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Andrew White

RECTIFYING AN EMPTY GESTURE: WHY PLACEMENT ON PAID ADMINISTRATIVE LEAVE SHOULD CONSTITUTE "ADVERSE EMPLOYMENT ACTION" FOR THE PURPOSES OF A FIRST AMENDMENT RETALIATION CLAIM

*Andrew White**

I. INTRODUCTION

The freedoms of speech and press are among the most fundamental liberties enshrined in the United States Constitution, protecting citizens from censorship by the government.[1] The Supreme Court, however, has held that several classes of speech should receive little or no protection at all.[2] One class of speech the Supreme Court has identified as receiving lesser protection under the First Amendment is speech made by public employees. For many years, public employees enjoyed no free speech rights, and the prevailing view in the courts was one expressed by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes Jr. regarding a local police officer who was fired for political canvassing: a public employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3]

This view remained the norm until the late 1960s, when the progressive Warren Court announced its decision in *Pickering v. Board of Education*.[4] In *Pickering*, the Court made a significant shift in public employee speech jurisprudence when it held that an Illinois public school teacher could not be fired for exercising his right to speak on issues of public importance.[5] In creating this newfound free speech protection for public employees, the Court established a balancing test to determine whether a public

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1. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. *See, e.g.,* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include… insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of peace.").

3. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see also* David L. Houston Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, ABA J. (Feb. 25, 2022, 2:16 PM), https://www.abajournal.com/magazine/article/public_employees_private_speech. [https://perma.cc/JMW4-2ZAW].

4. 391 U.S. 563 (1968).

5. *Pickering*, 391 U.S. at 574.

employee's speech enjoys First Amendment protection.[6] Justice Marshall wrote for the Court, explaining that a balance must be made between the "interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[7]

After *Pickering*, the Court refined this public concern and balancing inquiry in *Connick v. Myers* when it emphasized that public employees' free speech protection extends only to speech on true matters of *public* concern, and not to an employee grievance concerning internal office policy.[8] The Court also refined the government employer's side of the balancing scale, holding that the First Amendment does not require a public employer to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[9] The *Pickering-Connick* balancing test became the official legal framework for analyzing public employee speech for several decades until the Court introduced another threshold question to the issue in *Garcetti v. Ceballos*.[10] In *Garcetti*, the Court held that when public employees make statements pursuant to their official job duties, they enjoy no First Amendment protection of free speech at all.[11] So, before moving to the *Pickering-Connick* balancing test, courts must first determine whether the public employee engaged in speech pursuant to their official job duties.

Garcetti's newly added threshold inquiry to analyzing public employee free speech claims further limited public employee speech rights, thus making it harder for such employees to bring successful First Amendment retaliation claims against their employers.[12] Lower courts differ on what elements constitute a successful First Amendment employment retaliation claim, but all of them require that the public employee show they were engaged in protected conduct[13] and that adverse action was taken against them, at least in part, due to their speech or expressive conduct.[14] Moreover, the lower courts generally define "adverse action" in this

6. *See id.* at 568.

7. *Id.* at 568.

8. 461 U.S. 138, 154 (1983).

9. *Connick*, 461 U.S. at 154.

10. 547 U.S. 410 (2006).

11. *Garcetti*, 547 U.S. at 421.

12. First Amendment retaliation claims are commonly brought under 42 U.S.C. § 1983. *See, e.g.*, *Connick*, 461 U.S. at 141; Rankin v. McPherson, 483 U.S. 378, 382 (1987); *Garcetti*, 547 U.S. at 415; Lane v. Franks, 573 U.S. 228, 234 (2014).

13. In other words, the speech made by the plaintiff public employee must satisfy both the *Pickering-Connick* balancing test and the *Garcetti* threshold inquiry.

14. *See, e.g.*, Breaux v. City of Garland, 205 F.3d 150, 156 (5th Cir. 2000); Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir. 2013); Sensabaugh v. Halliburton, 937 F.3d 621, 627-28 (6th Cir. 2019).

context as action that is reasonably likely to chill or deter employees from engaging in constitutionally protected speech.[15] Naturally, the subjectivity of what actions are likely to deter public employees from engaging in protected speech has led to a split in opinions from the federal circuits.

One such split involves the question of whether paid administrative leave can constitute an adverse action giving rise to a First Amendment employment retaliation claim. Several circuits have held that paid administrative leave cannot constitute an adverse action,[16] while others maintain that paid leave could, under certain circumstances, be considered an adverse action.[17] Recently, the Eleventh Circuit was presented with an opportunity to join this fray, but it did so by declining to adopt a broad or bright-line rule as to whether paid leave always does or does not constitute an adverse action for purposes of a First Amendment retaliation claim.[18] Instead, the Eleventh Circuit, in *Bell v. Sheriff of Broward County*, decided the case "narrowly on the complaint" before it, holding that the plaintiff, a sheriff deputy who was suspended for five days with pay following the publication of his piece in a local newspaper criticizing the sheriff for his response to the COVID-19 pandemic, did not suffer adverse action.[19]

This Note argues that the circuit courts who maintain that paid leave does not constitute an adverse action fail to properly consider that simply being placed on paid administrative leave can, in and of itself, be adverse action, and that paid administrative leave should almost always be considered adverse action for the purpose of a First Amendment retaliation claim.[20] Section II of this Note first briefly discusses the history and development of public employee speech jurisprudence. Section II also explains how lower courts have defined both what a public employee plaintiff must show for a successful First Amendment retaliation claim and what constitutes an adverse action in this context. Section II concludes by examining the key decisions that make up the current circuit split over whether paid administrative leave can constitute an adverse action.

Section III of this Note argues that the circuits which have concluded

15. *See Dahlia*, 735 F.3d at 1078; *Sensabaugh*, 937 F.3d at 638; Bell v. Sheriff of Broward County, 6 F.4th 1374, 1379 (11th Cir. 2021).

16. *See Breaux*, 205 F.3d at 158; *Sensabaugh*, 937 F.3d at 629.

17. *See Dahlia*, 735 F.3d at 1078-79.

18. *See Bell*, 6 F.4th at 1379.

19. *Id*.

20. This Note, however, does not argue for or against either the merits of current public employee speech jurisprudence, nor does it argue for a change in what a plaintiff needs to show in order to bring a successful First Amendment retaliation claim. Rather, it simply argues that paid administrative leave should be considered adverse action in this context.

that paid administrative leave cannot be considered adverse action are too short-sighted, as they fail to account for the stigmatization and the other negative effects of an employee being placed on administrative leave, even with pay. In that same vein, Section III further contends that the exigent fact-based approaches employed by the Ninth and Eleventh Circuits are also blind to these same practical realities. While their approach allows for a greater chance of a successful claim, it still is not sufficient to ensure that constitutionally protected public employee speech is, indeed, protected. Finally, Section IV concludes by reinforcing the need for the United States Supreme Court to resolve this circuit split by adopting this Note's suggested bright-line rule: that placement on paid administrative leave constitutes adverse employment action in the context of a First Amendment retaliation claim. The adoption of a bright-line rule will preserve the already narrow path to recourse available to public employees who are punished for exercising their right to make constitutionally protected speech.

II. BACKGROUND

The First Amendment's free speech clause provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[21] However, until the late 1960s, this important civil liberty did not cover speech made by public employees. [22] Ultimately, the Supreme Court's decision in *Pickering* granted public employees tangible free speech rights.[23] Subsequent cases helped shape and refine the available, albeit narrow, route for public employee plaintiffs to seek redress when their employer retaliates against them for engaging in constitutionally protected speech or expression.[24]

This Section discusses the history and background of public employee free speech jurisprudence leading to the circuit split over whether paid administrative leave can constitute an adverse action for the purpose of a First Amendment retaliation claim. First, Part A discusses the major Supreme Court decisions that have shaped public employee speech jurisprudence. Second, Part B explains how the lower courts have taken the major decisions discussed in Part A to shape the requirements for a plaintiff to succeed in a First Amendment retaliation claim. Finally, Part C addresses the circuit split over whether paid leave can constitute adverse action for purposes of First Amendment retaliation claims and

21. U.S. CONST. amend. I.

22. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

23. *See id.* at 574.

24. *See infra* Parts A-C.

discusses some of the most recent cases decided in circuits across the country on this issue.

A. Public Employee Speech: The Doctrinal Landscape from 1892-2006

The origin of the public employee speech doctrine can be traced back to Justice Oliver Wendell Holmes Jr. before he assumed the position of Associate Justice on the United States Supreme Court.[25] In *McAuliffe v. City of New Bedford*, a policeman in New Bedford, Massachusetts was fired for engaging in political canvassing in violation of local police regulations.[26] Then-Massachusetts Supreme Judicial Court Justice Holmes dismissed the officer's complaint, writing that the policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[27] Holmes reasoned that, much like when an individual accepts an offer for private employment, a person who accepts public employment suspends his constitutional rights to free speech as terms of his employment, and the city was free to "impose any reasonable condition upon holding offices within its control."[28] Thereafter, public employment was seen as a privilege rather than a right, and thus, it could be subject to restrictions and conditions that would otherwise be unconstitutional, such as the waiving of First Amendment free speech rights.[29]

Public employees were practically left without any free speech protections until 1968, when Illinois public high school teacher Marvin Pickering was dismissed from his position after writing a letter to a local newspaper criticizing the local board of education and district superintendent for the way they had handled tax proposals to raise revenue for the schools.[30] In *Pickering v. Board of Education*, the Court rejected the traditional Holmes theory that courts had followed since 1892.[31] However, the Court simultaneously recognized that a state has interests as an employer "in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation

25. Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 9-10 (2013).

26. *See* McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

27. *Id.*

28. *Id.* at 517-18.

29. *See* Shinar, *supra* note 25, at 10.

30. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

31. *Id.*at 568 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967)) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

of the speech of the citizenry in general."[32] Thus, a balancing test was established to help determine whether certain public employee speech is protected, one that balances the "interests of the [public employee], as a citizen, in commenting upon matters of public concern" with the interests of the state, as an employer, "in promoting the efficiency of the public services it performs through its employees."[33] The Court ultimately sided with Pickering, concluding that a teacher may not be fired for exercising their right to speak on issues of public importance.[34]

Fifteen years after *Pickering*, the Supreme Court revised and refined its balancing test in *Connick v. Myers*.[35] In *Connick*, the Court reiterated its balancing concerns from *Pickering*,[36] but emphasized that when public employee speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices."[37] The speech in dispute in *Connick* was a questionnaire circulated by an assistant district attorney in New Orleans, one that the Court characterized as primarily an "employee grievance concerning internal office policy," rather than speech that discussed matters of public concern.[38] The Court did acknowledge, however, that one of the questions on the questionnaire touched on matters of public concern.[39] Nevertheless, after running that question through its *Pickering* balancing analysis, the Court sided with Connick, holding that Connick's reasonable belief that the questionnaire would "disrupt the office, undermine his authority, and destroy close working relationships," coupled with the absence of public concern in the rest of the questionnaire, removed any constitutional protection Myers may have had to engage in such expressive activity.[40]

Connick transformed the "matters of public concern" issue into a threshold question, one which must be answered "yes" in order for a court to proceed to the balancing portion of the inquiry, weighing the public employee speech's importance against the government's interest in maintaining efficiency and avoiding internal disruption.[41] The Court in *Connick* also declined to define what speech would constitute matters of public concern, and lower courts would later grapple with this issue,

32. *Id.*

33. *Id.*

34. *Id.* at 574.

35. 461 U.S. 138 (1983).

36. *See Connick*, 461 U.S. at 143.

37. *Id.* at 146.

38. *Id.* at 154.

39. This question asked if other assistant district attorneys ever felt "pressured to work in political campaigns on behalf of office supported candidates." *Connick*, 461 U.S. at 149.

40. *Id.* at 154.

41. *See* Shinar, *supra* note 25, at 11.

leaving no certainty for scholars and courts to rely on.[42] The *Pickering-Connick* balancing analysis, however, remained the leading framework on cases involving public employee speech rights for the next two decades.[43] Courts protected public employee speech when they spoke on matters of public concern, unless the speech was outweighed by disruption that reasonably can or does interfere with the efficiency of the delivery of public services.[44] It was not until 2006 that the Court would make any significant adjustments to the public employee speech doctrine.[45]

This significant change to public employee speech doctrine arose in the Supreme Court's ruling in *Garcetti v. Ceballos*.[46] In *Garcetti*, a deputy district attorney in Los Angeles County was assigned to investigate alleged inaccuracies in an affidavit used to obtain a search warrant in a pending criminal matter.[47] Following his investigation, the deputy district attorney determined that the affidavit contained serious misrepresentations.[48] He recommended to his superiors that the criminal case be dismissed through a memorandum, but they decided to proceed with the prosecution.[49] The defendants decided to call the deputy district attorney to testify about his observations of the affidavit's content, and the deputy truthfully recounted his findings about its misrepresentations.[50] Subsequently, the deputy was allegedly subjected to a series of retaliatory employment actions for providing his truthful testimony, including demotion, denial of a promotion, and transfer to another courthouse.[51]

In a divided five-to-four decision, the Court first emphasized that *Pickering* only protected public employee speech when they spoke as a *citizen* on a matter of public concern, and not as an employee.[52] Here, the Court noted, the deputy district attorney did not speak as a citizen when he wrote the memorandum recommending dismissal and criticizing the affidavit.[53] Rather, his expressions within were "made pursuant to his

42. *See* Stephen Alfred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 43-44 (1988).

43. *See* Matt Wolfe, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. CHI. L. REV. 1473, 1476 (2010).

44. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 384 (1987) (emphasizing the principles and balancing inquiry from *Pickering* and *Connick*).

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

46. *Id.*

47. *Id.* at 413.

48. *Id.* at 414.

49. *Id.*

50. *Id.* at 414-15.

51. *Id.* at 415.

52. *Id.* at 418.

53. *Id.* at 421.

duties as calendar deputy."[54] The Court sided with the government, and it introduced a new, bright-line threshold inquiry to the *Pickering-Connick* analysis: "when public employees make statements to their official duties, the employees are not speaking as citizens for First Amendment purposes."[55] The new *Garcetti* rule added an extra step to the traditional two-prong inquiry: it is inconsequential if the public employee spoke on a matter of public concern if they did so pursuant to their official job duties.[56]

Garcetti signaled a significant setback for the ability of public employees to speak without the fear of retaliation, and it established an additional hurdle that public employee plaintiffs must jump over in order to bring a successful First Amendment retaliation claim. The exact formulation of the additional required showings a plaintiff must make to succeed on a First Amendment retaliation claim has been left for the lower courts to sort out.[57]

B. First Amendment Retaliation Claim: The Elements

While circuits may vary, to establish a First Amendment retaliation claim, a public employee must show that (1) they spoke as a private citizen, and not pursuant to their official duties per *Garcetti*, (2) they spoke on a matter of public concern per the *Pickering-Connick* requirement, (3) their interest in commenting on matters of public concern outweigh the public employer's interest in efficiency, (4) an adverse action was taken against them that would deter a person of "ordinary firmness" from continuing to engage in the protected conduct, and (5) the adverse action was motivated, at least in part, by the protected conduct.[58] The fifth prong is simply a causal analysis, and the first three prongs are laid out in depth in the preceding major cases discussed in this Note.[59] The fourth prong requiring the showing of an "adverse action" has created the circuit split mentioned above, and thus will be the focus of the remainder of this Note.

In the First Amendment employment retaliation context, courts have generally defined an "adverse action" to be a government act of retaliation that is reasonably likely to chill or deter employees exercising their First

54. *Id.*

55. *Id.*

56. *Id.* at 426.

57. *See infra* Parts B-C.

58. *See, e.g.*, Breaux v. City of Garland, 205 F.3d 150, 156 (5th Cir. 2000) (decided before *Garcetti*, including all but the first element in its statement of the elements of a successful retaliation claim); Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir. 2013); and Sensabaugh v. Halliburton, 937 F.3d 621, 627-28 (6th Cir. 2019) (condensing the first three prongs into one).

59. *See supra* Part A.

Amendment rights.[60] Some examples of actions that courts have traditionally found to be "adverse" enough to satisfy this requirement include discharges,[61] demotions,[62] refusals to promote or hire,[63] non-renewals of contracts,[64] transfers,[65] threats,[66] losses of pay,[67] and even reprimands.[68] Similarly, circuits have also given examples of what does not, in their view, constitute adverse action in a First Amendment retaliation claim, including mere accusations or criticisms,[69] investigations,[70] letters of guidance,[71] negative evaluations,[72] and, of course, suspensions without pay.[73]

C. The Circuit Split Over Whether Paid Administrative Leave Can Constitute Adverse Action for a First Amendment Employment Retaliation Claim

The circuit split surrounding the question of whether paid administrative leave can constitute adverse action for the purposes of a First Amendment employment retaliation claim consists of several different approaches. This Note will examine the decisions of four different circuits regarding the split: two that held that paid leave cannot constitute adverse action,[74] one that held that paid leave could constitute an adverse action if certain circumstances are met,[75] and another that issued a fact-specific, rather than a broad, ruling.[76]

Subpart 1 of this Part discusses both the Fifth Circuit's decision in *Breaux v. City of Garland* and the Sixth Circuit's decision in *Sensabaugh v. Halliburton*, which both found that paid leave does not constitute

60. *See, e.g.*, *Dahlia*, 735 F.3d at 1078; *Sensabaugh*, 937 F.3d at 628; Bell v. Sheriff of Broward County, 6 F.4th 1374, 1377 (11th Cir. 2021).

61. *Breaux*, 205 F.3d at 157; *Sensabaugh*, 937 F.3d at 628; *Bell*, 6 F.4th at 1377.

62. *See id.*

63. *See id.*

64. *Sensabaugh*, 937 F.3d at 628.

65. *Breaux*, 205 F.3d at 157 ("Transfers can constitute adverse employment actions if they are sufficiently punitive . . . or if the new job is markedly less prestigious and less interesting than the old one.").

66. *Dahlia*, 735 F.3d at 1079.

67. *Breaux*, 205 F.3d at 158; *Dahlia*, 735 F.3d at 1079.

68. *Breaux*, 205 F.3d at 157; *Bell*, 6 F.4th at 1377.

69. *Breaux*, 205 F.3d at 157.

70. *Id.*

71. *Sensabaugh*, 937 F.3d at 628.

72. *Bell*, 6 F.4th at 1377.

73. *Breaux*, 205 F.3d at 158; *Sensabaugh*, 937 F.3d at 629.

74. *Breaux*, 205 F.3d at 158; *Sensabaugh*, 937 F.3d at 629.

75. *See Dahlia*, 735 F.3d at 1079.

76. *See Bell*, 6 F.4th at 1379.

adverse action for the purposes of a First Amendment employment retaliation claim. Subpart 2 then examines the Ninth Circuit's decision in *Dahlia v. Rodriguez*, which held that paid leave could constitute adverse action in this context under certain circumstances. Finally, Subpart 3 looks at the most recent edition of the circuit split: the Eleventh Circuit's decision in *Bell v. Sheriff of Broward County*, which declined to decide whether paid leave always or never constitutes adverse action for a First Amendment retaliation claim, narrowly deciding that the plaintiff's paid leave in this case did not constitute such adverse action.

1. *Breaux v. City of Garland* and *Sensabaugh v. Halliburton*

In *Breaux v. City of Garland*, two police officers of the Garland Police Department in City of Garland, Texas, brought suit against the city, its former police chief, and the city manager.[77] The two police officers claimed that they were retaliated against for making allegations of public corruption in the police department.[78] After the district court found the defendants liable, the defendants appealed to the Fifth Circuit, contending, among other things, that neither officer suffered an adverse employment action as required for a successful First Amendment retaliation claim.[79] A unanimous panel reversed, holding that, although the officers spoke on a matter of public concern, the retaliation complained of – including suspension with pay – did not constitute adverse employment action.[80]

In reaching its decision, the Fifth Circuit reviewed its precedent and determined that actions such as investigations, false accusations, and compelled psychological testing do not rise to the level of "adverse action" required to bring a successful First Amendment retaliation claims.[81] Interestingly, while the court further stated that placement of one of the officers on paid administrative leave also did not constitute adverse action,[82] it simultaneously omitted explanation as to why paid leave could not possibly constitute adverse action for a First Amendment retaliation claim. Nevertheless, the court went on to find that the retaliation complained of, including "investigations, criticisms, public (but withdrawn) reprimands, psychological and polygraph testing, suspension with pay, [and] transfer," did not, either individually or collectively, constitute adverse employment action sufficient to give rise to a

77. 205 F.3d 150 (5th Cir. 2000).
78. *Id.* at 155.
79. *Id.* at 156.
80. *Id.* at 164-65.
81. *See id.* at 157-58.
82. *Id.* at 158.

retaliation claim.[83]

In *Sensabaugh v. Halliburton*, a former high school football coach at a public school in Tennessee brought a § 1983 action against the school board and the school district's director after he was fired, allegedly as a result of two social media posts expressing his concerns about the conditions and practices of schools within the district.[84] One of the posts concerned the conditions of a local elementary school that included pictures showing the faces of several students, while the other concerned the employment of prisoners at the school.[85] In response to these posts and other alleged misconduct, the director of school sent the coach both a "Letter of Guidance," which essentially amounted to a warning, and a "Letter of Reprimand," which placed the coach on paid administrative leave pending investigation of his conduct and warned him that termination was possible.[86] Shortly after the investigation had concluded, the coach was terminated from his position, and he subsequently filed suit.[87]

After the district court dismissed the coach's complaint, a unanimous Sixth Circuit panel affirmed, holding that while the coach engaged in protected conduct, the letters did not constitute adverse actions and his termination, while an adverse action, was not solely caused by the protected social media posts.[88] In examining the letters as potential adverse actions, the court stated that the plaintiff must show that the employment actions he suffered would "chill or silence a person of ordinary firmness from future First Amendment activities."[89] It went on to warn that not every action is "constitutionally cognizable" as an adverse action, and quickly dismissed the Letter of Guidance as a potential adverse action because the letter "did not itself impose any discipline or alter [the coach's] employment conditions in any way."[90] The letter, the court noted, expressly permitted the coach to keep his social media posts and notified him that he could continue to post comments in the future.[91] Therefore, the court could not conclude that this letter would chill or silence a person of ordinary firmness from future First Amendment activities.[92]

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83. *Id.* at 164.

84. 937 F.3d 621, 624 (6th Cir. 2019).

85. *Id.* at 625.

86. *Id.* at 626.

87. *Id.* at 627.

88. *Id.* at 628-29.

89. *Id.* at 628 (quoting Benison v. Ross, 765 F.3d 649, 659 (6th Cir. 2014)).

90. *Id.*

91. *Id.* at 628-29.

92. *Id.* It should be noted that the director of schools had issue with Sensabaugh's social media posts specifically because they depicted the faces of several students, which the director believed "could

Turning to the Letter of Reprimand, the court noted that this letter effectively amounted to suspension with pay pending investigation by independent outside counsel.[93] Citing its prior case law, the Sixth Circuit determined that suspension with pay does not constitute adverse action.[94] The court then held that the coach did not have a viable First Amendment retaliation claim and affirmed the judgment of the district court.[95]

Both the Fifth Circuit in *Breaux* and the Sixth Circuit in *Sensabaugh* arrived at the conclusion that paid administrative leave does not constitute adverse action for the purposes of a First Amendment employment retaliation claim. The next two cases in this circuit split do not take the complete opposite approach, but they certainly differ enough to justify their examination in this jurisdictional juncture.

2. *Dahlia v. Rodriguez*

In *Dahlia v. Rodriguez*, a police detective brought a § 1983 action against the City of Burbank, California, the city's chief of police, and other officers, alleging he suffered retaliation for exercising his free speech rights by disclosing alleged use of abusive interrogation tactics by other officers in the department.[96] Following his observations of several instances of officer misconduct during police investigations, the detective pleaded with his superiors to stop the abusive treatment he was witnessing.[97] After the detective's supervisors threatened him several times not to reveal his observations during an independent investigation of the alleged misconduct, the detective eventually disclosed the defendants' misconduct and the threats they made to him.[98] A few days later, the detective was placed on administrative leave, and the detective filed suit.[99]

The Ninth Circuit began its analysis by announcing its variation of the common First Amendment employment retaliation claim requirements.[100]

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be violative of both the [Board's] policy and the Family Educational Rights and Privacy Act," and the director specifically instructed Sensabaugh to "remove any photo showing a child's face—but not any posts or other content." *Id.* at 625.

93. *Id.* at 629.

94. *Id.*

95. *Id.* at 630.

96. 735 F.3d 1060, 1063 (9th Cir. 2013).

97. *Id.* at 1063-64.

98. *Id.* at 1064-65.

99. *Id.* at 1065.

100. *See id.* at 1067 (stating that the inquiry to ask is "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even

After concluding that the detective spoke on a matter of public concern as a private citizen,[101] the court turned to the "adverse action" requirement, and held that, under some circumstances, placement on paid administrative leave can constitute adverse employment action.[102] The court noted that "government act[s] of retaliation need not be severe and . . . need not be of a certain kind" in order to constitute adverse employment action in the First Amendment context.[103] Instead, the court declared that the proper inquiry is whether the action is "reasonably likely to deter employees from engaging in protected activity."[104] The court then went on to examine the alleged retaliatory acts taken against the detective.

The court found that the detective's assertions – that being placed on administrative leave prevented him from taking a promotional exam, required him to forfeit on-call and holiday bonus pay, and prevented him from furthering his investigative experience – would constitute adverse employment action if proved.[105] The court concluded that these factors, combined with the "general stigma resulting from placement on administrative leave," would be reasonably likely to deter employees from engaging in First Amendment activity.[106] Further, the court recognized that the threats made to the detective by his superiors would also constitute adverse action in a retaliation claim.[107] Therefore, the en banc Ninth Circuit reversed the district court and held that the detective had brought a sufficient First Amendment retaliation claim, remanding the matter to the district court for further proceedings.[108]

3. *Bell v. Sheriff of Broward County*

The Eleventh Circuit became the latest circuit to join the fray when it decided *Bell v. Sheriff of Broward County*. In *Bell*, Deputy Sheriff Jeffery Bell sued his county employer and its sheriff, alleging he suffered retaliation in violation of his First Amendment free speech rights.[109] In April 2020, Bell wrote an opinion piece in a regional newspaper in his capacity as the elected president of the local police union.[110] In his newspaper piece, Deputy Bell criticized the Sheriff of Broward County

absent the protected speech").

101. *Id.* at 1067-78.

102. *Id.* at 1078.

103. *Id.* (quoting Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir. 2003)).

104. *Id.* (quoting Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003)).

105. *Id.* at 1079.

106. *Id.*

107. *See id.*

108. *Id.* at 1080.

109. Bell v. Sheriff of Broward County, 6 F.4th 1374, 1375 (11th Cir. 2021).

110. *Id.*

for his response to the COVID-19 pandemic, complaining that the sheriff was unprepared for the pandemic and failed to provide a sufficient supply of protective equipment to the employees of the Sheriff's Office.[111] A few days later, Deputy Bell drafted a "whistleblower" letter pursuant to Florida law and sent it to the sheriff in order to curtail threats made by the sheriff against him and to obtain a meeting with the sheriff about his issues with the county's COVID-19 response.[112]

On that same day, the sheriff suspended Bell with pay for making "false statements" and engaging in "conduct unbecoming" of a Sheriff's Office employee, and Bell was placed under investigation.[113] This suspension caused Deputy Bell to lose some of his responsibilities as the local union president, prevented him from acting as a law enforcement officer, and required him to report to internal affairs daily.[114] Five days following his suspension with pay, Deputy Bell sued the sheriff in his official capacity alleging violation of his First Amendment rights.[115] The district court found that Deputy Bell spoke as a citizen, not as a county employee, in his published newspaper piece.[116] It further concluded that Deputy Bell had spoken about a matter of important public concern – "the allegedly inadequate supplies of personal protective equipment provided to BSO [Broward County Sheriff's Office] employees" – and that Deputy Bell's First Amendment interests outweighed those of the sheriff under the *Pickering-Connick* balancing test.[117] Nevertheless, the district court dismissed Deputy Bell's claim, holding that suspension with pay, without more, does not constitute an adverse employment action.[118]

On appeal, the Eleventh Circuit reviewed the sole issue of whether Deputy Bell suffered an adverse employment action sufficient to bring a First Amendment retaliation claim.[119] The court began its analysis by citing its version of the familiar First Amendment retaliation standard: that a "public employer retaliates [in violation of the First Amendment] when [it] takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech."[120] The court then turned to Deputy Bell's claim, and quickly decided that Deputy Bell's suspension with pay from law-enforcement activities did not constitute adverse

111. *Id.* at 1375-76.
112. *Id.* at 1376.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1377.
120. *Id.* (quoting Stavropoulos v. Firestone, 361 F.3d 610, 618 (11th Cir. 2004)).

action sufficient to give rise to a retaliation claim.[121]

In reaching its decision, the Eleventh Circuit first noted the holdings of the Fifth Circuit,[122] Sixth Circuit,[123] and Ninth Circuit[124] regarding whether paid leave constitutes adverse employment action.[125] The court then explicitly declined to issue a broad ruling about whether a public employee's suspension with pay always or never constitutes an adverse employment action for the purposes of a First Amendment retaliation claim.[126] Instead, the court proceeded to decide the case "narrowly on the complaint" before it and held that Deputy Bell's five-day suspension with pay pending investigation was not an adverse action.[127] The court reasoned that because Deputy Bell's was suspended with pay less than a week before suit was filed, such a "temporally-limited suspension" would not deter a reasonable person from exercising First Amendment rights.[128] Thus, the Eleventh Circuit affirmed the district court's dismissal of Deputy Bell's complaint,[129] and left open the question of whether paid leave categorically does or does not constitute adverse employment action.

III. DISCUSSION

The cases that make up this circuit split employ several different approaches to the question of whether paid administrative leave constitutes adverse employment action for the purposes of a First Amendment retaliation claim, and yet none of them hit the mark. It is severely misguided to hold that paid leave categorically cannot be an adverse employment action in a retaliation claim. This conclusion ignores the potential social, emotional, and other harms public employees may suffer by being placed on administrative leave. Even courts that do recognize that paid leave could possibly constitute an adverse employment action under certain circumstances ignore several practical realities that, when properly realized, make apparent that being placed on paid leave in and of itself can constitute adverse employment action. Further, performing a case-by-case analysis leads to a risk of inconsistent decisions within a circuit, which should be avoided for the sake of fairness

121. *Id.* at 1378.
122. Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir. 2000).
123. Sensabaugh v. Halliburton, 937 F.3d 621, 629 (6th Cir. 2019).
124. Dahlia v. Rodriguez, 735 F.3d 1060, 1078-79 (9th Cir. 2013).
125. Bell v. Sheriff of Broward County, 6 F.4th 1374, 1378-79 (11th Cir. 2021).
126. *Id.* at 1379.
127. *Id.*
128. *Id.*
129. *Id.*

to all public employees who may wade into the crosshairs of their employers' ire for engaging in otherwise protected First Amendment activity.

Part A of this Section examines the decisions made by the Fifth Circuit in *Breaux* and the Sixth Circuit in *Sensabaugh* and criticizes those decisions for both being short-sighted and for failing to provide adequate justification for holding that paid leave can never constitute adverse employment action in a First Amendment retaliation claim. Part B examines the Ninth Circuit's decision in *Dahlia* and while it commends the Ninth Circuit for not being *as* short-sighted as its sister circuits, it argues that the court still failed to issue the necessary broad, bright-line ruling that this Note suggests. Part C looks at the Eleventh Circuit's decision in *Bell* and cautions against the use of such a case-by-case analysis approach due to the risk of inconsistent decisions that can lead to unfairness for future public employee plaintiffs seeking to assert that their First Amendment rights have been violated. Finally, Part D emphasizes the need for a broad rule that paid leave presumably does constitute adverse employment action in the context of a First Amendment retaliation claim, further justifying such a broad ruling.

A. The Fifth and Sixth Circuits Failed to Recognize Other Harms That Public Employees May Suffer When Placed on Paid Administrative Leave.

Both the Fifth Circuit in *Breaux* and the Sixth Circuit in *Sensabaugh* held that paid administrative leave categorically cannot constitute adverse employment action for the purposes of a First Amendment retaliation claim.[130] However, the Fifth and Sixth Circuits did so without any reasoned explanation as to *why* being placed on paid leave could not be an adverse employment action in this context. These circuits performed a great judicial disservice by failing to issue a thorough justification as to why they came to this conclusion, and in doing so, they failed to recognize the other harms that public employees can face when suspended from work while still receiving their regular paychecks. One might surmise that the Fifth and Sixth Circuits came to this conclusion based on a simple calculus: because public employee plaintiffs who are placed on paid leave still receive their checks, no harm is done, and no foul can be found. Yet this notion, while seemingly intuitive, overlooks several other potential adverse effects that can result from missing time at work, even while still getting paid.

130. *See* Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir. 2000); Sensabaugh v. Halliburton, 937 F.3d 621, 629 (6th Cir. 2019).

As the Ninth Circuit in *Dahlia* prudently pointed out, being placed on administrative leave, even when paid, can lead to a number of other foreseeable harms, such as the inability to take a promotional exam, the loss of bonus pay, and the loss of job experience.[131] In *Breaux*, one of the plaintiff employees was placed on administrative leave for almost three months, but because he was paid while on suspension, the Fifth Circuit found that this could not be an adverse employment action.[132] Similarly, in *Sensabaugh*, the plaintiff coach was suspended with pay for nearly five months, and yet the Sixth Circuit could not recognize how this might have adversely impacted the plaintiff.[133]

Neither circuit considered how the plaintiffs could have suffered other harms due to their suspensions. Did the plaintiffs miss out on some sort of promotion or bonus pay given out based on hours worked or tasks completed? Did missing such a significant amount of work time prevent the plaintiffs from gaining experience needed to excel in their employee roles? The Fifth and Sixth Circuit's short-sightedness, or perhaps intentional ignorance, of these considerations demonstrate why a holding that categorically prevents paid leave from being considered an adverse employment action in a First Amendment retaliation claim is both unwise and unjust.

B. While the Ninth Circuit's Circumstantial Analysis Was Better, It Still Missed the Mark.

While the Ninth Circuit in *Dahlia* held that being placed on paid leave could, depending on the surrounding circumstances, constitute adverse employment action for a First Amendment retaliation claim,[134] this approach also fails to give proper weight to the full extent of possible harms that can result from being suspended with pay. Before examining the plaintiff's case, the *Dahlia* court expressed that "a government act of retaliation need not be severe and it need not be of a certain kind" for it to qualify as an adverse employment action in the First Amendment retaliation context.[135] In addition to being threatened by his superiors, Dahlia was placed on paid administrative leave, which allegedly prevented him from taking a promotional exam, required him to forgo bonus pay, and caused him to miss out on further investigation experience in the police department.[136] The Ninth Circuit found that these, taken

131. *See* Dahlia v. Rodriguez, 735 F.3d 1060, 1079 (9th Cir. 2013).

132. *Breaux*, 205 F.3d at 158.

133. *See Sensabaugh*, 937 F.3d at 629.

134. *See Dahlia*, 735 F.3d at 1078-79.

135. *Id.* at 1078 (quoting Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir. 2003)).

136. *Id.* at 1079.

together, would be reasonably likely to deter public employees from engaging in First Amendment activity.[137]

While this analysis was certainly more appropriate and thorough than the analysis shared by the Fifth and Sixth Circuit, it still neglected to give full weight to the harms that being placed on paid leave can cause, irrespective of actual workplace harms such as missed promotions and bonus pay. First, the Ninth Circuit failed to consider how working a job can give people meaning and purpose. Being placed on administrative leave, even while still receiving pay, can deprive these individuals of this fulfillment, and thus harm them both psychologically and emotionally. For these public employees, placement on paid leave would likely deter them from exercising their First Amendment rights.

Second, placing an employee on administrative leave can result in a general stigma that may leave a negative impact for much longer than the suspension lasts. While the Ninth Circuit did commendably mention this fact as part of its analysis in *Dahlia*,[138] the court considered it collectively among the other alleged adverse acts that the plaintiff asserted were made in retaliation for engaging in protected speech.[139] The stigma that may follow being placed under investigation and suspension by an employer, even when the suspended employee returns to their normal workstation, could deter even the most reasonable from engaging in protected speech. Employees, including those in the public sector, often spend most of their waking hours at work, and it can become quite unpleasant when those hours are filled with dirty glances and under-the-breath rumors from coworkers. When faced with the choice between avoiding these unpleasantries and engaging in protected speech, it is not hard to imagine that reasonable people would likely forgo exercising their First Amendment rights in exchange for keeping the workday cordial.

Further, being placed on paid administrative leave will inherently result in the employee losing crucial growth and development potential in their position. This result particularly impacts newer or younger employees and employees whose suspension lasts a significant period of time. One of the top qualities that employers look for in employees is constant upskilling or reskilling.[140] If a public employee is forced to miss time at work due to being placed on administrative leave, they also miss out on vital opportunities for job growth and skill development, which will adversely

137. *Id.*

138. *Id.* (quoting Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003)) (". . . [T]he general stigma resulting from placement on administrative leave appear[s] 'reasonably likely to deter employees from engaging in protected activity.'").

139. *See id.*

140. *See* Mark Talmage-Rostron, *Top Three Things Modern Employers Want from Their Employees*, NEXFORD UNIV. (Apr. 8, 2022, 10:33 PM), https://insights.nexford.org/top-three-things-modern-employers-want-from-their-employees [https://perma.cc/7PHB-3G2K].

impact the employee in their current position as well as potential future employment positions they may hold. The Ninth Circuit deserves credit for not taking the easy route and holding that placement on paid leave categorically does not constitute adverse employment action in a First Amendment retaliation claim. However, it also did not go broad enough in its ruling, and it failed to consider that placement on paid leave in and of itself can bring enough adversity to chill a reasonable person from engaging in protected First Amendment speech.

C. The Eleventh Circuit's Case-By-Case Analysis Invites the Risk of Inconsistent Decisions.

The Eleventh Circuit in *Bell* decided not to answer the question of whether a public employee's suspension with pay always constitutes or never constitutes an adverse employment action in the First Amendment retaliation context.[141] Rather, the *Bell* court decided the case narrowly on the specific facts alleged in the plaintiff's complaint, holding that the deputy's five-day suspension with pay, pending investigation, was not sufficient to be considered an adverse action.[142] Unlike the other cases discussed in this Note, Deputy Bell's suspension was admittedly very short, and the court thought that such a brief suspension would not deter a reasonable person from exercising their First Amendment rights.[143] However, even being suspended with pay for only a week could still feasibly deter public employees from engaging in protected speech. Consider the employee whose job duties include reporting potential misconduct within a given governmental department. If said employee is placed on paid leave each time they report a misconduct or criticize protocol, these one-week suspensions add up, and it may not seem worth it to the employee to continue to report if it will result in a one-week suspension every time.

Further, the Eleventh Circuit's employment of a case-by-case analysis to determine whether a given suspension with pay gives rise to an actionable First Amendment retaliation claim invites the risk of inconsistent decisions, leaving many public employees wondering whether their own placement on paid administrative leave is sufficient to give them a valid claim. With the high costs of litigation and the need for consistent precedent to rely on, deciding this question on a case-by-case basis is both unwise and unjust. Public employees already face enough hurdles to engage in First Amendment activity. Keeping them guessing about whether their placement on paid leave is enough for them to have

141. Bell v. Sheriff of Broward County, 6 F.4th 1374, 1379 (11th Cir. 2021).

142. *Id.*

143. *Id.*

an actionable claim further impedes their ability to rectify wrongful governmental suppression of speech. Thus, the Eleventh Circuit's fact-based analysis is inappropriate for use in this field of jurisprudence.

D. A Broad Rule That Placement on Paid Leave Presumably Does Constitute Adverse Employment Action is Needed.

A broad rule holding that placement on paid administrative leave presumably does constitute adverse employment action in a First Amendment retaliation claim is needed in order to give public employees the minimum free speech rights they deserve. In addition to the reasons previously mentioned,[144] there are other considerations that these circuits failed to recognize when deciding whether suspension with pay can constitute adverse employment action. First, under all three methods of analysis discussed in this Note, a giant loophole is created for public employers to effectively punish employees for engaging in otherwise protected speech. If a public employee makes speech on a matter of public concern that is not significantly outweighed by maintenance of the efficiency of a particular government office,[145] and they do so outside the course of their official job duties,[146] a public employer can simply suspend that public employee for a short period of time with pay, ensuring they don't miss any significant promotional or experiential opportunities, to avoid being slapped with a valid retaliation claim. This strategy could theoretically be done repeatedly over time and, in the aggregate, this abuse of the glaring loophole created by these circuit courts would certainly deter employees from exercising their First Amendment rights.

In addition, the circuits involved in this split failed to consider how placement on paid administrative leave can affect a public employee's future employment prospects. Whether an employee wishes to transfer to another government job or move into the private sector, their next potential employer will likely perform the usual background check and may contact the employee's former employers to help evaluate whether to hire them. What is this potential future employer going to think when they see that this employee had been suspended with pay, possibly multiple times, at their former job? While the circuits in this Note either unknowingly or intentionally ignored this reality, it is undoubtably going to make it more challenging for the affected public employee to seek future employment with a litany of suspensions on their employment record. Thus, a broad rule holding that placement on paid leave

144. *See supra* Parts A-C.

145. Thus, satisfying the *Pickering-Connick* balancing test requirement, discussed *supra* Section II.A.

146. As required by the Supreme Court's decision in *Garcetti*, discussed *supra* Section II.A.

presumably does constitute adverse employment action in a First Amendment retaliation claim is necessary to avoid these other unfortunate realities that would likely deter public employees from engaging in protected speech.

IV. CONCLUSION

The freedom of speech is essential to all free peoples, and America's extensive speech protections make it unique to the rest of the world in that respect.[147] Nevertheless, the government, as an employer, needs to be able to maintain the operational efficiency of its offices to be able to provide effective services. As a result, taking government employment naturally must come with some restrictions on those rights to achieve that important interest. However, public employees certainly should retain ample room to exercise their First Amendment rights outside the confines of their official job duties, particularly when it comes to matters that the public has a right to know about. Thus, adding extra hurdles for these employees and creating loopholes that government employers can exploit should be discouraged and rarely, if ever, done.

Allowing public employees to be placed on paid administrative leave in response to their engagement in protected activity undermines the principles of liberty and freedom that are embodied in the First Amendment and the rest of the Bill of Rights. This Note calls upon the United States Supreme Court to resolve this circuit split and implement the broad ruling that placement on paid leave presumably constitutes adverse action for the purpose of a First Amendment retaliation claim. Failure to do so will risk making public employee speech rights nothing but an empty gesture.

147. *See generally* Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).