noted the potential impact of *Garcetti* on further proceedings after remand. The court stated: "When considering the merits of Cooley's §1983 claim, the district court must be mindful that whether Cooley's 'speech' was entitled to First Amendment protection is a question now best analyzed pursuant to *Garcetti* … . The ultimate determination will involve evaluating what 'union activities' Cooley engaged in and how he engaged in them, as well as their potential impact on the functioning of the fire department." *Id.* at 393 n. 9. The inclusion of this remark in a footnote is somewhat interesting. The "union activities" for which Cooley claimed protection all occurred in his status as union president and had nothing to do with his normal job duties. Thus, exactly how *Garcetti* might be applied to deprive Cooley of First Amendment protection is unclear.

***Justice v. Danberg*, 571 F.Supp.2d 602 (D. Del. 2008).** A state prison employee who also served as a union vice president alleged he was denied promotion as a result of his activities on behalf of the union in collective bargaining negotiations. Defendants moved for summary judgment based on *Garcetti*, contending that the employee's union activities were in his role as an employee rather than as a citizen speaking on a matter of public concern. *Id.* at 608-9. The court rejected this claim. The court noted that *Garcetti* disallows First Amendment claims only in circumstances where the activity is one *required* by the public employee's duties. *Id.* at 609. Defendants argued that Justice met this standard, since state law required that he be a member of his union. The court rejected this contention. The court noted that while Justice was required by Delaware law to be a union member, he was not required to be a vice president in the union nor to be active in the union beyond his required membership. *Id.* More importantly, the court noted that if it "were to adopt defendants' interpretation of [*Garcetti*], union activity would cease to be a fundamental right protected under the Constitution, a holding that would contradict decades of Supreme Court precedent. The court declines to find that *Garcetti* represents an abrogation of such a well-established right. Consequently, the court finds that plaintiff was acting as a citizen when participating in union negotiation activities." *Id.* at 609-10 (citations omitted).

***Weintraub v. Board of Education of the City School District of the City of New York*, 593 F.3d 196 (2d Cir. 2010) cert. denied 131 S. Ct. 444 (2010)**. In this case, the court analyzed a public school teacher's claim that he was retaliated against because he filed a formal union grievance to challenge the school administration's refusal to discipline a student who threw books at the teacher during class. The school district moved for summary judgment based on *Garcetti*, arguing that the teacher's grievance was filed pursuant to his official duties and thus was not protected by the First Amendment. The Second Circuit agreed, holding that the grievance was a means to fulfill one of the teacher's core job duties, maintaining discipline in the classroom. The court found it important that the teacher was only able to file a formal grievance because of his status as a public employee and that there is no speech analogous to an employee grievance that is available to private citizens.

***Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011).** The court reversed on *Garcetti* grounds a state-contracted speech therapist's claim for First Amendment retaliation based on making comments to parents that state agency was not in compliance with state regulations and encouraging them to contact advocacy organizations to address the problem). In *Trant v. State of Oklahoma*, 426 Fed. Appx. 653 (10th Cir. 2011), the court held that reporting or threatening to report wrongdoing to outside authorities is not within the scope of official duties where the employee is not tasked to do so by his employer nor required to do so by independent legal obligation imposed as a function of his official position. In *Reinhardt v. Albuquerque Public Schools Board of Education*, 595 F.3d 1126 (10th Cir. 2010), the court reversed summary judgment based on a *Garcetti* analysis and reinstated the claim of school district speech pathologist who alleged that she was retaliated against after filing formal complaint with state education agency alleging violations of special education laws by school district. In *Platt v. Village of Southampton*, 391 Fed. Appx. 62 (2d Cir. 2010), the court dismissed on *Garcetti* grounds a police officer's claim of First Amendment retaliation based on his report to the Village Trustee of an improper relationship between two other officers, holding that the report was made in his capacity as an officer rather than as a citizen.

Huth v. Haslun*, 598 F.3d 70 (2d Cir. 2010).** The court held that a state employee's reports to supervisor about misconduct committed by fellow employees, which were made during daily meetings where employees in the division were discussed, were not protected under *Garcetti*. In ***Bowie v. Maddox*,** 653 F.3d 45 (D.C. Cir. 2011), the court held that a public employee's refusal to sign an affidavit drafted for him by a superior in connection with a former subordinate's discrimination claim, as well as the employee's subsequent rewriting of the affidavit in a manner critical of his employer's decision to terminate the subordinate, was not protected under *Garcetti*. In ***Rohrbrough v. University of Colorado Hospital Authority*,** 596 F.3d 741 (10th Cir. 2010), the court held that a public hospital employee's statements raising concerns about patient care in the hospital to coworkers and supervisors were not protected under *Garcetti*. In ***Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), the court reversed the dismissal of a police officer's claim for First Amendment retaliation for refusing his superiors' requests to file a false report in connection with an investigation into a citizen complaint about excessive use of force by another officer.

In ***Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006).** The Supreme Court considered the question of what constitutes actionable retaliation under Title VII's anti-retaliation provision. In *Burlington Northern*, the employee was a female forklift operator in an otherwise all-male department. After she complained that her immediate supervisor

made insulting remarks to her in front of her male colleagues, and told her repeatedly that women should not be working in the department, she was removed from her forklift duty and assigned to perform only standard track laborer tasks. The Court stated: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination. '" 126 S.Ct. at 2415. Several lower courts have held that the *Burlington Northern* standard should be applied to First Amendment retaliation claims as well. E.g., ***Hellman v. Weisberg***, 360 Fed.Appx. 776, 779 (9th Cir. 2009) ("[T]he test of adverse employment action in the First Amendment context is substantially similar to the test under Title VII"); ***Boyd v. Peet***, 249 Fed.Appx. 155, 158 (11th Cir. 2007) ("[A] court may apply Title VII standards to First Amendment retaliation claims."); ***Zelnik v. Fashion Institute of Technology,*** 464 F.3d 217 (2nd Cir. 2006), *cert. denied* 127 S.Ct. 2062 (2007) (*Burlington Northern* standard applied to professor's claim that state university retaliated against him for exercising his free speech rights by denying him professor emeritus status); ***Peyton v. City of Yazoo City, Miss.***, 764 F.Supp.2d 831, 840 (S.D. Miss. 2011) (applying *Burlington Northern* standard to deputy city clerk's First Amendment retaliation claims against the city); ***West v. New Mexico Taxation and Revenue Dept.,*** 757 F.Supp.2d 1065, 1101 (D. N.M. 2010) ("The standard for determining whether an employer subjected an employee to an adverse employment action is the same for retaliation claims under the First Amendment and Title VII"); ***Rodriguez v. City of Laredo,*** 2007 WL 2329860 (S.D. Tex. 2007) (*Burlington Northern* standard applied to police officers' claims that city retaliated against them after their complaints of improper ties between the police chief and city manager); ***Sharp v. City of Palatka***, 529 F.Supp.2d 1371 (M.D. Fla. 2008) (applying *Burlington Northern* standard to police officers' First Amendment retaliation claims against the city).

C. Employment Decisions Based on Political Patronage

Closely related to the *Pickering-Connick-Garcetti* line of cases involving the free speech rights of public employees in the workplace, there is a separate body of established First Amendment jurisprudence around the rights of public employees to associate with and actively support political parties and other associations of their choice without putting their jobs in jeopardy, and the right of public employers in some circumstances to dismiss employees based on their political beliefs or affiliations. This doctrine covering this type of claim is known as the *Elrod-Branti* rule, based on the two leading cases in this area, *Elrod v. Burns*, 427 U.S. 327, 96 S. Ct. 2673 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980).

The Supreme Court's opinion in *Elrod v. Burns* includes an excellent discussion of the historical rise and fall of political patronage as a job qualification in both the federal and local governments. The *Elrod* case itself arose in Cook County, Illinois, which included Chicago - one of the last great political machines in the country at the time of the case. In 1970 the Republican sheriff of Cook County was defeated by a Democrat in the sheriff's election, and the new Democratic sheriff promptly dismissed several sworn personnel in the sheriff's office because they were Republicans and had supported his opponent.

After an extended discussion of patronage hiring practices throughout American history, the Court in *Elrod* held that the patronage dismissals severely interfered with the employees' First

Amendment rights to political belief and association, and that such dismissals were, on balance, not the least restrictive means for achieving efficiency in the sheriff's office. Thus, the Court established the general rule that patronage dismissals of public employees violate the First Amendment. The Court then went on to carve out an exception for some types of job positions where political allegiance is necessary to the effective formation and administration of government policy. In *Elrod*, the Court reasoned that dismissing employees based solely on their political beliefs could only be justified when the employees were involved in "policy making" roles or held "confidential" positions. 427 U.S. at 372. Because the employees at issue in the *Elrod* case were not in policy-making roles and were not "confidential" employees, the Court held that they did not fit within the narrow exception. *Id.* at 375. Thus, they could not be terminated because of their political beliefs or affiliations.

In *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980), the Court refined the policy-maker / confidential employee exception first recognized in *Elrod*. The *Branti* case involved an assistant public defender in New York who was threatened with discharge by the newly-appointed public defender because of his political affiliation. The Court examined its opinion in *Elrod* and concluded that the labels "policy maker" and "confidential" employee were imprecise, though useful. The Court stated:

> "… [I]t is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered…. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.
>
> "It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, *the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."*

445 U.S. at 518, 100 S.Ct. at 1295 (emphasis added).

The Court also held in *Branti* that a public employee need only prove that he/she was discharged for the reason that they were not affiliated with or sponsored by a particular political party. That is, it was not necessary for the employee to establish that they had been actually coerced to change their political allegiance. The employee's mere exercise of First Amendment rights of political association was sufficient to protect the employee from discharge for exercising that right.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct.2729 (1990), the Supreme Court extended the *Elrod-Branti* rule beyond discharge from employment to other actions such as hiring, promotion, and transfer decisions. In that case Illinois' Governor, Jim Thompson, had imposed a hiring freeze on state jobs in 1980, which required that any hire, promotion, or transfer decision on a state job be cleared through the Governor's office. The plaintiffs alleged that the Governor was using the hiring freeze and clearance process as a *de facto* patronage system to hire, promote, and transfer only those who voted in the Illinois Republican primary election or gave money to the Republican Party. The lower courts had dismissed the plaintiffs' *Elrod-Branti* claims because the employment decisions at issue were not employment dismissals.

The Supreme Court in *Rutan* reversed the lower court opinions, finding there is no material difference in the chilling effect on First Amendment rights between dismissal from employment based on political patronage and a failure to hire or other employment action based on such patronage. The Court rejected the argument that public employment was a privilege and that an individual has no right to a public job, finding that government jobs have value, as do promotions and transfers within a government employer, and while the government may deny a benefit to an individual for any number of reasons, "there are some reasons upon which the government may not rely" (citing *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1972)). The Court summed up its holding in *Rutan* as follows:

> "To the victor belongs only those spoils that may be constitutionally obtained. *Elrod v. Burns…* and *Branti v. Finkel…* decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related political patronage practices--whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not."
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> 487 U.S. 64-65, 110 S.Ct. at 2731-32.

While the *Elrod, Branti*, and *Rutan* cases all involved partisan political parties (i.e. Democrats and Republicans), the Fifth Circuit has recognized that the *Elrod–Branti* doctrine applies when an employment decision is based upon support of and loyalty to an individual candidate as distinguished from a political party. *Jordan v. Ector County*, 516 F.3d 290, 295–96 (5th Cir.2008).

Moreover, in political patronage cases, the Fifth Circuit "more readily find[s] that the government's interests outweigh the employee's interests where the employee is a policymaker or is confidential." *Wiggins v. Lowndes County,* 363 F.3d 387, 390 (5th Cir.2004) (citation omitted). For purposes of First Amendment cases involving political patronage, the Fifth Circuit standard is that a "policymaker is an employee whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors." *Id.* In determining whether an employee is a policymaker, "consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Elrod,* 427 U.S. at 368. A confidential employee is one who "stands in a confidential relationship to the policymaking process, e.g., as an advisor to a policymaker, or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations, *e.g.*, as a private secretary to a policymaker." *Id.* at 391.

The *Elrod-Branti* line of cases concerning political affiliation, and the *Pickering-Garcetti* line of cases concerning public employee speech, provide similar but distinct protections for public employees. Since the tests established by the courts are different under these two lines of cases, courts are often confronted with the question – which test to apply when the employee involved is a policymaker or confidential employee? There is no Supreme Court on Fifth Circuit precedent on this question, and the remaining Circuit Courts of Appeal have taken three different approaches. The first approach, taken by the First, Sixth, and Seventh Circuits, "hold[s] that where an employee is in a policymaking or confidential position and is terminated for speech related to political or policy views, the Pickering balance favors the government as a matter of law." See *Rose v. Stephens*, 291 F.3d 917, 922 (6th Cir.2002); *Foote v. Town of Bedford*, 642 F.3d 80, 84 (1st Cir.2011); *Bonds v. Milwaukee County*, 207 F.3d 969, 978 (7th Cir.2000) ("[W]e held that the rationale for the policymaking employee exception also covered [expression of] viewpoints relating to the policymaking employee's duties."). These courts observe that "disagreement between the employer and the policymaking employee over job-related policy issues causes the same failure of loyalty and shared political mission between superior and subordinate as inconsistent political affiliation or viewpoint." *Bonds,* 207 F.3d at 978. And because disagreement can undermine the goals of the employer, the employer's interest in effective governance outweighs the employee's interest in speaking when an employee in a policymaking position expresses political or policy views. See *Foote*, 642 F.3d at 84. These courts also "recognize[ ] the inherent inconsistency in a rule that protects a policymaking employee who overtly expresses his disloyalty while denying that same protection to one who merely belongs to a different political party." *Rose*, 291 F.3d at 922. But these courts limit the application of this rule to situations where the speech is about political or policy views because the interest of the employer in having loyal political servants does not apply outside that context. *Id.*

The second approach, taken by the Ninth Circuit, inquires whether the employee serves in a position in which political affiliation or patronage is a proper consideration and then treats that inquiry as "dispositive of any First Amendment retaliation claim." *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994–95 (9th Cir.1999). If the court concludes that the employee is a policymaker or

confidential employee, the employer prevails without applying the *Pickering* balance. See *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir.1997).

The third approach, taken by the Second and Eighth Circuits, appears to limit the application of *Elrod-Branti* rule. See, *Hinshaw v. Smith*, 436 F.3d 997, 1005–07 (8th Cir.2006); *Lewis v. Cowen*, 165 F.3d 154, 162–63 (2d Cir.1999). These courts observe that the Supreme Court "has never stated that the discharged employee's position in the employment hierarchy would automatically tilt the *Pickering* balance in the employer's favor." *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir.1997); see also *Hinshaw*, 436 F.3d at 1006 ("We hesitate to expand the *Elrod–Branti* exception to a case where a party affiliation is not alleged as a basis for the termination."). But these courts "recognize the necessarily adverse effect an employee's speech on a matter related to the employee's policymaking or confidential duties would have on the factors enumerated in the *Pickering* balancing test," because the employers have a heightened interest in employee loyalty and the impression of public loyalty when political affiliation is a permissible consideration. *Hinshaw*, 436 F.3d at 1006–08.

D. Case Developments Involving Political Discrimination Claims

During the past 12 months there have been no U.S. Supreme Court decisions in cases involving application of the *Elrod-Branti* doctrine. Following are summaries of significant and/or interesting cases decided within the past several years illustrating the application of this doctrine in various settings, listed generally in reverse chronological order:

***Lopez-Erquicia v. Weyne-Roig,* 846 F.3d 480 (1st Cir. 2017).** The employee was a high-ranking office in Puerto Rico's Office of Insurance Commissioner who held a position classified under Puerto Rican law as a "trust" position – meaning she could be removed at-will. After an election that changed controlling party administration in Puerto Rico, but before the new administration took office, the employee demoted herself to a lower level position that is classified as a "career" position – meaning that she could be removed only for "cause." The new Insurance Commissioner then abolished the entire division that the employee managed and demoted the employee to an individual contributor role. In the employee's subsequent suit against the Insurance Commissioner alleging political discrimination based on the reassignment and a claim of harassment, the First Circuit granted summary judgment to the Commissioner based on qualified immunity. The opinion is instructive on how a reviewing court analyzes a political discrimination claim against a defense of qualified immunity in a Section 1983 case. The court first analyzed the employee's job duties to determine whether a "reasonable official at the time could have understood [the employee's] job to be unprotected" under the First Amendment. *Id.* at 484. After cataloging the jobs held by various employees in earlier *Elrod-Branti* political discrimination cases, the court reasoned that it did not have to "precisely locate" the employee's job position on the spectrum established by those earlier cases, but rather had only to decide whether the employee has "clearly established" that her job fell on the protected side of the line. The court concluded that the employee had not made that showing and, on that basis, the court granted summary judgement to the Commissioner based on qualified immunity. Interestingly, the court stated it was no bound by the Puerto Rico statute that defined the employee's position as a "career" position, but held that

for purposes of a qualified immunity defense in a Section 1983 action "the actual functions of the job control our analysis." *Id.* at 487.

***DePriest v. Milligan*, 823 F.3d 1179 (8th Cir. 2016).** The employee was a Deputy County Clerk who had worked for many years for the incumbent county clerk, and campaigned openly for him in an election. When the incumbent Clerk lost the election, the new Clerk terminated the Deputy. The appellate court affirmed summary judgment for the new Clerk on the Deputy's political discrimination claim, holding that the undisputed record showed that the new Clerk had changed the duties of the Deputy job position, and that while the former duties of the Deputy position might have resulted in the position being protected from discharge based on political affiliation, the new Deputy Clerk duties made it "appropriate for [the Clerk] to require personal and political loyalty in the Chief Deputy position." *Id.* at 1185. The court articulated the prevailing burden of proof in a political patronage discrimination case as follows: ". . .the plaintiff must submit sufficient evidence that political affiliation or loyalty was a motivating factor in the dismissal. If the plaintiff satisfies this burden, the defendant must establish *either* that the political motive was an appropriate requirement for the job, *or* that the dismissal was made for mixed motives and the plaintiff would have been discharged in any event." *Id.* at 1185, citing *Langley v. Hot Spring Co.*, 393 F.3d 814 (8th Cir. 2005) [internal punctuation removed].

***Reardon v. Herring*, 191 F.Supp. 3d 529 (E.D. Va. 2016**). An interesting case in which the Court contrasts the difference between the "policymaker" exception to the definition of an employee under the Fair Labor Standards Act and a "policymaker" job position that is subject to termination for political affiliation reasons under the *Elrod-Branti* doctrine. The employee, an Asst. Attorney General in Virginia, sued the Attorney General for the Eastern District of Virginia under the Equal Pay Act provisions of the Fair Labor Standards Act (29 U.S.C. §206), alleging she was paid less than male Asst. Attorneys General doing comparable work. The employer argued that the employee was not a covered "employee" under the FLSA because she was appointed to serve on a "policymaking level" as defined in 29 U.S.C. §203(e)(2)(C). The opinion parses the differences among the Circuit Courts on the meaning of the "policymaker" exemption in the FLSA, noting that the Fifth Circuit has not taken a position on the scope and meaning of that exclusion to date. Among other things, the employer argued that the court should apply the definition of a "policymaking" position under the *Elrod-Branti* doctrine, and that the employee would be excluded from FLSA coverage under that definition. The court rejected that argument, and discussed at length the different concerns that the policymaker exclusion was intended to address under *Elrod-Branti* doctrine. In particular, the court emphasized that a "policymaker" exclusion from coverage under the FLSA was intended to be very narrowly construed, while the "policymaker" subject to termination of employment based on political patronage under *Elrod-Branti* is broader, and intended to apply to any position "that potentially implicates political considerations, regardless of semantic labels." *Id.* at 543.

***Garcia-Gonzales v. Puig-Morales*, 761 F.3d 81 (1st Cir. 2014).** An independent contractor alleges in this case claims his First Amendment rights to government contracting were violated because of his political affiliation. The contractor had for several years a contract to provide insurance brokerage services for various government agencies. He held himself out to be a member of a particular party. Shortly after the election of a new governor from the rival political party, the

contractor's existing brokerage contract was terminated, and he was invited to bid on a new series of contracts to be let through a competitive selection process. The contractor bid on, but was never awarded, these new contracts. He alleged both a due process claim arising from the termination of his existing brokerage contract, and a political discrimination claim based on his "preexisting commercial relationship" with the government through the terminated brokerage agreement. While the Court affirmed the dismissal of his due process claims, the Court found sufficient evidence to remand his First Amendment political discrimination claim. On that claim, the Court first notes that political discrimination claims can be made by independent contractors who have preexisting commercial relationships with the government, "where the government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance." 761 F.3d at 92 (citing *O'Hare Truck Services, Inc. v. City of Northlake,* 518 U.S. 712, 116 S.Ct. 2353 (1996), and other cases). The Court then finds that the contractor had sufficient interest in the contract that was cancelled after the change of governors to meet the "preexisting commercial relationship" standard. Significantly, the Court stated that the correct test to apply in such political discrimination cases is not the balancing test from the *Pickering* case (see, page 8 of this paper), but the tests from the political patronage cases based on *Elrod-Branti*. Under these cases, the plaintiff must show four elements to establish a claim of political discrimination: (1) that the plaintiff and defendant have opposing political affiliations; (2) that the defendant is aware of the plaintiff's affiliation; (3) an adverse action; and (4) that political affiliation "was a substantial or motivating factor" in the adverse action. *Id.* at 96.

***Foglesong v. Somerset County,* 2014 WL 4796754 (W.D. Pa. 2014).** A detective in the county District Attorney's office was not re-appointed by the new District Attorney after an election in which the detective had supported the former District Attorney who lost the election. The Court discusses the appropriate standard for political patronage claims under §1983, under which an employee must establish (1) that the employee worked in a position that did not require political affiliation, (2) that the employee engaged in constitutionally protected conduct, and (3) that the constitutionally protected conduct was a substantial or motivating factor in the employment decision at issue. The Court found that the detective's conduct in placing a campaign sign in his yard, voting for the former District Attorney, and not supporting the new (winning) District Attorney in the campaign were all constitutionally conduct. However, the Court found no evidence of causation because there was no showing that the winning District Attorney actually knew the detective's political affiliation, nor had she sought and been denied his support during the election. The detective argued that the new District Attorney's statement that she "felt she needed 'to bring in some of my own people in with me'" showed that the new District Attorney was not reappointing him because he did not actively support her. The Court found this insufficient because the employer established that the detective would not have been reappointed in any event for job performance reasons. Thus, under the *Mt. Healthy* standard, the employer established that the detective would have been terminated anyway. As a result, the Court granted summary judgment for the employer, finding that the detective had failed to establish that his Constitutionally-protected conduct was a substantial or motivating factor in the District Attorney's decision not to reappoint him.

***Reyes-Perez v. State Insurance Fund Corporation*, 755 F.3d 49 (1st Cir. 2014).** This case involves application of the *Mt. Healthy* defense (from *Mt. Healthy City School Dist. Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1977)) in the political patronage setting. Under the holding in that case, an employer can defend a §1983 action by showing that, even if the employee can demonstrate a violation of First Amendment, the employer can prevail if it can prove that it would have taken the same action for legitimate reasons unrelated to the constitutional violation. In this case, a manager whose position was reclassified from a political appointment position to a civil service position shortly before an election, was terminated following the election when the reclassification was rescinded by the new administration following the election. The manager had been publicly affiliated with the former administration that controlled the employer agency before the election. Shortly after the election, the new administration ordered a review of all civil service transactions that had occurred during the year before the election, and rescinded those that didn't comply with the Commonwealth's civil service rules, including the reclassification of the manager's position. As a result of the rescission, the manager was no longer eligible for the job position, and was terminated. The employer defended his §1983 political patronage lawsuit based on the *Mt. Healthy* defense, arguing that the audit and rescission of his appointment to the civil service position were legitimate, independent processes, and that his lack of qualifications for the job position was a sufficient reason for terminating his employment that, unrelated to his political affiliation. The manager argued that his political affiliation was the only reason the audit was done. The Court rejected that argument, finding that the audit encompassed over 3,000 total personnel files, was conducted by an independent outside investigator, and resulted in the rescission of numerous personnel actions in addition to the transaction involving this manager.

***Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).** Six jailers from Hampton, Virginia, alleged that the elected sheriff retaliated against them by failing to reappoint them because they supported the sheriff's opponent in the last election, and two of the six also alleged that the sheriff had retaliated against them based on Facebook posting they had made during the election campaign in support of the sheriff's opponent. The court reviewed the duties of the jailers under the Elrod-Branti rule, and concluded that the sheriff had not established that these jailers – who were called "deputy sheriffs" but had different duties from patrol deputies – were policymakers or confidential employees. The interesting issue in the case is the court's finding that pushing the "like" button on Facebook constitutes political speech and "is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." 730 F. 2d at 386. The court reversed the lower court's finding that "merely" liking a Facebook page (here, the campaign page for the sheriff's opponent) is insufficient speech to merit Constitutional protection. The court analyzed the Facebook practice of liking another Facebook page from a social perspective, noting that "clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance." Id. At 368.

***Leslie v. Hancock County Board of Education,* 720 F.3d 1338 (11th Cir. 2013).** A school superintendent and assistant superintendent made public complaints about the low rate of property tax collection by the county tax collector, which they believed to result in a low level of funding for their school district. Sometime after these complaints became public, the school board terminated the superintendent and demoted the assistant superintendent because of their statements. The employees contended the terminations were because the school board members were politically sympathetic to the tax collector. The issue as framed out by the court was whether and how to apply both the Pickering-Garcetti balancing test for employee speech and the Elrod-Branti doctrine for political affiliations when the issues in the case involve a policymaker speaking about policy. Ultimately, the court declined to define a specific approach because of the procedural posture of the case. Since the employees asserted §1983 claims against the school board members in their individual capacities, the board members asserted the qualified immunity defense to personal liability based on the lack of clarity in governing law. The court surveyed the prior jurisprudence on the interplay between these two doctrines and concluded that there was no uniform approach. Thus, the court found the absence of any clearly established law to be sufficient to grant the individual board members' qualified immunity defense without ever actually deciding what the rule should be.

***State Employee Bargaining Coalition v. Rowland,* 718 F.3d 126 (2d Cir. 2013).** A coalition of labor organizations representing public employees, and a number of state employees, filed suit against the Governor of Connecticut alleging patronage discrimination based on layoffs of union employees during a statewide reduction in force. The state had requested significant bargaining concessions from the unions during contract negotiations and advised the unions that, unless they agreed to the concessions, the state would lay off 3,000 unionized employees. The parties did not reach agreement, and the unionized employees were laid off. No non-union employees were laid off, and the state's bargaining representatives told their union counterparts that the layoffs would be rescinded if the unions agreed to the bargaining concessions. In analyzing the case, the court recognized earlier Supreme Court precedent holding that the First Amendment right to free association includes the right of public employees to associate in unions. See, e.g., Smith v. Arkansas State Highway Employees, 441 U.S. 463, 81 S.Ct. 247 (1979). The court then discussed the Elrod-Branti doctrine and its application to associations other than political parties and candidates, and concluded that the doctrine was broad enough to cover discrimination in public employment based on union membership. Thus, the Second Circuit aligned with earlier decisions of the Seventh, Eighth, and Tenth Circuits recognizing an Elrod-Branti cause of action for termination based on public union affiliation. After establishing that the cause of action exists in the Second Circuit, the court then further analyzed the record and determined that the layoffs were unlawful because the employer could not show that they were "narrowly tailored to further vital government interests." 718 F.2d at 135.

***Underwood v. Harkins,* 698 F.3d 1335 (11th Cir. 2012).** When the Republican clerk of the Lumpkin County (Ga.) Superior Court decided not to run for reelection, his two deputy clerks, Underwood and Harkins, both ran for his seat in the Republican primary. Harkins won the primary election and the general election. Her first act in office as the new Superior Court Clerk was to fire Underwood. Harkins did not dismiss any other employees in the clerk's office. In this opinion, the court affirmed summary judgment for the employer on Underwood's §1983 claim, holding that

the *Elrod-Branti* exception applied, and that the balancing test between the terminated employee's right to run for office and the employer's interest in office loyalty favored the employer in this instance. The court found determinative the statutory duties of the clerk and deputy clerk under state law, because the deputy clerk has the same statutory authority as the clerk under the law. Thus, "an immediate subordinate who has the same statutory powers and duties as the elected official for whom she works is the type of confidential employee who can be terminated under *Elrod, Branti*, and their progeny. . . if she runs in an election against her eventual superior." 698 F.3d at 1343. Although the employee claimed that she didn't actually exercise the same duties as the clerk in her role as deputy clerk, and wasn't in reality a "policymaker" or "confidential" employee, the court found this argument unpersuasive because the employee had the statutory authority to be a policymaker – even if she hadn't exercised that authority in the past. The other interesting issue in the case is that the terminated employee was a member of the same political party as her boss – thus, as the court stated, "this is not a pure political patronage case. Nor is it a pure political affiliation case." Id at 1342. Nonetheless, the court applied the Elrod-Branti analysis, finding the patronage and political affiliation cases "helpful . . . for guidance where appropriate." Id. At 1343.

***Harris v. City of Balch Springs*, 9 F. Supp. 3d 690 (N.D. Tex. 2014).** A former recreation center manager sued the city, its city manager and several of its council members alleging, inter alia, that she been terminated because she had worked on the reelection campaign of the city's former mayor (who subsequently lost the election). The part of the court's opinion dealing with the First Amendment free association claim focuses primarily on whether the plaintiff was a "policymaker" or "confidential" employee. The court examines the plaintiff's specific job duties and notes that she claimed her authority was circumscribed by the requirement that she present any substantial policy change to her manager, or the city manager, or the city council for approval, "including such details as work hours, overtime, recreation center programs, and money handling policies." Based on that assertion, the court concluded that authority to act as a policymaker was "limited to a large degree" by the management authority of her superiors. Thus, the court concluded that she did not fit the definition of a "policymaker" or "confidential" employee and, therefore, had First Amendment protection under the Elrod-Branti rule. The court contrasted the plaintiff's job position in this case with an older Fifth Circuit case involving a nonelected road manager working for a county who was considered a "policymaker" because his duties (unlike the plaintiff in this case) "strongly influenced the public's view of the elected board of supervisors" and had the ability to undermine the board's policies "by overt or covert opposition." *Gentry v. Lowndes County*, 337 F.3d 481, 488 (5th Cir. 2003).

III. PRIVATE EMPLOYEE PROTECTED ACTIVITY

As noted above, the employee of a private (non-governmental) employer is not generally entitled to protection under the First Amendment. Under the right (and likely limited) set of facts, an employee's political speech could in theory also constitute protected activity under a statute otherwise applicable to a private employer. For example, an employee who expresses opposition to a political candidate on the grounds that the candidate is sexist, racist, or harbors animosity toward particular national origins or religious views could as part of the ensuing discussion express views that are entitled to protection under Title VII of the Civil Rights Act of 1964. Similarly, an

employee who connects his or her support for a candidate to specific issues or challenges in his or her particular workplace, might argue his or her speech was protected under the National Labor Relations Act (NLRA).

Given that Title VII and the NLRA are two of the statutes most likely to support this form of creative argument—and the ones the panelists will be referencing during their discussion—an overview of the standard for protected activity under both is provided below. While other statutes protect certain forms of employee speech (*e.g.*, the Americans with Disabilities Act, the Family Medical Leave Act, The Dodd–Frank Wall Street Reform and Consumer Protection Act, etc.), they are less likely to be implicated by otherwise political speech.

A. Title VII Protected Activity

To establish a prima facie case of retaliation, a plaintiff must prove: (1) he or she participated in an activity protected by Title VII; (2) his or her employer took an adverse employment action against him or her; and (3) a causal connection exists between the protected activity and the adverse action. *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484 (5th Cir. 2008).

1. *Standard Opposition*

Title VII recognizes two forms of protected activity: (1) when an employee opposes a practice made unlawful by Title VII; and (2) when an employee makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under Title VII. *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372–73 (5th Cir. 1998) (citing 42 U.S.C. § 2000e-3(a)). The first of these is commonly referred to as "opposition," while the second is commonly referred to as "participation." *E.E.O.C. v. Rite Way Serv., Inc.*, 819 F.3d 235, 239 (5th Cir. 2016). While an employee's political speech is unlikely to ever constitute "participation," it is at least conceivable that an employee's political speech could lead to a conversation that ultimately involves "opposition."

To show "opposition," an employee is not required to prove that the practice (which may include comments or conduct) he or she opposed in fact violates Title VII. Rather, the employee need only prove he or she had a "reasonable belief" the opposed practice violated Title VII. *Rite Way*, 819 F.3d at 237. As a threshold matter, this means employee's complaint must oppose an *employment* practice that is *discriminatory* on the basis of one of the characteristics protected by Title VII (*i.e.*, race, color, sex, national origin, or religion). Complaints about simply "unfair" treatment are not protected under Title VII. *Brown v. United Parcel Service, Inc.*, 406 Fed. Appx. 837, 840 ("Title VII does not protect opposition to all forms of unscrupulous conduct."); *cf. Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (2004) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* ... because of ... sex.'"). In addition, the employee must actually *oppose* the allegedly unlawful practice. *Thompson v. Somervell County*, 2011 WL 2623571, *3 (5th Cir. 2011) (plaintiff's request for documentation of her sexual harassment complaint and statement that she "was going to do whatever it took to make this right" was not protected activity, because the purpose of the plaintiff's request was to help her find another job with the employer, not to combat discrimination); *St. John v. Sirius Solutions*, 299

Fed. Appx. 308, 309 (5th Cir. 2008) (plaintiff's emails complaining that his manager had disclosed his medical condition did not constitute protected activity simply because he referenced his medical condition in the emails).

Moreover, if the employee is opposing something other than a discrete job action—such that the opposed practice would violate Title VII only if it constituted a hostile work environment—the court will also consider the "severity" and "frequency" of the comments or conduct being opposed. *Clark County School District v. Breeden*, 532 U.S. 268, 269 (2001); *Taliaferro v. Lone Star Implementation & Electric Corp.*, 2017 WL 2544540, *2 (5th Cir. June 9, 2017); *Satterwhite v. City of Houston*, 602 Fed.Appx. 585, 588 (5th Cir. 2015). As the Supreme Court has explained:

> Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"

Breeden, 532 U.S. 268, 270-71 (2001) (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 788, (1998)).

As a result, isolated comments are rarely capable of supporting a reasonable belief that Title VII has been violated, even if those comments are explicitly offensive on the basis of race, color, sex, national origin, or religion. *See, e.g., Breeden*, 532 U.S. 268, 269 (2001) (employee who reviewed applications as part of her work and complained about her manager and a coworker laughing about an applicant who once said, "I hear making love to you is like making love to the Grand Canyon," could not reasonably believe their conduct violated Title VII as a matter of law); *Taliaferro*, 2017 WL 2544540, *2 (employee's complaint about the owner's text message asking her where her children were and then explaining, "Just came by in the Vette looking for a hot date! Oh ya! You are going to be in trouble when he finds out!" was not protected because no reasonable person could believe the single text message violated Title VII); *Satterwhite*, 602 Fed. Appx. at 589 (complaint to human resources about a co-worker's isolated use of "Heil Hitler" could not constitute protected activity as a matter of law, because no reasonable person could believe that the comment violated Title VII); *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337, 348 (5th Cir. 2007) (although racially offensive, comments regarding "ghetto children" that ceased when plaintiff complained could not reasonably be believed to violate Title VII as a matter of law); *cf. Rite Way*, 819 F.3d at 243-44 (holding summary judgment improper where plaintiff complained about a series of acts and comments by a supervisor toward another employee, including the supervisor pretending to slap the employee's butt while saying "ooh wee," commenting that the coworker's pants were tight, and responding to the co-worker's complaint by saying "I'm a man, I'm gonna look"); *Walker v. Thompson*, 214 F.3d 615, 619-22 (5th Cir. 2000) (holding that years of inflammatory racial epithets, including "nigger" and "little black monkey," were sufficient to survive summary judgment); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991)

(finding summary judgment for defendant inappropriate where plaintiff was subjected to "nigger jokes" for a ten-year period and had his workstation adorned with "a human-sized dummy with a black head"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (reversing summary judgment where plaintiff suffered "incessant racial slurs" including "nigger" and "dumb monkey").

The context in which the employee opposes a practice also matters. *Oncale*, 523 U.S. at 81 ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"); Fifth Circuit Pattern Jury Instructions (Civil Cases) § 11.5a at 153 n.4 (2014) (an employee's belief must be objectively reasonable "in light of the circumstances."). As the Supreme Court has explained,

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Oncale, 523 U.S. at 81.

Notably, courts have held that an employer's zero tolerance policy may be considered as part of the "circumstances" a court must consider when deciding whether an employee's belief that Title VII has been violated was reasonable. *Taliaferro*, 2017 WL 2544540 at *3 (considering employer's zero tolerance policy in determining the reasonableness of an employee's belief that a hostile work environment existed in violation of Title VII); *Rite Way*, 819 F.3d at 244 (same). At the same time, the fact that an employer may have zero tolerance for any form of sexual, racial, or other discriminatory conduct or comments does not mean an employee's belief that those conduct or comments violate Title VII will necessarily be deemed reasonable:

> In particular, Taliaferro points to section 90 of the Employee Handbook, which states that Lone Star has a "zero tolerance" policy for "sexual propositions, innuendo, suggestive comments, [and] sexually-oriented jokes or teasing[.]" However, a reasonable employee would not believe, based on the Employee Handbook, that telling a single sexually-oriented joke was unlawful. Rather, a reasonable employee would understand that the company was being proactive in curtailing conduct before it arose to unlawful discrimination. Moreover, employee handbooks, like the one at issue here, commonly proscribe a range of lawful conduct so as to address misconduct before it becomes a legal problem. Thus,

> Taliaferro's complaint, which relies on a single text-message exchange and the Employee Handbook language, is insufficient to state a claim for retaliation under Title VII. Simply put, the Employee Handbook may be considered along with all other relevant circumstances, but the "zero tolerance" policy in the Employee Handbook alone does not give rise to a claim where one otherwise does not exist.

Taliaferro, 2017 WL 2544540 at *3.

2. *Online Harassment*

Title VII is not a general civility code. *Oncale*, 523 U.S. at 80-81. Rather, it is a statute regulating employment practices. *Id*. As a result, complaints about discrimination occurring outside the workplace typically are not be protected under Title VII—because discrimination outside the workplace typically does not violate Title VII—unless and until that discrimination comes into the workplace. Of course, discussions about discrimination outside the workplace can lead to discussions and conduct inside the workplace that may fall within the scope of Title VII.

In 2000, the New Jersey Supreme Court became one of the first courts to give careful consideration to the issue of harassment occurring outside the workplace. In *Blakey v. Continental Airlines*, Tammy Blakey complained of sexual harassment and a hostile working environment based on conduct and comments directed at her by male co-employees. *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000). Specifically, Blakey complained to Continental's management concerning pornographic photographs and vulgar gender-based comments directed at her that appeared in her plane's cockpit and other work areas. Dissatisfied with Continental's response, Blakey sued Continental for its failure to remedy the hostile work environment. While the federal litigation was pending, Blakey's fellow pilots published a series of electronic messages to an on-line computer bulletin board called the Crew Members Forum (the "Forum"). *Id*. at 554. The Forum was accessible to all Continental pilots and crew member personnel through CompuServe, an Internet service provider with whom Continental had a contract. Pilots and crew were not required to access the Forum. At the time of the offending posts, only 250 Continental employees nationwide had access to the Forum, and Continental management was not permitted to post messages or reply to any messages on the Forum. *Id*. at 545. Put simply, the Forum was an electronic bulletin board, where employees could post messages for each other if they chose to do so.

The *Blakey* court ultimately held the allegedly harassing postings in the Forum *might or might not* support a claim for alleged workplace harassment, depending on whether Continental derived a "substantial workplace benefit" from the bulletin board and whether the bulletin board was "sufficiently integrated" with the workplace so as to impose on Continental an obligation to respond to allegedly harassing posts on the bulletin board. As the *Blakey* court explained,

> The case appears to have proceeded on the thesis that there could be no liability if the harassment by co-employees did not take place within the workplace setting at a place under the physical control of the employer. Although the electronic bulletin board may not have a physical location within a terminal, hangar or aircraft, *it may nonetheless have been so closely related to the workplace environment and beneficial to Continental that a continuation of harassment on the forum should be*

> *regarded as part of the workplace*. As applied to this hostile environment workplace claim, we find that if the employer had noticed that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy that harassment.

Id. at 543.

Twelve years later, California picked up where *Blakey* left off. In *Espinoza v. County of Orange*, a corrections officer won a jury trial on his state law disability harassment claim based, at least in part, on blogs posted by his coworkers. *Espinoza v. County of Orange*, 2012 WL 420149 (Cal.App.4 Dist. Feb. 9, 2012). Ralph Espinoza was a juvenile corrections officer who was born with no fingers and no thumb on his right hand. *Id*. at *1. Espinoza was self-conscious about his condition and often kept his hand in his pocket. *Id*. Another corrections officer, Jeffrey Gallagher, created a blog entitled "Keeping the Peace" using the name "keepdapeace." He did not use a County of Orange computer to create the blog, and specifically posted a message stating "[t]his blog ain't run by the government. It also ain't run by O.C.E.A." *Id*. at *2. Anonymous posters to the blog posted, among other things, the following series of messages, which gave rise to Espinoza's claim:

- "I will give anyone 100 bucks if you get a picture of the claw. Just take your hand out of your pocket already!!!!!!!!!!!!"
- "Has anyone seen the one handed bandit's hand[?] First one to get a picture gets a 100 dollars."
- "Do I still get the $100 if I get a picture of the claw with a blue glove dangling off it?"
- "When do I get my $100, since I get to see the claw up close and personal in my office 4X a week."
- "Shyt [sic] where's my 100 bucks . . . I want my 100 bucks! Damm [sic] it! I knew having a picture of Ralphie boy fishing in Rangel's ass would pay off some day."

Id. at *2-3.

The posts continued in this fashion for about a week, becoming more vulgar as the week progressed. A co-worker told Espinoza about the blog, and Espinosa began to read it every night at home after work. *Id*. at *3. Espinoza then filed Special Incident Reports with his superiors, describing the blog and complaining of other acts of harassment, such as co-workers failing to respond when he greeted them, using hostile language, threatening him with bodily harm, mocking him, writing the word "claw" in several places at the workplace, keying his car, and smudging the form of a claw on the windshield of his cart. *Id*. at *4.

Greg Ronald, a deputy chief probation officer, learned of the blog, printed a copy of it, and asked the chief deputy IT manager to investigate. The information gathered showed many employees were accessing the blog from County computers using generic login passwords or identifiable names. *Id*. at *4. In response, Ronald sent an e-mail to all employees informing them the blog posts violated policy. *Id*. In the meantime, Espinoza's supervisor told Espinoza he had forwarded Espinoza's complaints to upper management but did not himself investigate them. Likewise, although HR was notified of the issue, HR did not interview plaintiff or three of the possible bloggers that were identified, did not investigate the unit, and did not review any security tapes. *Id*. at *4-5. Thereafter, Espinoza was diagnosed with high blood pressure, irritable bowel syndrome, insomnia, and depression and was eventually placed on disability, with his treating physician testifying he could not work due to his hostile work environment. *Id*. at *5.

Espinoza sued for disability harassment and discrimination, retaliation, and failure to prevent harassment and was awarded over $820,000 in damages at trial. On appeal, the County argued the blog postings should not have been entered into evidence because the conduct was outside the physical workplace and was non-workplace activity that the employer had neither dictated nor authorized. *Id*. at *6. In particular, the County urged the court to follow the reasoning of the New Jersey Supreme Court's decision in *Blakey v. Continental* to find it was not responsible for what Espinoza's co-workers posted online. Specifically, the County argued it did not benefit from the employee blog and thus was not liable under the reasoning of *Blakey*.

The *Espinoza* court rejected this argument, noting the *Blakey* decision states, "[E]mployers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace." *Id*. (quoting *Blakey*, 751 A.2d at 552). The Court pointed to substantial evidence—as revealed by the County's own investigation—that the blog posts were made by co-workers: the posts referred to Espinoza, the posts discussed work-related issues, and management sent two emails to employees directing employees to stop posting improper comments to the blog. *Id*. at *7. In addition, the Court observed that several of the workplace incidents were connected to comments posted to the blog. For example, coworkers were putting their hands in their pockets to mock Espinoza in the workplace and the words "the claw" were appearing on Espinoza's cart and other places at work, mirroring some of the comments found in the offending blog posts. As a result of the apparent connection between what was happening online and what was happening in the workplace, the Court affirmed the judgment. *Id*. at *15.

One of the other factors to consider with respect to harassment occurring outside the workplace is whether the employer has any ability to control the conduct at issue. For example, in *Vance v. Ball State University*, a University employee complained of racist and threatening comments anonymously posted by readers in response to articles on the University's online newspaper regarding racial hostility plaintiff was experiencing in her job. *Vance v. Ball State University*, 200 WL 4247836, *8 (S.D. Ind. Sept. 10, 2008). The court held the University was not liable for the anonymous comments, because the University had no effective control over the anonymous posts. *Id*. at*17, fn. 21.

There is also the question of whether we really *want* employers to be responsible for harassment occurring outside the workplace. In *Blakey*, the New Jersey Supreme Court specifically held that

Continental did *not* have an obligation to monitor the posts on the Forum. *Id*. at 551-52. In reaching this conclusion, the court considered that employees did have to use the Forum for work, a limited number of employees had access to the Forum, and it was not entirely clear that the Forum could be fairly considered part of the workplace. *Id*. at 554-55. Moreover, the court noted that obligating Continental to monitor the Forum would implicate "grave" privacy concerns, leading the New Jersey Supreme Court to offer some practical (and free) advice to employers:

> To repeat, employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace. Besides, it may well be in an employer's economic best interests to adopt a proactive stance when it comes to dealing with co-employee harassment. The best defense may be a good offense against sexual harassment. "[W]e have afforded a form of a safe haven for employers who promulgate and support an active, anti-harassment policy." Effective remedial steps reflecting a lack of tolerance for harassment will be "relevant to an employer's affirmative defense that its actions absolve it from all liability." Surely an anti-harassment policy directed at any form of co-employee harassment would bolster that defense.[1]

Id. at 552 (internal quotations and citations omitted).

Of course, employers should remember that they may be charged with knowledge of allegedly harassing conduct, if an official with authority to correct the problem is made aware of the problem. *See, e.g., Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999) ("A title VII employer has actual knowledge of harassment that is known to 'higher management' or to someone who has the power to take action to remedy the problem.") (footnote and citations omitted). Moreover, at some point, online workplace harassment may become so pervasive as to permit a jury to infer that the employer was either on notice of the conduct or should have been. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (an employee may demonstrate constructive knowledge by "showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.") (citation omitted).

B. The National Labor Relations Act

The General Counsel of the National Labor Relations Board is an independently appointed federal official who prosecutes complaints of unfair labor practices in front of the National Labor Relations Board ("NLRB"). While he or she is bound by the decisions issued by the NLRB, the General Counsel can take positions that may extend decisions previously issued by the NLRB. Because the General Counsel determines the prosecution of unfair labor practice complaints, prudent employers keep abreast of the General Counsel's positions on various issues because they

[1] *Id*. at 552 (internal quotations and citations omitted).

impact employers attempting to avoid unfair labor practice charges and the attendant costs and negative publicity that may surround them.

In mid-2015 the General Counsel issued a report regarding employee handbook rules. Richard F. Griffin, Jr., *N.L.R.B., Report of the General Counsel Concerning Employer Rules*, Memorandum GC 15-04 (Mar. 18, 2015) (hereinafter NLRB Employer Rules Report). Most of the attention at the time the report was released was directed towards work rules regarding speech on social media. However, it also discussed work rules surrounding political speech. Private employees have what are commonly called Section 7 rights to "… to engage in other concerted activities for the purpose of … mutual aid or protection." 29 U.S.C. § 157. And employers are prohibited from violating an employee's Section 7 rights. 29 U.S.C. § 158(a)(1). It is often alleged that a particular employer's work rule violates Section 7, for example, if an employer had a rule banning union membership, this would be a clear-cut case of a Section 7 violation.

However, the General Counsel and the Board have extended the scope of the prohibition against work rules that violate Section 7 to include facially neutral rules. Under the Board's *Lutheran Heritage* decision, an employer violates this prohibition by maintaining a work rule if any of the following is true: 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004).

The NLRB Employer Rules Report identified the following work rule as a violation of Section 7:

> Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.

NLRB Employer Rules Report, p. 11. According to the General Counsel, this rule was found unlawful because "Section 7 protects communication about political matters, e.g., proposed right to work legislation." *Id.* The General Counsel reasoned that because the rule did not provide "clarifying context or examples" it "would be reasonably construed to cover" for example, Section 7 communications about right-to-work legislation. *Id*. The General Counsel further said, that "discussion of unionization would also be chilled" because it "can be an inflammatory topic similar to politics and religion." *Id*.

The NLRB General Counsel had previously waded into a discussion of whether or not political activity was protected by the NLRB. The General Counsel's office issued a guideline memorandum in 2008 to establish enforcement policy. It was issued after a series of charges stemming from employer discipline in 2006 after many employees participated in nationwide and local demonstrations to protest legislative proposals that would impose greater restrictions and penalties on immigrant employees and their employers. Ronald Meisburg, N.L.R.B., *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy*, Memorandum GC 08-10 at 8 (July 22, 2008) (hereinafter NLRB Memo re: Advocacy). The memo reiterates the Supreme Court's ruling that employees are protected "through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

However, it also acknowledged "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection clause'" of Section 7. *Id* at 567-568. After setting up this tension the memo goes on to explore where to "draw the line" between protected and unprotected political activity. *NLRB Memo re: Advocacy*, p. 1.

The General Counsel identified a case from 1976 where the Board held that an engineer was unlawfully fired after writing a letter to members of Congress on behalf of a group of engineers opposing easing "restrictions on the importation of foreign engineers." *Kaiser Engineers v. N.L.R.B.*, 538 F.2d 1379, 1382 (9th Cir. 1976). The employer fired the engineer, because it believed the letter was embarrassing because it might be construed as indicating that the employer advocated discrimination against foreign engineers. The Board's reasoning, as described by the Ninth Circuit, was that sending the letter to protect the job security of the engineers constituted Section 7 activity. *Id.* This is one example of political activity that the General Counsel believes that writing such a letter "has a direct nexus to employee working conditions." *NLRB Memo re: Advocacy*, p. 3.

The General Counsel memo further draws distinctions between employees who engage with state regulators to advocate for job-related issues and other possibly embarrassing concerns. *Id*. p. 6. For example, the General Counsel concludes that "nursing employees who informed state agencies about staffing levels were protected, but those who complained about patient care quality were not." *Id.* It further concludes that distributing "purely political" literature would be unprotected if it did not reference any particular employment related issue because there would be "too attenuated" to constitute activity for "mutual aid or protection." *Id*. Reviewing the cases the General Counsel proposes the following rule to distinguish protected activity under the NLRA from unprotected activity: whether there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees. *Id.*, p. 7.

Based on the above rule, the General Counsel found that participating in immigration protests including employee attendance at and support of the demonstrations in 2006 was within the scope of Section 7. *Id*., p. 8. The General Counsel then proceeds to discuss whether or not taking "time off from work to attend rallies and, in many instances, to also demonstrate through their absence from work the role of immigrants in the workforce" was afforded Section 7 protection. *Id.*, p. 7. After discussing various precedents, the General Counsel does not give an answer and instead says he has distilled the following principles:

- Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonwork areas, is protected;

- On-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and

- Leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules.

Id., p. 13. In short, if an employer has a neutrally applied absence rule, the employee's violation of that rule to attend a protest does not trump the absence rule and the employer may discipline the employee.

Controversial Speech* in the Workplace – Rights and Duties

PRIVATE SECTOR – IN THE WORKPLACE	PUBLIC SECTOR – IN THE WORKPLACE
1. **Free speech:** no general free speech right in the private sector workplace	1. **Free speech:** employees have limited First Amendment free speech right in the workplace
2. **Politics:** at-will employees can be disciplined for expressing partisan political views	2. **Politics:** most employees (both at-will and for-cause) protected from discrimination based on political affiliation and political activity
3. **Working conditions:** employees cannot be disciplined for speech about working conditions if the speech is "protected concerted activity" under NLRA	3. **Working conditions:** NLRA rules for "protected concerted activity" don't apply to public employers
4. **Business communication channels:** employers can limit use of employer-owned work computers, bulletin boards, etc. to business purposes	4. **Business communication channels:** employers can limit use of employer-owned work computers, bulletin boards, etc. to business purposes
5. **Speech during working time:** employers can adopt policies restricting political speech during work time and in work areas, and restricting clothing with political messages in the workplace	5. **Speech during working time:** employers can adopt policies restricting political speech during work time and in work areas, and restricting clothing with political messages in the workplace
6. **"Civility" policies:** employers can adopt and enforce "civility policies"	6. **"Civility" policies:** employers can adopt and enforce "civility policies"
7. **Hostile workplace claims:** controversial speech that implicates race, religion, ethnicity, or gender can create hostile work environment under Title VII or TCHRA if "severe or pervasive"	7. **Hostile workplace claims:** controversial speech that implicates race, religion, ethnicity, or gender can create hostile work environment under Title VII or TCHRA if "severe or pervasive"
PRIVATE SECTOR – OUTSIDE THE WORKPLACE	**PUBLIC SECTOR – OUTSIDE THE WORKPLACE**
1. **Off-duty conduct – generally:** Texas at-will employees have no legal protection against discipline based on off-duty speech or conduct, including content of social media posts (unless protected under Title VII, ADA, ADEA or NLRA)	1. **Off-duty conduct - generally:** in addition to anti-retaliation protection in discrimination statutes, public employees have broad First Amendment protection for off-duty speech/ conduct on issues of public concern, unless it involves the employee's job responsibilities
2. **Social media:** cyber-bullying of a co-worker through social media can create/contribute to hostile workplace under federal or state law if it affects working conditions	2. **Social media:** cyber-bullying of a co-worker through social media can create/contribute to hostile workplace under federal or state law if it affects the working conditions

* Controversial speech = words or other forms of expression about topics (usually political, religious, or cultural) with a high level of public interest and sharply divided public sentiment.