ATLANTIC LAW JOURNAL
VOLUME 22
2020

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- ARTICLES -

THE EVOLUTION OF PUBLIC EMPLOYEE SPEECH PROTECTION IN AN AGE OF SOCIAL MEDIA

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I. INTRODUCTION

The legal interpretation of public employees' First Amendment right of Free Speech has evolved and narrowed in the four decades since the landmark U.S. Supreme Court ruling in *Pickering v. Board of Education*.[1] In that case, the Court adopted a balancing test to determine whether an employee's right to speak as a private citizen on a matter of public concern outweighs the employer's interest in promoting efficiency.[2] *Pickering* and subsequent cases have become foundational in interpreting the

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[†] The authors would like to thank Douglas S. Lake, MBA student, Eastern Illinois University, for his research assistance on this article.

[1] Pickering v. Board of Education, 391 U.S. 563 (1963).

[2] *Id.* at 568 (stating that "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.")

rights and limitations of free speech of public employees.

However, new social media platforms are increasing the amount, speed, and reach of personal opinions in ways not foreseen when *Pickering* was decided. More public employees are utilizing their First Amendment right to Freedom of Speech within the public forum of social media platforms; social media platforms amplify the potential impact of the speech with their lack of population and geographic limitations. The exchange of opinions, information, and ideas on social media now immediately and directly affects the public, employees and their government employers more than anyone ever could have predicted. This amplification of speech impacts not only the interest in protecting the free speech but also the likelihood that governmental employers will attempt to block the statements in order to avoid any political controversy or backlash. Quite commonly, all of this will be done in the name of efficiency.

Prior to the creation and rise of social media, cases involving an employee's dismissal emanated mainly from letters to newspapers,[3] depositions,[4] statements at public events,[5] or even statements made during private conversations.[6] These types of speech generally required thoughtful and planned action and therefore were less likely to be speech many employees engaged in. The wide-spread

[3] *Id.* at 564.
[4] Garcetti v. Ceballos, 547 U.S. 410, 414 (2006).
[5] Pool v. Van Rheen, 297 F.3d 899, 904-905 (9th Cir. 2002).
[6] Rankin v. McPherson, 483 U.S. 378, 381 (1987).

adoption and use of Facebook[7] and other social media platforms[8] has allowed for an exponential increase in the ability of public employees to make their opinions on matter of public concern widely known. By adopting the same standards and tests used to determine the amount of protection a public employee is entitled under the First Amendment created before social media, the courts have upset the balance between government efficiency and individual constitutional rights. The consideration of whether the employee's speech merely has the potential to cause a disruption to government efficiency rather than a showing of actual disruption greatly restricts these constitutional protections.

Given the prospect of potential workplace disruption resulting from constitutionally protected employee social media posts, the pressing question now is how courts should evaluate these cases.

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[7] *Social Media Fact Sheet*, Pew Research Center (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/ (Stating that, as of March 21, 2005, 5% of the United States' adult population had a social media account. As of February 7, 2019, 72% of the United States' adult population had a social media account on at least one platform).

[8] Andrew Perrin and Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, is Mostly Unchanged Since 2018*, Pew Research Center (April 10, 2019), https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/ (Facebook remains the most popular social media platform; however other social media platforms always have a wide reach with 73% of the United States' adult population using YouTube, Instagram at 37%, Pinterest at 28%, LinkedIn at 27%, Snapchat at 24%, Twitter at 22%, WhatsApp at 20% and Reddit at 11%).

Rather than relying strictly on standards and tests developed in previous cases reached prior to social media's increasing influence, it is imperative that the courts adopt a relaxed standard. The only way for the courts to protect the precarious balance between the employees and their government employers is to require the government employers to meet a heightened evidentiary burden. It should not be enough to simply prove a workplace disruption is possible. Instead the government employer should be required to prove that the employee's speech actually caused a disruption to efficiency or has a high likelihood of causing a disruption to efficiency.

II. LANDMARK CASES

Pickering was the first major case to acknowledge that public employees enjoy First Amendment protection for Freedom of Speech. As such, *Pickering* is cited in virtually every case on this topic. In *Pickering*, a public-school teacher, Marvin Pickering, wrote a letter to the local newspaper criticizing the school district's use of funds generated through a tax increase. Mr. Pickering was dismissed after the Board of Education determined that the letter was "detrimental to the efficient operation and administration of the schools of the district."[9] In overturning the Illinois state appellate decision against Mr. Pickering[10], the U.S. Supreme Court determined that there must be a balance between "the interests of the teacher, as a citizen, in commenting

[9] *Pickering*, 391 U.S. at 564.
[10] *Id.* at 565.

upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[11]

The factors in *Pickering* have been applied, distinguished, and refined in numerous subsequent public employee Freedom of Speech cases. A balancing test was applied in *Connick v. Myers*,[12] when an assistant district attorney objected to her transfer to a different section of criminal court to prosecute cases. Myers drafted and distributed a questionnaire to staff members, asking questions about office morale and other workplace issues. When her supervisor, Connick, learned of this activity, he terminated her for refusing to accept the transfer and for insubordination. Myers filed suit under federal civil rights legislation[13] asserting that she was wrongfully terminated for exercising her "constitutionally-protected right of free speech."[14] In its analysis, the Supreme Court in *Connick* stated that the "content, form, and context of a given statement"[15] should be considered in determining whether the speech addresses a matter of public concern and that the "manner, time, and place"[16] of the speech should be considered in determining whether institutional efficiency is threatened. The employer retains the right to manage its employees

[11] *Id.* at 568.
[12] Connick v. Myers, 461 U.S. 138 (1983).
[13] 42 U.S.C. §1983.
[14] *Connick* at 141.
[15] *Id.*at 147.
[16] *Id.* at 153.

and restricting speech made pursuant to official job duties, and "reflects the exercise of employer control over what the employer itself has commissioned…" When an employee speaks "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest…"[17] the speech represents a personnel opinion that should not be protected by a federal court. The expansion of *Pickering* in the *Connick* case is essential to all cases involving public employee's First Amendment right of Freedom of Speech. *Connick* reinforced the position that not all speech made by public employees receives First Amendment protection and that how and where the speech is transmitted, such as on a publicly available social media platform, is important in determining whether the speech threatens the governmental employer's efficiency.

Garcetti v. Ceballos[18] further distinguished the public employer's right to discipline an employee for making statements when the statements are made as a part of their official duties. Ceballos, a deputy district attorney, drafted a memo that expressed concerns about misrepresentations contained in an affidavit for a warrant. After he testified in court about his concerns, Ceballos claimed that he was subjected to adverse employment actions in retaliation for his testimony. In response to the allegations, the employer asserted that Ceballos' statements were not protected by the First Amendment under the *Pickering* test. Citing

[17] *Id.* at 147.
[18] Garcetti v. Ceballos, 547 U.S. 410 (2006).

Pickering as a "useful starting point,"[19] the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[20] *Garcetti* discusses the "delicate balancing of competing interests surrounding the [employee] speech and its consequences."[21]

These three landmark cases were all decided before social media's dominating influence on society. Yet these cases are necessary for the protection of speech in all forms. Without the Supreme Court's acknowledging the existence of a public employee's First Amendment right of Freedom of Speech in *Pickering*, public employees would not receive protection from retaliation for their speech regardless of how the speech was transmitted. The balancing tests established by *Connick* and *Garcetti* have been crucial in determining recent cases involving public employee's social media postings.

III. SPEECH AND THE SOCIAL MEDIA REALM

The social media era ushered in a new age of speech in which statements which at one time could have been seen as a merely distasteful comment overheard between individuals or groups have instead become a perpetual representation of beliefs

[19] *Id.* at 417.
[20] *Id.* at 421.
[21] *Id.* at 423.

enshrined through a momentary posting on a social media platform, an email, a text message, or another permanent digital form. The exchange of opinions, information, and ideas on social media directly affects public employees more than they or their government employers could have predicted. Social media amplifies speech made by its users. When a public employee's message is amplified by a social media's platform, the amplification of the speech increases not only the interest in protecting the free speech but also the likelihood that the employee's speech will disrupt the government employer's interest in efficiency.[22] The rapid rise of the use and reach of the internet and electronics adds a new dynamic to public employees' First Amendment right of Freedom of Speech. Courts have addressed this change in speech delivery by slowly finessing the application of the three landmark cases to suit the cases application to modern technology.

A. Public Forum Doctrine

An important consideration courts faced when examining Freedom of Speech within social media was whether the definition of public forum should be expanded to recognize the internet as part of the public forum where the right to exercise Freedom of Speech exists. The U.S. Supreme Court addressed the question of citizens' right to exercise free speech on public property in *Hague v.*

[22] Liverman v. City of Petersburg, 844 F.3d. 400, 407 (4th Cir. 2016).

Committee for Indus. Org.[23] This case challenged a city's right to limit speech in streets and parks, stating that streets and parks "have been [historically] used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[24] Legal scholar and visiting fellow at Yale University Alissa Ardito notes that the Court further developed a "tripartite doctrine" to analyze a state's authority to regulate speech on public property.[25] This doctrine identifies the first level as "traditional public fora,"[26] which include the streets and parks mentioned in *Hague*. In these traditional places, a state has a higher burden of demonstrating that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[27]

Through the 2017 decision in *Packingham v. North Carolina*,[28] the Court applied the public forum framework to social media platforms. "While in the past there may have been difficulty in identifying the most important places (in the spatial sense) for the exchange of views, today the answer is clear. It is cyberspace...and social media in particular."[29] One author notes that "[g]iven the spatial ability of

[23] Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).
[24] Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 336 (2013), (citing *Hague*, 307 U.S. 496, 515).
[25] *Id.* at 337.
[26] *Id.*
[27] *Id.*, (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).
[28] Packingham v. North Carolina, 137 S.Ct. 1730 (2017).
[29] *Id.* at 1735.

citizens to access social media for the intended purpose of expressing their views on important issues, it is not inconceivable for a public official's social media account to obtain the same standard of scrutiny that is applied to a traditional public forum."[30] The United States Court of Appeals for the Second Circuit unanimously affirmed that President Donald J. Trump is not permitted to block users from his Twitter account as the account was a public forum.[31] This decision will impact other public official's social media accounts. Congressional Representative Alexandra Ocasio-Cortez of New York was advised by Columbia University's Knight First Amendment Institute (the same organization which had filed the above mentioned lawsuit against President Trump) that her blocking critics from her personal Twitter account is a violation of the First Amendment under its analysis.[32] Recently Recent trends indicate social media posts should be analyzed as statements made in public forum, requiring a continued application of the traditional balancing tests developed in the five decades since *Pickering.*

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[30] Elise Berry, *Suppression of Free Tweets: How Packingham Impacts the New Era of Government Social Media and the First Amendment*, 9 ConLawNow 297, 301 (2017-2018).

[31] Knight First Amendment Institute at Columbia University v. Trump, 928 F.3d 226, 237 (2nd Cir. 2019).

[32] Sonam Sheth and John Haltiwanger, *Alexandria Ocasio-Cortez Says She has the Right to Block Critics on Social Media – a Court Ruling Against Trump Suggests She Might Not*, Business Insider, (August 31, 2019, 11:06 am), https://www.businessinsider.com/alexandria-ocasio-cortez-trump-first-amendment-aoc-block-critics-2019-8

B. What is Speech?

It is easy of understand and accept that posting a statement or comment on a social media platform qualifies as speech under the First Amendment. But courts have encountered challenges when attempting to apply *Pickering, et al* to other forms of social media activity, as illustrated in the 2013 Fourth Circuit decision in *Bland v. Roberts.*[33] In *Bland*, the court addressed the concept of new forms of "speech" in social media platforms when four former employees appealed a summary judgement in favor of their employer after they were termination for their social media activity. These former employees of a Sheriff's office alleged that they were terminated because they made statements in support of the incumbent Sheriff's opponent. The issue before the court, which had never been addressed before, was whether "liking" a comment on a Facebook account could be categorized as "speech" for First Amendment purposes.

The court spent time discussing information available on Facebook's help pages before determining that "liking" a page is a way to share information. In light of this, the court decided that this conduct, the sharing of information, qualifies as "speech."[34] A "like" can also be interpreted as

[33] Bland v. Roberts, 730 F. 3d 368 (4th Cir. 2013).

[34] *Id.* at 385. ("'Liking' on Facebook is a way for Facebook users to share information with each other. The 'like' button, which is represented by a thumbs-up icon, and the word 'like' appear next to different types of Facebook content. Liking something on Facebook "is an easy way to let someone know that you enjoy it." *What does it mean to "Like"*

symbolic speech, since it generates a "thumbs up" icon.[35] Because clicking the "like" button results in publishing the fact that the account holder liked something, it is a "substantive statement" similar to "displaying a political sign in one's front yard."[36] Having concluded that liking a Facebook post is "speech," the *Bland* court then agreed that an employee speaking on the issue of whether a candidate should be elected to office is a matter of public concern, and that there was no evidence that the former employees' support of an opposing candidate caused disruption in operating the Sheriff's Office.[37]

Accepting a "like" as a form of speech opens a large number of public employees to scrutiny for a single click of a button. The inclusion of "liking" a social media post as speech greatly expands the amount of speech made by public employees subject to investigation by employers as well as added protection by the First Amendment. Facebook is the largest social media platform in the world,[38] with an average of 1.59 billion daily uses in June 2019 and 2.41 billion active monthly users as of June 30,

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something?" quoting Facebook Help, http://www.facebook.com/help/452446998120360)

[35] *Id.* at 386.

[36] *Id.* at 387.

[37] *Id.*at 388. (The court eventually affirmed the district court's decision that the Sheriff was entitled to qualified immunity on the plaintiffs' First Amendment claims and remanded the reinstatement claims).

[38] https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/

2019.[39] The platform, which debuted in its original form on February 4, 2004,[40] launched what is now an integral feature of the platform: the ability to "like" a comment or post made by another Facebook user on February 9, 2009.[41] Leah Pearlman, the project manager behind the development of the Like button, introduced the feature in a blog post which explicitly stated that the "like" button was created to inform friends that "I like this" rather than commenting on the post.[42] The popularity of the "Like" button exploded to the point that by 2015, Facebook users worldwide Liked posts 4,166,667 times a minute.[43] The use of this feature has already directly lead to employees facing adverse employment action. Hotel chain Marriott International Inc. recently terminated a social media manager when the employee "liked" a tweet posted by a third party which praised Marriott

[39] https://newsroom.fb.com/company-info/#targetText=360%20million%20people%20are%20now%20active%20on%20Facebook

[40] Lily Rothman, *Happy Birthday, Facebook*, Time Inc., (February 4, 2015), https://time.com/3686124/happy-birthday-facebook/

[41] Jason Kincaid, *Facebook Activates "Like" Button; FriendFeed Tires of Sincere Flattery*, THE TECHCRUNCH (February 9, 2009, 9:06 pm CST), https://techcrunch.com/2009/02/09/facebook-activates-like-button-friendfeed-tires-of-sincere-flattery/

[42] Leah Pearlman, *I Like This*, Facebook blog post (February 9, 2009, 8:00 pm), https://www.facebook.com/notes/facebook/i-like-this/53024537130)

[43] George Carey-Simos, *How Much Data is Generated Every Minute on Social Media*, WERSM (August 19, 2015), https://wersm.com/how-much-data-is-generated-every-minute-on-social-media/

for listing Tibet as an independent country rather than part of China.[44] The tweet angered the Chinese government and the employee became a casualty of Marriott's attempts to appease the Chinese government.

The popularity of the "Like" button and the feedback of users resulted in Facebooks expansion of the Like button to include Reactions.[45] The six new reactions ("love," "haha," "wow," "sad," and "angry") were added because it was thought that these emojis could be easily understood regardless of language or culture.[46] The issue employers face with these new reactions face is likely the same as with employees' use of the "Like" button: ambiguity as to the user's thoughts when the reaction is chosen.

One author notes that, while courts have yet to rule on the question of whether social media "reactions" should be considered speech, it seems likely that this would be the decision. "[I]f …"like" is speech, there is an even stronger case that a 'reaction,' which requires additional user effort to

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[44] Wayne Ma, *Marriott Employee Roy Jones Hit 'Like.' Then China Got Ma*d, The Wall Street Journal, (March 3, 2018 at 11:35 am ET), https://www.wsj.com/articles/marriott-employee-roy-jones-hit-like-then-china-got-mad-1520094910

[45] Sammi Krug, *Reactions Now Available Globally*, Facebook Newroom (February 24, 2016), https://newsroom.fb.com/news/2016/02/reactions-now-available-globally/

[46] Associated Press, *Facebook Introduces Reactions Alongside Like Button*, Chicago Tribune (February 24, 2016, 7:44 am CST), https://www.chicagotribune.com/business/blue-sky/ct-facebook-reactions-20160224-story.html)

post, is also speech."[47] If a "reaction" is determined to be speech, the question of whether a public employee's "reaction" to a post is protected then depends on whether the original post addressed a matter of public concern and whether the "reaction" caused disruption.[48]

IV. DISRUPTION IN THE WORKPLACE

When public employees voice an opinion on matters of public concern as private citizens, the most important distinguishing factor used to determine whether they are entitled to receive protection appears to be whether the speech itself will disrupt the workplace environment. The level of disruption required to meet this standard appears to differ, depending on whether the employee is a member of a "paramilitary organization" or works in another governmental position. *Grutzmacher v. Howard County*,[49] a Fourth Circuit decision, is the foundational case examining the intersection between a public employees' First Amendment right to Freedom of Speech and the social media world. The *Grutzmacher* case represents a further extension of the *esprit de corps* mentality established in *Pickering*, that paramilitary organizations, such as firefighters, paramedics, and police departments,

[47] Frank E. Langan, *Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS L.J. 228, 244 (2018).
[48] *Id.* at 245.
[49] Grutzmacher v. Howard County, 851 F.3d 332, 338 (4th Cir. 2017), *cert. denied* 138 S.Ct. 171 (2017).

need increased cooperation amongst its employees in order to guarantee successful completion of a joint endeavor.[50]

A. The Importance of Efficiency in Public Employment

Public employers have a duty to taxpayers to perform services as effectively as possible. "While the Supreme Court has recognized that government employees have a limited First Amendment Free Speech protection, it has also recognized that the government has a vested interest in maintaining its role as an employer to fulfill its obligations to the public in an effective and efficient manner."[51] When a public employee, therefore, engages in speech that negatively affects the efficient performance of the employer's operations, courts have determined that the employer is justified in placing restraints on this behavior.[52] One important consideration courts make when determining if the employee's speech will negatively affect efficiency is the employee's profession. The courts differentiate between paramilitary public employees and all other government employees when considering whether the speech will rise to the level of disruption.

[50] *Pickering*, 391 U.S. at 570.
[51] Waters v. Churchill, 511 U.S. 661 (1994).
[52] Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011).

1. Paramilitary Public Employers

Courts have recognized a special concern that throws the *Pickering* balancing test's application to social media speech into doubt when applied to employees of paramilitary organizations.[53] The efficiency and success of a paramilitary organization is distinctive from other public employers. These organizations rely on discipline, respect, and trust, to create the order, morale, and loyalty critical to successfully performing their jobs.[54] The courts have repeatedly pointed to the idea that without this cohesive and respectful atmosphere, paramilitary organization will be unable to fulfill their responsibilities and duties; because of this heightened concern, the threshold for what speech may cause disruption has more focus on the possible breakdown in coworker relationships.

In *Grutzmacher*, Plaintiff Buker, a battalion chief in the local fire department, posted a comment on his personal Facebook page on January 20, 2013, regarding the ongoing gun control debate. The comment read: "My aide had an outstanding idea…lets [sic] all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its [sic] almost poetic . . ."[55]

Buker's comment was posted while he was watching the continuous news coverage of support

[53] Hansen v. Soldenwagner, 19 F. 3d 573, 577 (11th Cir. 1994).
[54] *Id.*
[55] *Grutzmacher* at 338.

and backlash over President Barack Obama's signing of twenty-three Executive Actions aimed at combating gun violence and the President's call for Congress to enact legislation to expand background checks for gun purchases and ban military-style assault weapons, both of which occurred on January 16, 2013.[56]

Plaintiff Grutzmacher, a paramedic in the same fire department as Buker, "liked" Buker's comment and introduced race into the conversation. Grutzmacher's response, posted twenty minutes after Buker's original comment, read: "But…was it an "assult [sic] liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh…pick a black one, those are more "scary". Sorry had to perfect on a cool idea!"[57] Buker liked Grutzmacher's comment six minutes later.

The comments posted by Buker and Grutzmacher were subsequently forwarded to a superior in the fire department. In an email written by three of his direct supervisors, Buker was directed to remove the post as well as all other recent Facebook posts he might have made which were inconsistent with the Social Media Guidelines or Code of Conduct. Buker did remove the January 20th post, but then proceeded to add a response on his Facebook page on January 23rd, directed to whomever complained, stating that they should "feel free to delete me." Following up an inquiry on his

[56] Katie Reilly, *President Obama Announces Executive Action on Gun* Control, Time Inc. (Jan. 5, 2016, 12:52 pm ET), http://time.com/4167749/obama-gun-control-remarks/
[57] *Grutzmacher* at 338.

post, Buker stated that "free speech only applies to liberals" and that "Howard County, Maryland and the Federal Government are all Liberal Democrat held at this point in time," indicating that Buker's Freedom of Speech was under attack because his employer was a liberal organization.[58] Buker's January 23rd comment was quickly conveyed to the Department's Chief and the following day Buker was removed from working in field operations.

Further posts subsequently escalated the matter. While Buker was still being investigated for his social media posts, a volunteer firefighter and Facebook friend of Buker posted a picture on February 17th, which depicted an elderly woman with her middle finger raised.[59] The picture contained the caption "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE I'LL POST WHATEVER THE F*** I WANT" with an additional caption directed to the Chief investigating Buker ("for you Chief") added.[60] Buker liked the post and photo. The Fourth Circuit had previously held liking a post was a form of symbolic speech[61] which was considered and applied in *Grutzmacher*. Applying the precedent that "liking" social media posts is a form of speech was important in determining what actions by the plaintiffs could receive protection under the First Amendment right of Freedom of Speech.

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[58] *Id.* at 338-339.
[59] *Id.* at 339.
[60] *Id.*
[61] Bland v. Roberts, 730 F. 3d 368 (4th Cir. 2013).

Plaintiff Buker was fired from the Howard County for "repeated insolence and insubordination." The Fourth Circuit determined that Buker's comments represent a split between speech on matters of public concern and speech which was not a matter of public concern. Because the original January 20th post expressly addressed the issue of gun control, the Fourth Circuit held that this was a matter of public concern and therefore was protected by the First Amendment. The Court, however, could not say the same for the subsequent comments made by Buker. The last speech made by Buker, liking the picture posted, was especially troubling to the Court. It was noted that a Plaintiff's use of their middle finger is expressly disrespectful to Buker's superiors, which could cause a breakdown in authority and destroy close working relationships.[62]

In balancing employee speech protections with the interest of the Fire Department in performing public service, special attention was placed on the relationship between the plaintiffs and the defendants. Battalion Chief is a key leadership position within fire departments and disrespectful tone of Buker's speech would be even more likely to offend other employees and community members because the speech was directed toward a Battalion Chief. This open and contentious display would likely interfere with the operation and mission of the Fire Department. Battalion Chief manage the day-to-day operations in the field by directing the day-to-day enforcement of our policies and procedures; therefore, Buker's speech harmed the Chief's ability

[62] *Grutzmacher* at 348.

to do his job by attacking the Chief's position and authority.

Although the *Grutzmacher* case reaffirmed that the *esprit de corps* relationship in paramilitary organizations is essential when determining a public employee's First Amendment right of Freedom of Speech, the Fourth Circuit in *Grutzmacher* explicitly addressed the distinction between *Grutzmacher* and the case of *Liverman v. City of Petersburg*,[63] which the Fourth Court had decided the previous year in 2016.[64] The Court's holding in *Liverman* was singularly unique enough to warrant coverage in national mainstream media.[65]

Liverman appears at first glance to be nearly analogous to the factual situation in *Grutzmacher*. While off-duty, two police officers exchanged Facebook posts regarding the assignment of police officers to training duties and other job-related positions. Both officers were directly reprimanded for their statements, which were seen as making negative comments about the department. The

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[63] Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016).

[64] *Grutzmacher* at 349. ("[I]n *Liverman*, we found statements by veteran police officers raising "[s]erious concerns regarding officer training and supervision" were sufficient to overcome the government's interest in preventing workplace disruption").

[65] *See* Eugene Volokh, *Fourth Circuit protects police officer Facebook posts critical of department policies*, Wash. Post (Dec. 15, 2016, 3:09 pm CST) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/15/fourth-circuit-protects-police-officer-facebook-posts-critical-of-department-policies/?noredirect=on&utm_term=.c1ab1a422286

officers' Facebook postings directly violated the City of Petersburg's social media networking policy, which precluded public employees from making any statement which would be seen as disruptive to the workforce. However, the issue of police officer suitability for the positions to which they are assigned was clearly a matter of public concern, according to the court. The decision noted that courts have historically "recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees obtain knowledge of matters of public concern through their employment."[66] As noted in *City of San Diego, Cal. v. Roe*:

> Underlying the decision in Pickering is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.[67]

[66] *Liverman* at 407.
[67] City of San Diego, Cal. v. Roe, 543 U.S. 77, 82 (2004).

As in *Grutzmacher,* the larger issue in *Liverman* was whether the matter of public concern, as addressed by the plaintiffs, was disruptive to their organizations. Unlike the facts in *Grutzmacher*, though, the Fourth Circuit in *Liverman* held that the officer's comments touched on a matter of public concern of such a serious issue to the public at large as to outweigh any potential disruption which could have occurred.[68] While the court did find in the plaintiffs favor, *Liverman* was only decided on the narrow principle that the speech was of a "serious issue to the public at large" which is a more difficult task to prove than the original language established in *Pickering* that the protected speech only needed to be a "matter of public concern."[69]

The issue of disruption is central to distinguishing *Liverman* from *Grutzmacher*, as the Fourth Circuit stated that public safety officials' First Amendment right to speak on matters of public concern will outweigh a compelling government interest if the official speech is based in "specialized knowledge [o]r expresse[s] a good general 'concern about the inability of the department to carry out its vital public mission effectively.' "[70] The interplay between *Liverman* and *Grutzmacher* reveals how

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[68] *Liverman* at 411.
[69] *Pickering* at 586.
[70] *Grutzmacher* at 347-348. (*See also* Lane v. Franks, 573 U.S. 228, 240 (2014)) ("Our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment").

restricted speech by paramilitary public employees has become. While the plaintiffs prevailed in *Liverman*, the court's appeared only to protect the employee's right to Freedom of Speech as the subject matter was a serious issue of public concern. This distinction of the speech being a serious matter of public concern indicates that paramilitary employee's will only receive their constitutional protections if the speech reaches an even higher bar than had previously been created in *Pickering, Connick,* and *Garcetti.*

Paramilitary employees have continued to experience a tightening of their protections in other federal circuits besides the Fourth Circuit. In *Snipes v. Volusia County,*[71] the Eleventh Circuit focused on a reason to support the removal of different of members of the Beach Patrol, a law enforcement agency, for Facebook posts. Following the 2013 verdict in the George Zimmerman trial for the shooting death of black teenager, Trayvon Martin, officers posted vulgar and racist messages about the incident. In *Snipes,* the court stated that the employer did not have to show that actual disruption resulted from the posts. "The County needed to demonstrate only a reasonable possibility that such disruptions would occur."[72] This approach different than *Grutzmacher*, as the government employer in *Grutzmacher* used actual disruption which occurred

[71] Snipes v. Volusia County, 704 Fed.Appx. 848 (11th Cir. 2017).
[72] *Id.*at 852.

following the social media speech to support their decision to terminate the plaintiffs.[73]

2. Other Public Employers

With respect to public employers that do not serve a paramilitary function, it would be less likely that an employee's statements would be disruptive. A Pennsylvania Commonwealth appeals court case applied the reasoning used in *Grutzmacher* to assist in its analysis of a Department of Transportation employee terminated for negative statements made on Facebook.[74] Carr, a railroad programs technician, made a Facebook post, while off duty, expressing frustration about school bus drivers approaching railroad crossings. When the Department of Transportation received a copy of the post, Carr was terminated. On appeal, the Commonwealth Court of Pennsylvania applied a balancing test derived from *Pickering* and *Connick*. Four factors were adopted to determine whether the public employee's speech should receive First Amendment Freedom of Speech protection. They are:

[73] *Grutzmacher* at 345 – 346. (Three African American employees specifically conveyed a discomfort with the comments with one employee stating they did not want to work with either of the plaintiffs. There were also multiple conversations among the employees which caused "dissension" within the department.)

[74] Carr v. Commonwealth of Pennsylvania, 189 A.3d 1 (Pa. Commw. Ct. 2018), *appeal docketed*, No. 460 MAL 2018, 200 A.3d 435 (Pa. 2019).

1. Whether, because of the speech, the government agency is prevented from efficiently carrying out its responsibilities;
2. Whether the speech impairs the employee's ability to carry out his own responsibilities;
3. Whether the speech interferes with essential and close working relationships;
4. The manner, time and place in which the speech occurs[.]

Regarding the first factor, although the Department of Transportation argued that Carr's comments regarding school bus drivers' actions "threatened to erode the public's confidence in the Department,"[75] the appellate court interpreted the words as a "verbal manifestation of her frustration"[76] and not as a violent threat that would disrupt services. The speech, while inappropriate, still touched on a matter of public concern regarding the safety of school children and the traveling public as a whole. A speculative prediction of disruption should not be compelling enough to restrict employee speech on a matter of public concern. Governmental employers should only be permitted to take action adverse employment action related to an employee's speech without a showing of actual disruption if there is a "high likelihood of potential disruption."

[75] *Carr* at 14.
[76] *Id.*

Turning to the second and third factors, there was no evidence that Carr's ability to perform her job was impaired by her negative social media comments, nor was there evidence that Carr's working relationships had been adversely affected. Turning to the fourth factor, Carr's comments were made when she was off-duty and away from the office, but the broad nature of the audience of Facebook would weigh slightly in the employer's favor. Altogether, the court concluded that the "generalized interest in the safety of the traveling public [did] not outweigh Carr's specific interest in commenting on the safety of a particular bus driver."[77] Taking these factors into consideration, the court found that Carr's comments were protected. This case is currently on appeal to the Supreme Court of Pennsylvania.[78]

A Ninth Circuit decision addressed the issue of disruption in *Shepherd v. McGee.*[79] It determined that the disruption "threshold" was met in a situation involving a terminated caseworker employed by the Oregon Department of Human Services. Shepherd, a caseworker for Child Protective Services, became dismayed when some of her site visits revealed that clients had luxury cars and expensive television sets. She posted comments on her personal Facebook page, which included her own "rules for society," which would put additional restrictions on persons

[77] *Id.* at 15.
[78] Carr v. Commonwealth of Pennsylvania, 200 A.3d 435 (2019).
[79] Shepherd v. McGee, 986 F.Supp. 2d 1211 (D. Oregon, Nov. 7, 2013).

receiving public assistance. These included such statements as "you may not have additional children and must be on reliable birth control" and "If you've had your parental rights terminated by DHS, you may not have more children....it's sterilization for you buddy!"[80] Shepherd was terminated "due to her credibility being terminally and irrevocably compromised,"[81] because her job duties included testifying in child abuse cases regarding her observations of physical surroundings related to particular cases.

B. Potential vs. Actual Disruption Related to Efficiency in Public Employment

Social media posts and comments are a hot topic with journalists and lead to exponentially increased coverage of public employees' online presence. Both *Snipes* and *Shepherd* illustrate the principle that the potential for disruption is sufficient cause to terminate employment without actual disruption occurring. *Snipes* is analogous to *Shepherd* in that both Plaintiffs mounted a defense based on the argument that their statements did not cause an actual disruption. Both the Ninth Circuit and the Eleventh Circuit independently held that actual disruption is not necessary to support termination when discussing the public employees' social media activity. The doubt of Shepherd's ability to perform her job itself was sufficient

[80] *Shepherd* at 1214.
[81] *Id*. at 1217.

disruption,[82] while the mere likely possibility of Snipes' comments causing a disruption were sufficient for termination.[83] There was no consideration given for the creation of a requirement that disruption must or needs to develop in the form of a public outcry for a court to decided that the speech created enough disruption for permissible termination.

The holding that actual disruption is not necessary to support the removal of an employee represents a restriction of the principle created in *Pickering*, *Connick*, and *Garcetti*: that the First Amendment protects public employees' Freedom of Speech. This expansive interpretation of disruption within social media speech threatens to erode a public employees' ability to exercise their protected right to free speech. In order to combat this erosion while still recognizing the need of governmental employers to maintain efficiently accomplish its responsibilities, courts should adopt a narrower approach to disruption.

This narrower interpretation will not overly limit the ability of a government employer to remove an employee for inappropriate speech but will rather preserve the employee's constitutional protections. Many previously decided cases, which established the precedent of only needing to show a potential disruption, would still have allowed for the employee's removal under the proposed relaxed standard of "high likelihood of disruption."

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[82] *Id.* at 1218.
[83] *Snipes* at 852-853.

The Plaintiff in *Shepherd* contended no evidence existed of disruption stemming from her Facebook posts, with the Court countering that the doubt raised by the posts regarding the Plaintiff's ability to perform her job was sufficient to meet the standard of potential disruption.[84] Applying the proposed "high likelihood of disruption" standard, the government employer's position would still have prevailed. The government submitted "declarations establish[ing] actual, material, and substantial disruption" of the working relationship between Plaintiff and the Polk County District Attorney's Office.[85] These relationships were integral to the Plaintiff's employment as the District Attorney's Office relied on the Plaintiff's credibility.[86] The breakdown of this relationship represented a high likelihood of workplace disruption effecting the District Attorney's Office's capability of using the Plaintiff as a witness, an important component of her employment.[87]

Similarly, the Plaintiff in *Snipes* argued on appeal that his employer had not received any complaints regarding his comments, demands that he be fired, or protests about his speech.[88] The Court rejected this argument, instead adopting the position "that the County needed to demonstrate only a reasonable possibility that such disruptions would

[84] *Shepherd* at 1218.
[85] *Id.*
[86] *Id.* at 1215-1216.
[87] *Id.* at 1220.
[88] *Snipes* at 852.

occur."[89] The "high likelihood of disruption" likewise would have supported removal of the officer as the governmental employer presented evidence in the form of statements from the President of the Volusia County NAACP and the President of the Daytona Beach Black Clergy Alliance, both of whom indicated that protects or similar actions would have been undertaken had the Plaintiff not been dismissed.[90]

One of the most important functions of all courts within the United States is to identify and implement the delicate balance between necessary governmental actions and interests with the rights and freedoms of citizens. This balance is especially perilous when citizens are directly employed by the government. The adoption of the potential disruption approach is oversetting the balance of interests. A slight lessening of that standard could occur with the adoption of a "high likelihood of disruption" standard. This more reasonable approach would even the balance between government employers and their employees.

V. USING SOCIAL MEDIA PAGES TO IDENTIFY "PROBLEM" PUBLIC EMPLOYEES

The need for courts to shift the standard from potential to actual disruption becomes even more apparent when consideration is given to regional and national medias' expanding focus on public

[89] *Id.*
[90] *Id.* at 853.

employee's social media activity. The widespread use of social media and the ability for journalist and the public at large to access the public speech of these employees has exponentially increased the likelihood of this speech disrupting the workplace and workplace efficiency. Investigations and interest in certain public employee's social media activity illustrate the disruptive impact of some speech.

Public employees' use of Facebook and other social media platforms has caused a backlash in more situations than a specific disciplinary proceeding or firing. Philadelphia attorney Emily Baker-White was investigating a claim of police brutality when she located a Facebook post promoting a police dog attack made by a local officer.[91] The post inspired Baker-White to start what became the Plain View Project, an online and searchable database of over 5,000 social media posts from approximately 3,500 officers.[92] The Project explicitly states that it believes the posts and comments made these officers "could erode civilian trust and confidence in police" and actively encourages police departments to investigate the posts and comments. The effect of the Plain View Project's work is already being felt in multiple cities. The Philadelphia police department suspended 72 officers over discoveries made by the Plain View Project in June, fired 13 officers July, and

[91] Dan Andone, *This Group Found Thousands of Offensive Facebook Comments by Police. Here's What You Should Know*, CNN (June 20, 2019, 12:37 pm ET), https://www.cnn.com/2019/06/20/us/plain-view-project-what-is/index.html

[92] *Id.*

more firings expected.[93] In St. Louis, Missouri, calls are being made for the dismissal of police officers for comments and posts made between 2013 and 2017, after comments were found and made public by the Plain View Project.[94] The Plain View Project's research was introduced as evidence in legal proceedings[95] and will likely continue to be an important tool in future legal action. The use of this research indicates the long-term potential for social media speech to cause disruption within multiple segments of society.

More recently, The Center for Investigating Reporting published a three-part series titled "To Protect and Slur" in June 2019, which presents an in-depth look at the presence of police officers involved in online groups linked to Confederate, anti-Islam, misogynistic or anti-government militia groups on Facebook.[96] Reporters were able to identify officers

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[93] CBS3 STAFF, *More Philadelphia Police Officers Expected to be Fired Over Racist, Controversial Social Media Posts, Activist Say*, CBS Philly (September 9, 2019, 5:17 pm), https://philadelphia.cbslocal.com/2019/09/09/more-philadelphia-police-officers-expected-to-be-fired-over-racist-controversial-social-media-posts-activists-say/

[94] Eoin O'Carroll, *When Keepers of the Peace Harbor Hate*, The Christian Science Monitor, (September 11, 2019), https://www.csmonitor.com/USA/Justice/2019/0911/When-keepers-of-the-peace-harbor-hate

[95] Petition for a Writ of Certiorari, Garza v. City of Donna, 922 F. 3d 626 (5th Cir. 2019) (No. 19-276), *petition for cert. denied* (2019).

[96] Will Carless & Michael Corey, *To Protect and Slur: Inside Hate Groups on Facebook, Police Officers Trade Racist Memes, Conspiracy Theories and Islamophobia,* The Center for Investigating Reporting (June 14, 2019),

as belonging to these types of groups with the use of software created for the project. A computer program created the ability to search Facebook directly, resulting in the creation of two separate lists: members of an extremist group and members of police groups.[97] The lists were compared with over 14,000 people whose names appeared on both lists.[98] Eventually, 400 individuals were confirmed through official documents as currently or formerly employed law enforcement personnel.[99] Internal investigations in more than 50 different law enforcement departments were launched after the departments were presented with the research, with some departments specifically stating the investigations would critique an officer's work to determine if the online opinions may have affected the police work of each officer.[100]

Yet another investigation, led by organization Pro Publica, revealed that 9,500 current and former border control officers were part of a Facebook group whose page contained jokes about the deaths of migrants, memes showing members of Congress in in sexual positions, and other comments and posts described by sociologist and University of Arizona researcher Daniel Martinez as xenophobic

https://www.revealnews.org/article/inside-hate-groups-on-facebook-police-officers-trade-racist-memes-conspiracy-theories-and-islamophobia/

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

and sexist.[101] The group's title, "I'm 10-15," is a reference code used by the Border Patrol for "alien in custody," and included members in supervisory positions[102] which illustrates what Martinez says "seems to be a pervasive culture of cruelty aimed at immigrants within CBP. This isn't just a few rogue agents or 'bad apples.'"[103] Members of the "I'm 10-15" group began deleting comments and posts within minutes of learning of the Inspector General of DHS response to ProPublica's reports, in an effort to prevent the information from being available.[104] The problem, and benefit, of the internet is that information put online is difficult to remove. Comments and posts can be retrieved and saved, as

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[101] A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke and Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019, 10:55 am EDT), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes

[102] A.C. Thompson, *Border Patrol Condemns Secret Facebook Group, but Reveals Few Specifics*, ProPublica (July 10, 2019, 4:05 pm EDT), https://www.propublica.org/article/border-patrol-condemns-secret-facebook-group-but-reveals-few-specifics

[103] A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke and Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019, 10:55 am EDT), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes

[104] Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them*, The Intercept (July 5, 2019, 12:16 pm), https://theintercept.com/2019/07/05/border-patrol-facebook-group/

Ryan Devereaux of The Intercept has done with the Border Patrol comments from the "I'm 10-15" group.[105] Any effort to prevent any disciplinary action failed, as the Customs and Border Patrol's Office of Professional Responsibility identified 62 members who were current employees.[106] The CBP sent 59 employees cease and desist letters, proposed termination of seven employees (but which could increase to 20 employees), and proposed discipline against an additional 20 agents (which could increase 40 employees).[107]

The widespread focus and impact of these investigations are tangible examples of how social media speech by public employees can cause substantial and actual disruption to governmental organizations. Government resources and focus were shifted from the goal of the organization to deal with the fallout of the surrounding these reports. There is no evidence which indicates public employees will collectively avoid utilizing social media in the future. Increasing focus on statements made by public employees by journalist and organizations dedicated to proactively investigating the social media activity of public employees could be used to support the position that potential disruption is sufficient for termination. The

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[105] *Id.*

[106] Anna Giaritelli, *Customs and Border Protection Moving to Fire and Discipline Dozens of Agents for Facebook Posts*, Wash. Examiner (Sept. 5, 2019, 5:10 pm), https://www.washingtonexaminer.com/news/customs-and-border-protection-moving-to-fire-and-discipline-dozens-of-agents-for-facebook-posts

[107] *Id.*

continuous possibility of media focus on public employees creates an increased possibility that any current or future social media activity could result in public attention. The increased focus combined with adoption of a potential disruption standard could likely erase all First Amendment rights to Freedom of Speech public employees current enjoy. Without adopting the proposed relaxed standard of "high likelihood of disruption," public employees might see their right to make public statements on matters of public concern constricted to extremely limited circumstances.

VI. THE FUTURE FOR PUBLIC EMPLOYEE SOCIAL MEDIA SPEECH

With the increased scrutiny placed on public employees' social media activity, the ever-increasing types of social media communications will only complicate analysis of protected speech. The use of the "Like" button in relation to a Facebook post has already been determined as a form of speech.[108] Facebook's newest feature is Avatar stickers that look like an individual with the Avatar that are able to convey emotions and phrases on Facebook messenger and on Facebook's News Feed.[109] These Avatars have only been launched in Australia, but they are set to be released to the rest of the world in

[108] 730 F.3d 368 (4th Cir. 2013).

[109] Josh Constine, *Facebook Introduces Avatars, Its Bitmoj Competitor: Stickers that Look Like You*, TechCrunch (June 3, 2019, 10:35 am CDT), https://techcrunch.com/2019/06/03/facebook-avatars-stickers/

late 2019 or early 2020.[110] This new method of conveying information will add an additional layer to ways in which public employees can express thoughts. This creates a growing issue of how the use of technology changes people's ability to express emotions, thoughts, and opinions. These new developments create novel complexities, given additional Facebook reactions, and the interpretation of intent behind an individual's decision to use a particular symbol. Although the Like button was originally intended by Facebook to convey the literal meaning of "liking" the content of the post,[111] the actual use of "Like" has grown to carry different meanings based on the user.[112] In fact, research indicates that there are several reasons that an individual may "Like" Facebook content, including a desire to show support for the substance of the post or support for the person making the post, acknowledging viewing the post, as well as the social norms of simply "Liking" a post made by a friend regardless of the specific content.[113]

The ways in which technology changes people's ability to express emotions, thoughts, and opinions, will generate new and complex legal

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[110] *Id.*

[111] Leah Pearlman, *I Like This*, Facebook blog post, (February 9, 2009, 8:00 pm) https://www.facebook.com/notes/facebook/i-like-this/53024537130

[112] Ana Levorashka, et al, *What's in a Like? Motivations for Pressing the Like Button*, Proceedings of the Tenth International AAAI Conference on Web and Social Media (ICWSM 2016).

[113] *Id.*

issues. As new forms of social media are developed, new challenges will emerge in the area of civility of communication, privacy of account owners' writings, and whether an employer, public or private, has the authority to limit free expression in an employee's private life. Courts will be challenged to develop new balancing tests to weigh employees' rights of expression against employers' interests, as the current *Pickering* balance test appears to give public employers license to "put the thumb on the scale" in the interest of avoiding workplace disruption.

VII. MOVING FORWARD

The application of the *Pickering* analysis for public employee social media communications has evolved in such a way that virtually any negative comment may be interpreted as "potentially disruptive," effectively barring such posts. The current trend of limiting or prohibiting speech that could "potentially" cause disruption is heavily weighted in favor of public employers. In order to restore a balance between employees' right to speak and employers' right to manage their workforces, the authors propose that courts instead require an employer to show that an employee's negative social media comments result in actual or highly likely disruption, rather than speculative or "potential" disruption, of the public services it provides. Restricting comments that "potentially" would disrupt operations could discourage public employees from reasonably discussing matters of

public concern that they, as employees, could be most able to identify and address, including instances of whistleblowing. Moving away from the potential disruption standard is a reasonable alternative which would continue to afford a measure of protection for public employees' comments on matters of public concern in all areas of public employment. This narrower interpretation will not overly limit the ability of a government employer to remove an employee for inappropriate speech but will rather preserve the traditional constitutional protections afforded to public employees.

MULTIPLE LEAVES OF ABSENCE AND THE AMERICANS WITH DISABILITIES ACT: REASONABLE ACCOMMODATION OR GROUNDS FOR TERMINATION?

KEVIN FARMER[*]

I. INTRODUCTION

The Americans with Disabilities Act[1] [ADA] seeks to open workplace doors to the disabled. Those who are qualified for a position but live with a disability[2] are entitled to engage with covered employers in an interactive, individualized exchange to work together in good faith to create a reasonable accommodation that would enable the

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[1] 42 U.S.C. §§ 12101-12213 (2018). [All statutory references are to the ADA unless otherwise indicated.] The statute applies to private employers with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year as well as employment agencies, labor organizations and joint labor management committees. *Id*. § 12111(2), (5)(A).

[2] A qualified individual is defined as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires." *Id*. § 12111(8). A disability is defined as a "physical or mental impairment that substantially limits one or more major life activities" of an individual, *Id.* § 12102(2)(A).

disabled employee to perform the essential functions of a job unless the accommodation would create an undue hardship for the employer. Leaves of absence [LOA] have been recognized as reasonable accommodations by federal courts and the Equal Employment Opportunity Commission [EEOC]. As Part II explains, when an employee requests multiple LOAs, the judicial and administrative paradigm has demanded a fact-intensive, case-by-case analysis to determine whether the request constitutes a reasonable accommodation. In 2017, the Seventh Circuit broke ground and honored an employer's per se limit on multiple LOAs in upholding the denial of leave to a disabled worker and, in the process, rejecting an interactive resolution. The rationale of that opinion, and the far-reaching scope of its precedent, are discussed in Part III. An approach that shifts the focus from reasonable accommodation to undue hardship and encourages employers to become more transparent in stating their ability to satisfy employee needs prior to LOA requests—without handcuffing employers or employees with inflexible limits—is proposed in Part IV as a more effective and efficient solution that manifests the spirit as well as the letter of the ADA.

II. THE PARADIGM FOR JUDGING LOAS AS REASONABLE ACCOMMODATIONS UNDER THE ADA CALLS FOR A CASE-BY-CASE REVIEW

A delineation of two concepts lying at the heart of the ADA, reasonable accommodation and

undue hardship, will help set the stage for evaluating whether multiple LOAs can be legally denied by employers who enforce maximum leave policies. The term "reasonable accommodation" is not defined in the ADA. Rather, the statute provides a non-exhaustive list of actions that could qualify as accommodations.[3] Those accommodations can be functionally grouped into making physical changes to existing facilities, providing assistive devices or personnel, restructuring jobs, reassignment to vacant positions, and LOAs.[4] In order to justify an employer's consideration, the employee must demonstrate that the proffered accommodation is facially reasonable in most cases or plausible.[5] If the employee demonstrates that the accommodation is reasonable on its face,[6] the employer must accommodate the request, if possible, or demonstrate undue hardship if it is impossible.[7] Under the orthodox federal approach, determining whether the accommodation will enable a qualified individual to

[3] Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1129-31 (2010).
[4] Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodations Issues: Reassignment and Leaves of Absence*, 37 WAKE FOREST L. REV. 439, 444-45 (2002).
[5] US Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (2002).
[6] There is variation in the standard an employee must meet in order to demonstrate facial reasonableness. *Compare* Frumusa v. Zweigle's, Inc., 688 F. Supp. 176, 189 (W.D.N.Y. 2010) (requiring minimal evidence of facial reasonableness), *with* Bullard v. FedEx Freight, Inc., 218 F. Supp. 3d 608, 618 (M.D. Tenn. 2016) (demanding that reasonableness be viewed from an objective observer's perspective).
[7] *US Airways*, 535 U.S. at 401-02.

perform the essential functions of job[8] eschews a bright-line test in favor of a flexible, case-by-case analysis.[9] LOAs may be essential for disabled employees who need time off from work in order to undergo treatment, wait for remission of symptoms or receive disability-related training.[10] The key is that the LOA is temporary and that the employee is expected to return to work after a determinate period.[11]

The ADA expressly defines undue hardship. It is an action requiring significant difficulty or expense when considered in light of factors such as the nature and cost of the accommodation, the overall financial resources of the facility involved and of the employer as a whole, the number of employees, the effect on the employer, the number and type of facilities as well as the type of operation of the employer.[12]

The relationship between reasonable accommodation and undue hardship is mediated by the interactive process. The interactive process appears in regulations created by the EEOC.[13] "To determine the appropriate reasonable

[8] Regular and reliable attendance is an essential function of most jobs. Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537, 544 (8th Cir. 2018).
[9] Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 652 (1st Cir. 2000).
[10] Stacy A. Hickox & Joseph M. Guzman, *Leave As An Accommodation: When is Enough, Enough?*, 62 CLEV. ST. L. REV. 437, 444 (2014).
[11] *See* Befort, *supra* note 4, at 441.
[12] 42 U.S.C. § 12111(10)(A), (B) (2018).
[13] 29 C.F.R. § 1630.2(o)(2) (2018).

accommodation it may be necessary for the covered entity to initiate an informed, interactive process with the individual with a disability in need of accommodation."[14] The simplicity of stating the definition belies the complexity in its application. The interactive process requires that the scope and substance of an employer's good faith communications vary for each disabled employee and be tailored at two points: at the time the accommodation is requested and throughout the implementation of the accommodation as needed.[15] Experimentation with accommodations in the pursuit of an effective solution is the hallmark of good faith dialogue.[16]

The employee bears the burden of proving that an accommodation is one that is facially reasonable while the employer bears the burden of proving undue hardship.[17] Once the plaintiff has offered evidence of a facially reasonable accommodation, the employer then must show special circumstances (i.e., case-specific facts) that demonstrate undue hardship.[18] These burdens reflect

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[14] *Id*. § 1630.2(o)(3). While the regulation's use of the term "may" lends a permissive tone to the process it has been construed as mandatory. Kleiber v. Honda of America Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007).

[15] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1173 (10th Cir. 1999); Dillard v. City of Austin, 837 F.3d 557, 562 (5th Cir. 2016)*; see also* Henry H. Robinson, *Guide to Tailoring Interactive Processes to Initial and Supplemental Requests for Leaves of Absence*, 43 EMP. REL. L.J. 4, 5 (2017).

[16] Robinson, *supra* note 15, at 5.

[17] US Airways, Inc. v. Barnett, 535 U.S. 391, 400–02 (2002).

18 *Id*. at 402.

the informational asymmetry in the relationship. The employee is uniquely positioned to determine what effect a disability is having on his or her ability to work. The employee's health care provider, an integral contributor to the interactive process, augments that knowledge by adding a professional opinion on how best to accommodate the employee's disability to enable him or her to perform the essential functions of the job. Thus, the employee initiates the interactive process. As the employer engages in the process, it gains an increasingly better sense of the reasonableness of the accommodations proposed by the employee's camp by evaluating the effectiveness of the proposal against its ability to comply. Trial and error commonly ensue. When compliance would cause undue hardship, the employer has gone as far as the law requires. Much as the declaration of an impasse relieves an employer of continuing in collective bargaining under the National Labor Relations Act, proof of undue hardship ends the interactive process because no accommodation permitted by the ADA is possible.[19] In that event, the disabled employee can be legally terminated.

LOAs have been a particularly vexing accommodation because of their counterintuitive appearance.[20] An employee on leave is not at work. But on closer inspection, LOAs make sense because

[19] 42 U.S.C. § 12112(b)(5)(A) (2018).

[20] Robinson, *supra* note 15, at 17–20 (noting that a LOA followed by one or more extensions vexes managers who must take into consideration the aggregate length of absences as well as the employer's need to maintain control).

they provide the space for disabled employees to adapt control of their disabilities to the needs of their jobs without facing the pressure to perform while on the job. From the employer's perspective, several concerns militate in favor of a cautious receptivity to LOA requests. Compelling a disabled employee to return to work prematurely could raise the specter of placing the employee and, perhaps coworkers, at risk of injury.[21] From an employee relations perspective, forcing employees to return to work too quickly smacks of a cold-heartedness that would hardly endear managers to their workforce. And forcing a disabled employee to return to work at risk of termination invites litigation involving significant financial exposure. According to research conducted by UNUM, from 2012-2018 the average settlement of an ADA case was $2 million dollars.[22] But if a receptive approach is better, how long should an employee's job be protected while on leave?

The ADA does not provide guidance for evaluating the limit of a LOA request so as to determine whether it is reasonable and, if not, when it founders on the shoal of undue hardship.[23] The most helpful signposts can be found in a LOA

[21] 29 C.F.R. § 1630.2(r) (2018).
[22] Paul Falcone, *Disciplining Employees for FMLA and ADA Abuse*, SOC'Y FOR HUM. RESOURCE MGMT. ¶ 4 (July 29, 2019), https://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/FMLA-and-ADA-abuse-.aspx?utm_source=Editorial%20Newsletters~NL%202019-7-29%20HR%20Daily&utm_medium=email&utm_campaign=HR%20Daily
[23] Robinson, *supra* note 15, at 12.

guidance policy published by the EEOC in 2016.[24] As a starting point, disabled employees must be provided access to LOAs on the same basis as other similarly-situated employees.[25] Covered employers must go beyond standing LOA policies to consider providing unpaid leave as a reasonable accommodation if the employee requires it and the leave does not create an undue hardship.[26] The fact that the employer does not offer leave as an employee benefit, that the employee is ineligible for leave under an existing leave policy, or that the employee has exhausted any such leave cannot stand in the way of granting additional LOAs as an accommodation.[27] In the eyes of the commission, the ADA's mandate is to "change the way things are customarily done" to bring disabled employees into the workplace.[28]

In terms of the time parameters of LOAs, no decision or administrative interpretation has carved in stone a minimum period for all covered employers. Logic dictates, however, that bans on annual unpaid LOAs of less than twelve weeks each calendar year would not pass muster because that is the threshold set in the Family Medical Leave Act [FMLA] for employees suffering from serious health

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[24] *Employer Provided Leave and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 9, 2016), https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf [hereinafter *EEOC Leave Policy*].

[25] *Id.* at 1.

[26] *Id.* at 2.

[27] *Id.*

[28] *Id.*

conditions who work for FMLA-covered employers.[29] As a practical matter, the FMLA has created a minimum for LOAs regardless of whether employers are subject to the FMLA.[30] As far as an outer marker is concerned, the federal courts have uniformly held that LOAs with indeterminate return dates receive no protection under the ADA.[31] What lies between provokes the issue addressed in this article**.**

The longer the LOA, the more contentious it becomes. Courts have rejected LOAs as an accommodation based on the sheer length of the leave.[32] This is particularly true when leave is taken incrementally.[33] When multiple LOAs are involved,

[29] 29 U.S.C. § 2602 (a)(1)(A), (B) (2018).
[30] Robinson, *supra* note 15, at 13 (citing Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 967 (10th Cir. 2002)). *Cf*. Jelsma v. City of Sioux Falls, 744 F. Supp. 2d 997, 1017 (D.S.D. 2010) (noting that the FMLA and ADA were designed to dovetail to protect workers).
[31] *See* Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016); Vangas v. Montefiore Med. Ctr., 823 F.3d 174, 181 (2d Cir. 2016); Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759-60 (5th Cir. 1996); Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995); Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990)).
[32] Robert v. Bd. of Cty. Comm'rs of Brown Cty., 691 F.3d 1211, 1218–19 (10th Cir. 2012) (finding that the absence of an estimated return date rendered the leave indefinite and, as such, unreasonable as a matter of law).
[33] *See, e.g*., Whitaker v. Wis. Dep't Health Serv., 849 F.3d 681, 686 (7th Cir. 2017); Dillard v. City of Austin, 837 F.3d 557, 562 (5th Cir. 2016).

the interactive process considers the aggregate length of an initial leave as well as extensions.[34]

The paradigm for judicial and administrative review rejects per se rules in favor of a case-by-case analysis.[35] The reasonableness of a LOA request is case-specific.[36] "Put another way, it is wrong to say categorically that leave *can never* be a reasonable accommodation. [¶] The term 'leave' is a capacious one, however, and the cases do not hold that *any* leave will qualify as a reasonable accommodation."[37] As a result of the fact-intensive standard adopted by the federal courts, drawing a hard and fast outer marker for multiple LOAs has been elusive.[38]

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[34] Robinson, *supra* note 15, at 17; *see also Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION at Undue Hardship Issues ¶ 7 (Oct. 2002), https://www.eeoc.gov/policy/docs/accommodation.html [hereinafter *EEOC Enforcement Guidance*].

[35] *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122 (2nd Cir. 1999); Rascon v. U.S. West Commc'ns, 143 F.3d 1324, 1333 (10th Cir. 1998), *overruled on other grounds by* New Hampshire v. Maine, 532 U.S. 742 (2001); Ralph v. Lucent Tech., Inc., 135 F.3d 166, 172 (1st Cir. 1998).

[36] Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998); *Rascon*, 143 F.3d at 1333–34; *EEOC Leave Policy*, *supra* note 24, at 4–5.

[37] *Garcia-Ayala*, 212 F.3d at 652 (O'Toole, J., dissenting) (italics in original).

[38] *See* Befort, *supra* note 4, at 464–65 (asserting that the more successive leaves resemble an indefinite leave, the less likely courts are to find them reasonable).

Decisions favorable to employees include a case in which a court affirmed judgment for a disabled employee who had been denied a one-month LOA after exhausting a one-year leave.[39] Similarly, an employee's request for a one-month LOA following a ninety-day leave was upheld as a reasonable accommodation because the employer was unable to meet is burden of proving undue hardship.[40] In another case, an employer was guilty of failing to accommodate an employee who had been on leave nearly six months when it denied his request for a ten-day extension.[41] Other courts have been even more hospitable to employees. One went so far as to countenance an employee's LOA request that omitted any statement to the effect that the leave would enable him to perform his job by a date certain.[42]

But not all decisions break in favor of employees. Decisions favorable to employers include a case in which an employer's decision to deny a ten-month LOA in addition to a one-year leave was held to be reasonable.[43] Where an employee requested a two-month LOA following a ten-month leave, the court concluded that the request was unreasonable because the employer had no

[39] *Ralph*, 135 F.3d at 172.
[40] *Rascon*, 143 F.3d at 1335.
[41] Buress v. City of Franklin, 809 F. Supp. 2d 795, 813-15 (M.D. Tenn. 2011).
[42] *See* Dark v. Curry County, 451 F.3d 1078, 1090 (9th Cir. 2006); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001).
[43] Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999).

assurance that the employee could ever return to the job.[44] Yet another court speculated that a medical leave exceeding eighteen months would be unreasonable as matter of law.[45] Others simply entrust the decision to juries as in a case where the district court denied the employer's summary judgment motion by finding that a material question of fact existed as to whether a one-month extension of a thirteen-week LOA constituted a reasonable accommodation.[46]

Tensions are exacerbated when employers adopt policies that place caps on the amount of leave employees can request. Employers crave the predictability and uniformity of "maximum leave" or "no fault" policies to control employee absences.[47] The hard and fast rules for medical as well as non-medical leaves are thought to enhance clarity and transparency.[48] The EEOC formally recognizes the validity of such policies but cautions that the uniformity they seek cannot absolve an employer from the obligation to grant exceptions based on the individualized, interactive engagement with a disabled employee.[49] In effect, however, the EEOC

[44] Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225–26 (11th Cir. 1997).
[45] Walsh v. UPS, 201 F.3d 718, 726 (6th Cir. 2000).
[46] Powers v. Polygram Holding, Inc., 40 F. Supp. 2d 195, 202 (S.D.N.Y. 1999).
[47] Judy Greenwald, *Firms Struggle to Comply with ADA Rules*, BUS. INS. (Aug. 21, 2011), https://www.businessinsurance.com/article/20110821/news06/308219994/firms-struggle-to-comply-with-ada-leave-rules
[48] Robinson, *supra* note 15, at 19.
[49] *EEOC Leave Policy*, *supra* note 24, at 5.

rejects maximum leave policies by requiring an employer to consider whether the LOA is reasonable or show that compliance would pose an undue hardship.[50] Historically, most federal courts have concurred.[51]

More recently, however, an unreported decision that raised a warning flag for employees was handed down in *Billups v. Emerald Coast Utilities Authorities*.[52] The employee was granted leave under the FMLA to recuperate from a shoulder injury.[53] Thereafter, his doctors advised that he needed surgery that would require at least six months of convalescence but did not provide a firm return date.[54] When he failed to report by a deadline set by the employer he was terminated.[55] In affirming the lower court's dismissal of the case, the Eleventh Circuit held that by failing to provide a firm date for returning to work and the assurance that he would be

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[50] *Id.* at 6*; see also E*^{EOC} *Enforcement Guidance*, *supra* note 34, at Leave ¶ 4 (noting that if an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its maximum, or "no-fault," leave policy to provide the employee with the additional leave unless it can show that there is another effective accommodation available or that granting additional leave constitutes undue hardship); Robinson, *supra* note 15, at 19 (noting that absence control policies create uniformity and that the EEOC is opposed to uniformity).

[51] *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999).

[52] 714 F.App'x 929 (11th Cir. 2017).

[53] *Id.* at 931.

[54] *Id.* at 932.

[55] *Id.* at 933.

able to perform the essential functions of the job upon his return, he was no longer a qualified individual under the ADA and, therefore, was undeserving of leave as an accommodation.[56] While plaintiff's failure to provide a return date in that case tends to minimize its impact on how the federal courts have traditionally viewed multiple LOAs,[57] a growing hostility in the circuit courts to such leaves is discernable.[58] As then Judge, now Justice, Gorsuch adroitly noted in a 2014 opinion, reasonable accommodations "are all about enabling employees to work, not to not work."[59]

III. THE SEVENTH CIRCUIT'S GROUNDBREAKING DECISION TO UPHOLD AN EMPLOYER'S BAN ON MULTIPLE LOAS

[56] *Id*. at 934–36.
[57] *Cf*. Befort, *supra* note 4, at 471 (noting that successive leave requests should be deem reasonable if for short durations relative to the initial leave and if accompanied by a medical opinion that the employee will likely be able to work when the leave ends).
[58] *See* Delgado Echevarria v. AstraZeneca Pharm. LP, 856 F.3d 119, 130-31 (1st Cir. 2017) (finding that an employee's request for a one year leave following a five month leave does not constitute a facially reasonable accommodation because it "jumps off the page"); Hwang v. Kan. State Univ., 753 F.3d 1159, 1161–62 (10th Cir. 2014) (affirming dismissal of a professor's Rehabilitation Act case on the ground that the university was entitled to enforce a six month limit on leaves because an employee who is incapable of working for that period is not an employee capable of performing the essential functions of the position).
[59] *Hwang*, 753 F.3d at 1161–62.

Raymond Severson, who worked in a physically demanding job, lead operator, at Heartland Woodcraft, a fabricator of retail display fixtures, wrenched his back at home and thereby aggravated a degenerative back condition.[60] He requested, and received, a twelve-week LOA under the FMLA to recuperate.[61] The day before he was slated to return to work, he called his supervisor to report that his condition had worsened, that he would undergo back surgery, and that he would need an additional two months of leave.[62] Heartland terminated Severson but invited him to reapply when he recovered from surgery and was medically cleared to work.[63] Casting aside an amicus curiae brief from the EEOC, the district court made short shrift of Severson's disability discrimination lawsuit by granting defendant's motion for summary judgment on the grounds that the additional leave requested did not constitute a reasonable accommodation.[64] Casting aside another amicus curiae brief from the EEOC, the Seventh Circuit made short shrift of his appeal by unanimously holding that a long-term LOA cannot constitute a reasonable accommodation.[65] The opinion of Judge Sykes for the panel can be succinctly distilled: Because a reasonable accommodation is one that enables an employee to perform the essential functions of his or

[60] Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 478 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018).
[61] *Id.*
[62] *Id.* at 479-80.
[63] *Id.*
[64] *Id.* at 478-79.
[65] *Id.* at 482.

her job and a lengthy LOA does not make it possible for an employee to perform the job requirements, the employee is not a qualified individual under the ADA.[66]

> [A] long term leave of absence cannot be a reasonable accommodation. … '[n]ot working is not a means to perform the job's essential functions. … Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working. Accordingly … '[a]n inability to do the job's essential tasks means that one is not 'qualified'; it does not mean that the employer must excuse the inability.[67]

The court then confronted the EEOC's support for long term medical leave and made even shorter shrift of that argument: the ADA is not a leave statute. "Perhaps the more salient point is that on the EEOC's interpretation, the length of the leave does not matter. If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That's an untenable

[66] *Id*. at 481-82.
[67] *Id*. at 481 (citations omitted).

interpretation of the term 'reasonable accommodation'."[68]

The court did not cite, much less distinguish, any of the federal cases that sanctioned multiple LOAs. It did not explain why plaintiff's medical condition during his aggregate leave, rather than at the terminus of the second leave, was key to analyzing the reasonableness of the LOA.[69] It did not hint at any logistical or financial detriment Heartland would endure if it had awaited plaintiff's return following a second leave and, therefore, undue hardship played no role in the decision. By neglecting plaintiff's medical justification for leave, and Heartland's requirement for the work of a lead operator to be done, the court utterly disregarded the individualized, interactive exchange process that

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[68] *Id*. at 482. In an unreported decision handed down shortly after *Severson*, another panel of the Seventh Circuit emphasized its disdain for multiple LOAs in Golden v. Indianapolis Hous. Agency, 698 F. App'x 835 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1446 (2018). After taking sixteen weeks of leave an employee recuperating from breast cancer requested an additional six months. Noting that the employee had represented on a long-term disability application that she could not perform the essential functions of her position, the Seventh Circuit affirmed dismissal of her case on the grounds that she was not a qualified individual under the ADA. *Id*. at 837.

[69] Determining whether an employee is a qualified individual under the ADA normally occurs at the time of the adverse employment decision. Ammons v. Aramark Unif. Servs., Inc., 368 F.3d 809, 818 (7th Cir. 2004). However, when the requested accommodation is a LOA, that determination is made when the employee returns from leave. Donelson v. Providence Health & Servs. – Wash., 823 F. Supp. 2d 1179, 1189–90 (E.D. Wash. 2011).

makes the ADA work. Nor did the court explain why the interpretation of the ADA advanced by the EEOC, the agency charged with its enforcement, was not entitled to deference.[70]

So startling was *Severson* that human resource professionals have urged employers outside the jurisdiction of the Seventh Circuit not to follow it. For example, David Fram, ADA director with the National Employment Law Institute, states that *Severson* "is inconsistent with virtually all of the other courts and is certainly inconsistent with what the EEOC has said."[71] Taking a similar, though more restrained, tone, nascent legal scholarship has been critical of the court's prioritization of inflexible LOA limits over the more traditional case-by-case analysis used to determine the reasonableness of leave as an accommodation.[72] But the most succinct critique

[70] The interpretation of a statute by an agency charged with enforcing the statute is entitled to deference if the statute is ambiguous and the agency's interpretation is reasonable. City of Arlington v. FCC, 569 U.S. 290, 296 (2013); Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). EEOC regulations construing the ADA have been accorded substantial deference. Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 n.4 (3d Cir. 1998) (en banc).

[71] Allen Smith, *Multimonth ADA Leave Isn't Required in the 7th Circuit*, SOC'Y FOR HUM. RESOURCE MGMT. (Apr. 10, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-declined-to-review-ada-leave-case.aspx

[72] *See* Meg Ziegler, Comment, *ADA Litigation Cannot Reasonably Accommodate Per Se Rules*, 60 B.C.L. REV. II.-180, II.-196 (2019) (asserting that rather than creating a bright line rule, the Seventh Circuit should have focused on the whether a multimonth leave is reasonable in most cases and, if not, whether it would be reasonable given the specific facts of

comes from another Seventh Circuit judge a month after *Severson* was decided. Judge Rovner wrote a concurring opinion in an unreported case in which she agreed that the court was bound by stare decisis to follow *Severson* in an ADA case involving LOAs but expressed regret in having to do so. "I continue to believe that a per se rule declaring that a long-term leave of absence can never be a reasonable accommodation under the ADA, as opposed to one requiring a factual determination of undue hardship, is contrary to the language of the Act."[73]

IV. DEFINING UNDUE HARDSHIP BY JOB CATEGORY BEFORE REQUESTING LOA ACCOMMODATIONS

Reasonable accommodation and undue hardship are inexorably intertwined tenets of the ADA. The former term is inherently variable. It springs from the employee's disability. And while individuals may suffer from similar disabilities, how each person confronts his or her disability defies uniform treatment. Thus, logic dictates that the

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a case); Note, *Employment Law—Extended Leave and the ADA—Seventh Circuit Rules that a Multimonth Leave of Absence Cannot be a Reasonable Accommodation*, 131 HARV. L. REV. 2463, 2469 (2018) (contending that by setting an inflexible rule that characterizes multimonth LOAs as per se unreasonable, the *Severson* court went too far and instead should have established a standard that characterizes multimonth leaves as presumptively unreasonable while allowing employees to show special circumstances to overcome that presumption).

[73] *Golden*, 698 F.App'x at 838 (Rovner, J., concurring).

accommodation of individual requests must be determined on a case-by-case basis. The interactive process is designed to facilitate that determination by allowing the employee to submit a request that an employer will adopt, modify or reject (in favor of a counter-proposal). Give and take as well as trial and error testify to the fluidity of the process—one that can only succeed for both sides if good faith is evident. Flexibility is key. Thus, hard and fast rules placing lines of demarcation on the reasonableness of LOAs is repugnant to the ADA. The Seventh Circuit erred in Severson.

Notwithstanding its faulty rationale, the court's motivation to provide clear guidance to employers is laudable.[74] Neither employee nor employer gain from the prospect of expensive, time-

[74] *See* Dave McClurg, *Out of Office: Extended Leave Under the ADA*, 91 WIS. L. 18, 23 (2018) (opining that given the stature of the judges on the *Severson* panel, the denial of certiorari and the congruence of its reasoning with the *Hwang* decision, other circuits will likely find *Severson* to be very persuasive precedent when confronted with the issue of the reasonableness of extended LOAs); *see also* Jeff Nowak, *Viewpoint: Court Decisions Scale Back Additional Leave After FMLA is Exhausted*, SOC'Y FOR HUM. RESOURCE MGMT. (Oct. 31, 2017), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/rulings-scale-back-post-fmla-leave.aspx (predicting that management lawyers will be more aggressive in handling LOA requests based on *Severson*); Patrick Dorrian, *Employers Get 'Holy Grail' Ruling on Leave as Job Accommodation*, BLOOMBERG BNA (Oct. 26, 2017), http://fmlainsights.lexblogplatformthree.com/wp-content/uploads/sites/311/2017/10/Severson-decision-BNA-write-up.pdf (noting that *Severson* "goes a long way" in setting parameters to guide employers in handling LOA requests).

consuming litigation over the reasonableness of an accommodation. The traditional approach of federal courts, as well as the EEOC, has focused on the reasonableness of an accommodation. However, employees are harmed by this seemingly more "objective" focus on an accommodation's reasonableness because employers do not have to articulate the harm an accommodation would cause.[75] When employees request LOAs as the accommodation, firms have an incentive to discharge employees early in their leave when a firm return date may not be medically determined or to adopt policies that deny leave altogether.[76]

A more effective and transparent approach to evaluating multiple LOAs would shift the focus to undue hardship—a variable over which employers have superior information and accurate assessment methods—by analyzing an employer's ability to tolerate LOAs broken down by particular job classifications. Predictability in articulating an employer's tolerance for LOAs not only minimizes the likelihood of litigation, but also enhances employee relations because employees have a clearer idea of what is possible before the leave request is made. There is precedent for focusing on undue hardship so the shift from reasonable accommodation would be more of a jurisprudential evolution rather than a revolution.[77] If undue

[75] Hickox & Guzman, *supra* note 10, at 475–76.
[76] *Id.* at 476.
[77] *See* Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782-83 (6th Cir.1998) (declining to adopt a bright-line rule for a maximum LOAs); Criado v. IBM Corp., 145

hardship can be determined there is no need to define what reasonable accommodation is. It is everything that is not undue hardship. Undue hardship is the laboring phrase in the term, not reasonable accommodation. If 'unreasonable accommodation' seems not to make sense, it is because reasonable accommodation lacks a meaning other than undue hardship. The terms should be read together, and the opposite of the one is the other.[78]

Employers create jobs. They define the description of those jobs, develop specifications for the qualifications of people who can perform those jobs, and engage in the recruiting and selection necessary to find qualified people. Thus, from the point of job inception, the employer is armed with the knowledge of whether, and to what extent, a job classification can go unperformed, underperformed or be filled by other workers (permanent or temporary) if an employee needs leave as an accommodation. This knowledge determines the logistics and cost of the hardship a LOA will pose for discrete job classifications on a firm-wide basis. Advancing the articulation of the hardship analysis to the point of job creation and memorializing it in an employee handbook or collective bargaining agreement made available to applicants at the time of hire, is more transparent because everyone would know what the parameters for leave accommodations

F.3d 437, 441 (1st Cir. 1998) (affirming judgment for an employee who was terminated after a one year LOA because the employer could not show that the leave posed an undue hardship).

[78] Weber, *supra* note 3, at 1148.

could be. After all, the FMLA works well due to the clarity and fixed limits of the leave it affords. Advancement would also be fairer in that the determinants of hardship would be considered based on job descriptions without regard to the specific disability of any one employee or group of employees. What would this advance classification look like?

Just as employers classify positions as exempt or non-exempt for overtime purposes, jobs could be classified based on the nature and extent to which an employer could tolerate deviations from the job description. More particularly, such classifications could indicate whether, and to what extent, a LOA is possible for workers in discrete job classifications who may require leave in the future. The impact of an employee's absence on coworkers, whether particular job duties can be performed in an appropriate and timely manner, and the detriment to the employer's operations (taking into account the employer's logistics and financial resources) would be highly relevant to assess the extent to which a job classification could withstand a LOA.[79]

So, for example, positions calling for workers with no, or minimal, skills that could be easily filled with replacements or go unmet for finite periods, could receive a higher threshold for hardship status taking into consideration the factors defined by the

[79] *EEOC Leave Policy*, *supra* note 24, at 9; *see also* Hickox & Guzman, *supra* note 10, at 474 (asserting that the determination of whether an accommodation poses an undue hardship should be based on specific facts concerning the employee requesting leave as well as needs of the employer).

ADA. At the other end of the spectrum, highly skilled positions, or those demanding an exceptional educational background, licensure, particular industry knowledge or familiarity with customers, would probably fall lower on the hardship spectrum in that an employee's time away from work would be more difficult for an employer to tolerate. In those circumstances, employees who are forced to accommodate a disability would be aware of the limited duration within which they could be away from work while protecting their job. However, this possibility does not invite a quicker pink slip. On the contrary, armed with knowledge that an employee's absence poses a heightened risk of hardship, disabled employees and their health care providers would be motivated to search for accommodations that would enable the individual to reduce the leave, or avoid it altogether, in favor of other accommodations that produce a better fit for the organization while effectively responding to an employee's disability (e.g. reduced work schedules, temporary reassignments, telecommuting or job sharing).

The articulation of undue hardship by job classifications would be presumptive such that an employee in need of a LOA would be permitted to rebut the presumption based on the particular facts of his or her position during the interactive process. Specifying the hardship potential for a position prior to engaging in the interactive process for a particular disabled employee would go a long way to facilitating the process when the need arises. If the outcome of the interactive process demonstrates that

granting a LOA produces undue hardship, then termination of a disabled employee is consonant with the ADA. After all, work has to get done and employers need employees to do the work. But if a termination were to occur, emphasizing undue hardship over reasonable accommodation is a fairer way of responding to leave requests than terminating absent employees based on maximum leave policies. And the likelihood of litigation should recede.

V. CONCLUSION

A decade ago, the focus of federal court litigation pivoted from defining disabilities to determining what constitutes reasonable accommodation.[80] A search of Westlaw shows that since then, slightly over five hundred federal decisions have been handed down that deal with LOAs under the ADA. That explosion of costly, debilitating litigation does not benefit disabled employees, their employers, or society as a whole. And the imposition of maximum cutoffs by employers anxious to control employee absences only fuels the eruption. The specification of employer tolerance for LOAs, made clearly and proactively by job classifications, provides the foundation for defining hardship for employers who must deal with disabled employees. Although no employer has yet adopted this approach it is certainly a proposal worth consideration. The good faith of

[80] Reagan S. Bissonnette, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C.L. REV. 859, 860–61 (2009).

the interactive process that greases the wheels of the ADA would be enhanced while the acrimony wrought by litigation should diminish.

- END OF ARTICLES -

- BOOK REVIEW -

BOOK REVIEW

LITIGATION NATION: A CULTURAL HISTORY OF LAWSUITS IN AMERICA, by Peter C. Hoffer and John D. Smith. London, United Kingdom: Rowman & Littlefield Publishers, 2019. 232 pp. Hardbound. $35.00. ISBN: 978-1538116579.

MICHAEL CONKLIN [*]

> "Going to court, wagering one's law, accepting the outcome or at least the authority of the law—these were the struts and beams on which the new nation rose."[1]

This is a review of the book *Litigation Nation: A Cultural History of Lawsuits in America*.[2] The book provides an understanding of U.S. history

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[1] PETER CHARLES HOFFER & JOHN DAVID SMITH, LITIGATION NATION: A CULTURAL HISTORY OF LAWSUITS IN AMERICA 12 (2019).

[2] *Id.*

through the lens of civil litigation as a narrative of political and social change in America.

Litigation rates in America are on a clear upward trajectory, but there is also an ebb and flow to this trend. The authors use these variations to tell the story of America, which is highly effective because changes in litigation demonstrate conflict over changing beliefs.[3] Furthermore, litigation rates are not only informative as to the factors that result in people filing lawsuits but also as to the factors that result in others *not* filing lawsuits.

The book addresses these large-scale trends in litigation, but for the most part it focuses on specific cases that illustrate the individual motivations behind the cumulative trends. This don't-miss-the-trees-for-the-forest approach results in a highly engaging read. It illustrates what causes people to file lawsuits and how the end result profoundly affects real people. Rather than focusing on the landmark cases that most are already familiar with, the authors selected lesser-known, yet highly intriguing, cases. One such example is found in the defamation chapter, which contains the case of a seventeenth-century woman who sued for defamation after neighbors accused her of various witchcraft activities including casting spells to make people sick.[4]

The book is divided into eight chapters, each examining a broad category of litigation. The first chapter looks at a sharp increase in defamation lawsuits in the seventeenth-century colonies.

[3] *Id.* at 193.
[4] *Id.* at 19.

Chapter two looks at eighteenth-century lawsuits arising from land disputes caused by changing real estate transactions. The third chapter focuses on lawsuits regarding slavery in the Antebellum South. Chapter four analyzes worker lawsuits against employers. Chapter five looks at railroad shareholder lawsuits. The sixth chapter addresses rising divorce rates and the accompanying lawsuits in the early twentieth century. Chapter seven discusses the civil rights lawsuits of the second half of the twentieth century. Finally, chapter eight examines the rise of consumer tort cases.

The following are a few of the highlights from the defamation chapter to demonstrate the nature of the book:

Despite extramarital sex being common,[5] accusations of sexual misconduct in the seventeenth-century colonies was highly inflammatory.[6] Defamation lawsuits also sought compensation for false accusations of theft, verbal assault, and even witchcraft.[7]

These surges in defamation suits came at certain points in the life cycle of a colonial settlement.[8] They tended to spike after the initial job of clearing the land was completed and the settlers began to have more free time to gossip.[9] Defamation trends were not uniform among seventeenth-century

[5] *Id.* at 15 ("[A]bout half of all births came before betrothal.").
[6] *Id.*
[7] *Id.* at 18.
[8] *Id.* at 15.
[9] *Id.* at 15–16.

communities, and some experienced an "epidemic of defamation."[10]

The surge in defamation suits in the colonies experienced an equally abrupt cessation in the late seventeenth century.[11] This is attributable to the presence of African slaves.[12] Because the initial surge in defamation lawsuits was largely the result of English settlers experiencing uncertainty regarding new class structures, the presence of slaves created a sense of rough equality among whites. The decrease in defamation suits was also driven by the fact that the law did not recognize a cause of action for defamation against, or by, these new slaves.[13]

The chapter ends by discussing modern defamation issues, such as *New York Times Co. v. Sullivan*,[14] a defamation case based on a Yelp review,[15] and the 2018 lawsuit by three parents whose children were killed at Sandy Hook and accused by Alex Jones of being participants in a hoax.[16]

The book provides a look at U.S. history from a novel and compelling point of view. The utilization of individual cases helps emphasize the motivations of everyday plaintiffs and the ways our legal system affects them. The book is brilliantly summed up by the authors in the following quote: "In America,

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[10] *Id.* at 17.
[11] *Id.* at 20.
[12] *Id.*
[13] *Id.*
[14] *Id.*; *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[15] HOFFER & SMITH, *supra* note 1, at 33–34.
[16] *Id.* at 32–33.

litigation is both effect and cause. In times of rapid and significant social and cultural change, litigation rates rise because the gap between older values and new ones widens. Plaintiffs defending tradition face defendants who have adopted newer ways, or the reverse."[17]

[17] *Id.* at 193.

- END OF BOOK REVIEW -

INFORMATION FOR CONTRIBUTORS

Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the following formatting and style rules, including the quick tips below, will be strongly preferred. These revisions are effective for Volume 21 of the *Atlantic Law Journal* and subsequent volumes. In order to simplify the submissions process for authors we have largely conformed the *Atlantic Law Journal* style sheet to the standards of the *Southern Law Journal* with the permission of its editors. We extend our thanks to the *Southern Law Journal* for their gracious permissions.

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APPENDICES

- Identify all appendices by letter (ex. Appendix A, Appendix B, etc.)

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1. Use Microsoft WORD only (Word 2007 or later strongly preferred).

2. Use the BLUEBOOK! The QUICK REFERENCE: LAW REVIEW FOOTNOTES on the flip-side of the Bluebook Front Cover and the INDEX are much easier to use than the Table of Contents. Use both the QUICK REFERENCE and the INDEX! (The Index is particularly well done). If you don't have the latest version of the Bluebook, buy one!

3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations
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4. Statutes: 22 U.S.C. § 2541 (1972). See QUICK REFERENCE (and BB Rule 12) for examples.

5. Constitutions: N.M. CONST. art. IV, § 7. See QUICK REFERENCE (and BB Rule 11) for examples.

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