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INTRODUCTION

As a general proposition, an individual does not give up his or her constitutional rights upon acceptance of public employment. However, those rights, including the right of free speech, may be subject to certain restrictions in the public employment context. More specifically, the right of free speech in the public employment context requires a balancing of the interests of the employee to express his or her views as a citizen on matters of public concern against the interests of the government in efficient operation of a particular agency or service.

This judicially imposed balancing requirement has developed into a two part test. One must first decide whether the speech at issue is a matter of public concern.[1] This requires an examination of the speech context, form, and content, as well as the motive of the speaker. Secondly, if the speech is deemed a matter of public concern, then the balancing test noted above is applied.[2] Thus, the predicate and often central issue in public employee free speech cases is whether the speech at issue is a matter of public concern. A full exposition of the law in this area will be developed as a preliminary matter. Thereafter, more current developments will be examined.

Recently, there seems to be a developing difference of opinion between the Justices of the Supreme Court as to how the Court should decide whether public employee speech is a matter of public concern. For example, a statement about the propriety of the assassination attempt on President Reagan was deemed a matter of public concern by Justice Marshall, writing for the Court in Rankin v. McPherson[3], while Justice Scalia, writing for the Chief Justice and two other Justices in dissent, reached a conclusion quite to the contrary.

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[1] See generally, M. Nimmer and L. Sobel, Nimmer on Freedom of Speech §4.08 (1989). M. Player, Employment Discrimination, §3.13 (1988).

[2] Id.

[3] 438 U.S. 378 (1987).

The two positions in Rankin basically center around the interpretation of what constitutes a matter of public concern. As noted, the speech at issue was about the assassination attempt on President Reagan. McPherson, a clerical deputy constable, responded to the news report with words to the effect of, "If they go for him again, I hope they get him." This remark was uttered at work in the presence of her boyfriend and within the hearing of another employee.

Justice Marshall, writing for the Court, found that this statement was McPherson's way of criticizing the Reagan Administration's policies when the statement was viewed in context. This context included some other contemporaneous statements made by McPherson as well as her later explanation for the statement. This fairly liberal application of the public concern standard seems to comport with the Supreme Court precedent in the area as well as the holdings of the lower federal courts for the most part.

Justice Scalia, on the other hand, seemed to take a much stricter approach to the public concern issue. Rather than characterizing McPherson's statements as the Court did, he saw them as words close on the first amendment spectrum to fighting words and epithets, and therefore due less protection. Moreover, his opinion appears to apply a very narrow reading of the public concern determination in that very little examination is done beyond the four corners of the statement itself. As will be explained, this seems to constitute a departure from Supreme Court precedent which requires an examination of the content, form, and context of the speech, and, arguably, speaker motivation. This paper will examine the two positions represented in the Rankin decision as applied to a factual scenario that lends itself to highlighting the difference and flaws in these two opinions.

The factual scenario is taken from a 1989 decision of the United States Court of Appeals for the District of Columbia, which involved speech by a federal employee and union representative.[4] This individual drafted a union newspaper article which criticized an agency

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[4] American Federation of Government Employees v. Federal Labor Relations Authority, 878 F.2d 460 (D.C. Cir. 1989).

supervisor by the use of statements which may be characterized as racial slurs. The speaker was reprimanded for the statements and the union challenged the reprimand by filing an unfair labor practice complaint.[5] The government action was only challenged by way of the unfair labor practice. A constitutional challenge under the first amendment was not raised at the administrative level. Consequently, while the Court of Appeals upheld the Federal Labor Relations Authority conclusion that no Unfair Labor Practice had been committed by the agency, the Court never reached the first amendment issue due to a failure to raise the issue at the administrative level.[6] Thus, the first amendment issue remained open. Necessarily, however, a thorough discussion of this decision must include an examination of the interplay between statutorily protected union activity and first amendment protection in order to fully frame the first amendment issue.

The thrust of this paper will be to predict how the Supreme Court would have treated this case on the first amendment issue given the state of the law on public employee free speech. Of course, whether or not the speech at issue is a matter of public concern will be the crux of the distinction between the two positions the Court has taken, but the analysis will also take into account the balancing test set forth above. By breaking down the analysis into predictions of Justice Marshall's opinion, Justice Scalia's opinion, Justice Kennedy's concurrence in the judgment of the Court, and the opinion of the Court itself, a reasonable forecast as to the future direction of the Court in this area will be realized. After the forecast is made, the propriety of the two hypothetical opinions as measured against the precedent of first amendment protection of the public employee will be evaluated.

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[5] 5 U.S.C. §§7102, 7116(a)(1) and (2) (1978).

[6] AFGE, 878 F.2d at 466.

I FREE SPEECH AND THE PUBLIC EMPLOYEE; THE CURRENT LAW AND ITS DEVELOPMENT

The Pickering[7] *Premise*

The first amendment[8] protection afforded public employee speech has always carried with it certain restrictions. In fact, almost a century ago, it was a well accepted proposition that the public employee could be required to leave his or her constitutional rights at the door of the workplace. In an oft-cited passage from an 1892 opinion by Justice Holmes for the Massachusetts Supreme Judicial Court it was held that public employment contracts may well require the suspension of an individual's rights.[9] As written by Justice Holmes, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman".[10] Theories change. Priorities change. The judicial interpretation of first amendment protections afforded public employee speech has changed, yet some restrictions still remain.

In September 1964, Marvin L. Pickering, an Illinois public schoolteacher, wrote a letter to a local newspaper which criticized the School Board's handling of its financial responsibilities.[11] Pickering was dismissed from his job because of the alleged effects of this letter on school administration. While this dismissal was upheld administratively and in the Illinois courts,[12] Pickering prevailed on his first amendment claim before the Supreme Court.

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[7] Pickering v. Board of Education, 391 U.S. 563 (1968).

[8] U.S. CONST. amend. I.

[9] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

[10] McAuliffe, 155 Mass. at 220, 29 N.E. at 517 Therein the Court upheld termination of a police officer for political activity in violation of the city code prohibiting same.

[11] Pickering, 391 U.S. at 566 Specifically, the letter criticized how the Board and Superintendent allocated funds and the Board's stated reasons for a passage of a tax increase.

[12] 36 Ill. 2d 568, 225 N.E. 2d 1 (1967).

Writing for the Court, Justice Marshall set forth two propositions critical to an analysis of first amendment protection of public employee free speech. First, he noted that the days of McAuliffe are long gone and that public employment can no longer be conditioned upon waiver of constitutional rights.[13] Secondly, and most importantly, the Court provided a statement of the necessary balance to be struck in dealing with these cases:

> The problem in any case is to arrive at a balance between the interests of the teacher, as citizen, in commenting upon matters of public concern and interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[14]

Although various equations have been applied since the Pickering case to assist in realizing this balance, the Pickering premise of necessary balance remains to this day the starting point and end point in determining whether public employee free speech is due heightened constitutional protection.[15] Nevertheless, because this balancing test requires constitutional give and take, it is increasingly clear that some restrictions remain on the first amendment speech rights of public employees. McAuliffe, although softened, has not been completely put to rest.[16] Thus the bounds of restriction which have developed in application of the Pickering premise must be examined.

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[13] Pickering, 391 U.S. at 568 (citing Weiman v. UpdeGraff, 344 U.S. 183 (1952)) (employment conditioned loyalty oath which indiscriminately addressed knowing and unknowing association violated fourteenth amendment). Shelton v. Tucker, 364 U.S. 479 (1960) (employment conditioned membership disclosure violates first amendment freedom of association). Keyishian v. Board of Regents, 385 U.S. 589 (1967) (employment conditioned membership restriction violates first amendment due to vagueness).

[14] Id., at 568.

[15] Nearly verbatim application of the balance to be struck is evident in state as well as federal case law. See e.g.; Brinkley v. City of Tacoma, 114 Wash. 2d 373, 787 P.2d 1366, 1372 (Wash. 1990) (employee free speech interest must be balanced against state employer interest in efficient operations). Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160, 163 (Md. App. 1989) (Verbatim application of language set out in text accompanying note 14 supra.).

[16] See e.g., Domiano v. Village of River Grove, 904 F.2d 1142, 1145 (7th Cir. 1990) (Holding first amendment is not license for insubordinate speech that interferes with workplace). Stewart v. Baldwin County Board of Education, 908 F. 2d 1499, 1505 (11th Cir. 1990) (Public employee's right to freedom of speech is not absolute. (citing Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989))

The Connick[17] *Test*

In Connick v. Meyers, the Supreme Court first set up the two part public concern-balancing test to be used in public employee free speech cases. First, in order for heightened constitutional protection to attach,[18] the speech must first involve a matter of public concern.[19] Secondly, if, and only if, the speech involves a matter of public concern, the interests of the government as employer in suppressing the speech must be balanced against the first amendment rights of the employee.[20] In determining whether the speech at issue involves a matter of public concern, Connick requires an examination of the content, form, and context of the speech on the record as a whole. While this statement of the appropriate inquiry seems to require a review of all circumstances surrounding the speech, two particular areas are consistently examined by the courts

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[17] Connick v. Meyers, 461 U.S. 138 (1983).

[18] It is important to understand the degree of constitutional protection afforded speech once it is found to touch upon a matter of public concern. The Supreme Court did not hold that the absence of public concern implication strips the speech of all constitutional protection. Connick, 461 U.S. at 147. Rather, if the subject matter does not embrace an issue of public concern the only consequence is that the resulting personnel decision of a public employer will not be subject to heightened constitutional scrutiny in Federal Court. Id. Such a holding, of course, leaves open first amendment protections afforded the average citizen, such as protections of the libel laws. Id.

[19] Connick, 461 U.S. at 148.

[20] Thus, the public concern threshold becomes the gatekeeper to the Pickering balancing test. However, it should be noted that the public concern issue is not an addition to the Pickering balance discussed supra. Rather, the public concern issue only serves to determine whether the employee speaks as a citizen on a matter of public concern. It is only that speech which is due a heightened level of constitutional protection. See supra, note 14 and accompanying text. As the Court in Connick held:

> The repeated emphasis in Pickering on the right of a public employee "as citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter. 461 U.S. at 143.

The public concern inquiry is clearly an outgrowth of, rather than an addition to, Pickering. But See Smith, Beyond "Public Concern": New Free Speech Standards for Public Employees, 57 U. Chi. L. Rev. 249, 256-57 (1990). Author proposes that Connick's public concern requirement is not an outgrowth of Pickering, noting that the mention of public concern in Pickering, rather than a threshold prerequisite, was one of several factors to be considered in the balancing test.

within this broader test. They are the motivation of the speaker and the public communication of the speech. the starting point, of course, is to realize a definition of public concern. Thereafter, in identifying the sources from which the public concern issue is determined, content, form, and context as the predicate statement of the test will first be examined. Secondly, the speaker motive issue and its parameters will be set out. Finally, the importance of public communication in the overall equation will be examined.

Of course the whole case must begin with some type of government action which allegedly chills the first amendment right of the employee in the first place. The government action need not be as drastic as discharge. Indeed, the Courts have held far less drastic measures can trigger a first amendment right deprivation.[21]

Public concern, as a concept, is normally defined as a matter of political, social, or other concern to the community.[22] Although this statement serves as an adequate working definition, it is equally true that public employee speech which may be of general interest to the public is not necessarily within this category.[23] Nor is it necessarily true that any complaint voiced within a government office by a government employee is per se a matter of public concern.[24] Predictably,

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[21] See e.g.: Hoffman v. Mayor of Libery, 905 F.2d. 229, 233 (8th Cir. 1990). (rehiring of speaker at lower position held prior to termination is sufficient government action. Court also holds (n. 6) government action short of discharge is sufficient if retaliatory. Morfin v. Albuquerque Public Schools, 906 F.2d. 1434, 1437 n. 3 (10th Cir. 1990) (and cases cited therein) (harassment, abuse, transfer, and failure to renew contract are sufficient government actions; actions short of actual or constructive employment decision can suffice). Hubbard v. Administrator, E.P.A., 735 F.Supp. 435, 438-439 (D.D.C. 1990) (government decision not to hire sufficient if based upon speaker exercise of first amendment rights).

[22] Connick, 461 U.S. at 146. See also: Flanagan v. Munger, 890 F.2d 1557, 1562 n. 4 (10th Cir. 1989). Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989). Berg v. Hunter, 854 F.2d 238, 241 (7th Cir. 1988). (All applying same definition).

[23] Connick, 461 U.S. at 148 n. 8. Accord: Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (acknowledging difference between a matter of public concern and a matter of public interest). Flanagan, 890 F.2d at 1563 (not enough that subject matter could be of general interest to the public). Terrell v. University of Texas System Police, 792 F.2d 1360, 1361 (5th Cir. 1986) (fact that subject matter might or would have motivated great public interest is "of little moment"). Ferrara v. Mills, 781 F.2d 1508, 1514 (11th Cir. 1986) (degree of public interest is relevant only in Pickering balance stage). Wilson v. City of Littleton, 732 F.2d 765, 769 (10th Cir. 1984).

[24] See infra text accompanying note 30.

given this variance and flexibility in definition, the statements of what constitutes public concern have equally varied in breadth.[25] Regardless of the definition applied, however, some certainty exists in the sources from which the public concern issue is determined. Public concern issues are decided by examining, at a minimum, the content, form and context of the speech on the record as a whole.[26] Not one area is, in and of itself, controlling, rather, all deserve treatment.[27] Content, form, and context, however, are not the end of the inquiry.

As more and more cases were decided, two other areas were examined by courts in determining whether the speech at issue touched upon a matter of public concern. Courts have consistently looked at the subjective motivation of the speaker. That is, they examine whether the speaker intends to address a matter of public concern as opposed to resolve a personal complaint or grievance. Additionally, courts tend to examine the public versus private expression of the speech. These two additional areas of concern for the courts will be addressed below, however a preliminary point should be made. These different areas of inquiry are best viewed as various potential sources of circumstantial evidence on the issue of public concern which is no more than a quest to determine whether, under Pickering, the employee speaks as a citizen.[28] Therefore, since

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[25] Rankin, 483 U.S. at 395 (Scalia, J., dissenting) (Additional citation omitted). Here Justice Scalia gives several definitions used by the Court to include, "'those matters dealing in some way with the essence of self-government,'" and, "matters as to which 'free and open debate is vital to informed decision-making by the electorate'".

[26] Connick, 461 U.S. at 147-48. This test, by its language alone, contemplates a review of all circumstances surrounding the speech.

[27] Rankin, 438 U.S. at 384, 385. Connick, 461 U.S. at 147. Accord: Williams v. Roberts, 904 F.2d 634, 638 (11th Cir. 1990). Fire Fighters Association of Dist. of Columbia v. Barry, 742 F.Supp. 1182, 1189-90 (D.D.C. 1990) (content of speech, which was a bumpersticker declaring, "D.C. Fire Department — It's Not Just A Job, It's A Joke, Too!", cannot be divorced from a context of ongoing public controversy).

[28] This perspective is important. If one were to view each of these areas as the embodiment of a separate test on the issue of public concern, the numerous lower court decisions since Connick could not be reconciled. One would engage in the frustrating and endless attempt to determine in what circumstances the courts apply the content, form and context test as opposed to the speaker motivation test. The decisions employ no such magic trigger, nor are they necessarily so confined to one area on the other. For an example of this perspective in application, see: Schalk v. Gallenmore, 906 F.2d 491, 495-96 (10th Cir. 1990) (Court acknowledges necessity of examining content, form and context, of speech as well as subjective motivation of the speaker; in application, the Court looks to all these areas to the exclusion of none). The interplay between content, form, context, speaker motive, and public versus private speech can be troubling. Pickering teaches that the threshold determination is whether or not the speaker speaks as a citizen on matters of public concern.

we deal with numerous potential sources of evidence, all of which go to the ultimate public concern issue, none of the areas are in and of themselves controlling. All should be considered.

The thrust of the speaker motive inquiry is to determine whether the public employee is driven by a desire to alert the community or to stir robust debate within the community on matters of public concern, or, on the other hand, to further some private interest. As one can imagine, there exists a very fine line between these two ends of the spectrum. Naturally, when the speaker is employed by a government instrumentality, any criticism of the employer could be construed as a matter of public concern since the employer is ultimately responsible to the public.[29] The courts have met this dilemma on two fronts.

First, the Supreme Court has flatly held that all statements by public employees which are critical of their employers do not necessarily rise to the level of public concern solely because the

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Pickering, 391 U.S. at 568. Connick addressed the alternative possibility, which is not afforded higher constitutional protection, when an employee speaks upon matters of personal interest. 461 U.S. at 147. Connick further held that the determination between the two alternatives is made by examining the content, form, and context of a given statement on the record as a whole. 461 U.S. at 148. Thus, the Court tells us content, form, and context are the sources from which to make the ultimate determination: whether the speaker speaks as a citizen or employee. Surely, "context" can embrace the motive of the speaker and all circumstances around the speech. On the other hand, motive may be no more than a recharacterization of the ultimate determination — does the speaker speak as citizen or employee. The same problem is presented on the issue of whether the speech is communicated to the public. Surely, such conduct is evidence of the speaker's motive to address a matter of public concern, and consequently may be considered a subset of the motive issue. On the other hand, the way in which the speech is communicated can just as easily fall within the context and form sources set out in Connick. Given the foregoing, it is quite obvious that one may engage in painstaking analysis and niceties of characterization in an effort to put these five areas of inquiry into neat packages as they have been applied by the courts. Such is not possible. Rather, one must feel comfortable with the fact that courts look at all these areas on the issue of public concern. No one area controls to the exclusion of any other. Ironically, the Court in Pickering cryptically addressed the future dilemma at its birth:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged.

391 U.S. at 569. True to its word, the Court has not laid down such standards. However, the law of the first amendment has always been, by necessity, a law of flexibility. Public employee freedom of speech is no exception.

[29] See, e.g., Ferrara v. Mills, 781 F.2d 1508, 1515 (11th Cir. 1986) (recognizing, "... virtually all speech made in and about a public employment setting will have some public significance...").

speaker is employed by a government instrumentality. Justice White wrote for the Court in Connick:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgement, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[30]

Therefore, it is clear there is no public concern per se label attaches when the public employee is critical of the government employer.[31]

Secondly, the courts have been meticulous in examining the true motive of the speaker and have largely been unwilling to accept personal grievances over internal agency policies as matters of public concern.[32] On the other hand, some subjects are so disassociated from the internal procedures of the agency, or the employee's position therein, that the conclusion the speaker sought to address a matter of public concern is virtually inescapable.[33] In analyzing this source of

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[30] 461 U.S. at 149.

[31] See also: Berg v. Hunter, 854 F.2d 238, 242 (7th Cir. 1988). That Court, citing Connick phrased the point as follows:

> If every facet of internal operations within a government agency were of public concern, and therefore any employee complaint or comment upon such matters constitutionally protected, no escape from judicial oversight of every governmental activity down to the smallest minutia would be possible.

However phrased, the validity of the point is equally compelling.

[32] See, e.g., Barkoo v. Melby, 901 F.2d 613 (7th Cir. 1990) (police dispatcher complaints about the taping of dispatch communications and overtime not matters of public concern since they were motivated by personal dispute with employer, not concern for the public). Wadud v. Willsie, 735 F.Supp. 1488, 1495-96 (D. Kan. 1989) (state psychiatrist's criticism of medical center's private practice prohibition personal in motivation; accompanying criticism of standard of care could be matter of public concern, but lack of specificity in this particular case did not require such a conclusion). It appears, in Wadud, that the Court believed the plaintiff's speech as a whole was a vehicle to further his personal grievances.

[33] See, e.g., Considine v. Board of County Commissioners, 910 F.2d 695, 699-700 (10th Cir. 1990) (county employer's complaints about gravel pit, ditch, and hazardous waste disposal cites matters of public concern). Stewart v. Baldwin County Board of Education, 908 F.2d 1499, 1506-07 (11th Cir. 1990) (teacher complaint about school tax issue clearly motivated by desire to address issue of public concern in case Court found "remarkably similar" to Pickering on its facts).

circumstantial evidence on the public concern issue, the Eighth Circuit Court of Appeals succinctly summarized the scrutiny speaker motive will face:

> Where a public employee speaks out in public or in private [ ] on matters that relate solely to the employee's parochial concerns as an employee, no first amendment interests are at stake. [ ]. The focus is on the role the employee had assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution [ ]. (footnote and citation omitted)[34]

This test, regardless of how stated,[35] has been applied to make the distinction between matters of public concern and disagreement with internal agency policies or practices.[36]

Although meticulous in the speaker motive inquiry, courts have been careful not to consider a finding of personal motivation by the speaker to be dispositive on the issue of public concern. In fact, the courts have readily embraced the fact that any given speech may serve more than one motive for the speaker.[37] In fact, at least one court has held that a personal grievance can

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[34] Cox v. Dardanelle Public School District, 790 F.2d 668, 672 (8th Cir. 1986). See Note, The Public Employee Can Disagree with the Boss — Sometimes, 66 Neb. L. Rev. 601 (1987). (author undertakes a thorough analysis of the Cox decision).

[35] See: Koch v. City of Hutchinson, 847 F.2d 1436, 1445 (10th Cir. 1988) (citing Cox, the Court set out the test as follows:

> Included within the Connick inquiry is a focus on "the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of the governmental officials in the conduct of their official duties.").

Although this wording varies somewhat from Cox, the import is no different. Accord, Considine, 910 F.2d at 699.

[36] Cox, 790 F.2d at 673 (teacher's criticism of school personnel policies, standing alone, unprotected, but accompanying criticism of educational theories and practices clearly matter of public concern). See also: Connick, 461 U.S. at 148, 149 (Ms. Myers' attempts in her questionnaire to "gather ammunition for another round of controversy with her supervisors" was unprotected, yet her question regarding perceived office pressure to work in political campaigns was a matter of public concern as it touched upon a potential violation of employee constitutional rights). But see infra note 43a. Kurtz v. Vickery, 855 F.2d 723, 730 (11th Cir. 1988) (college associate professor's personal dispute with college president over salary issues unprotected, but overall allegations of improprieties in allocation of financial resources beyond the scope of internal management since the welfare of a state university was at stake).

[37] See, e.g., Wadud, 735 F.Supp. at 1494-95. There the Court treats both sides of the issue. While holding that the plaintiff at bar was motivated solely by his own financial and career interests, the Court evidenced a

blossom into a matter of public concern and thus gain Connick protection in midstream.[38] In such an instance, an existing personal motive is not fatal.[39] This is really no more than an extension of the logic that held one of Ms. Meyers' questions in Connick was a matter of public concern, while her questionnaire, as a whole, was an attempt to turn her personal displeasure over office policies into a "cause celebre".[40]

Before leaving the area of employee motivation, it is important to point out the downside of using this source in evaluating public concern issues. Motive is a very subjective concept. Coupled with the fact that employees in this type of case often have mixed motives, this source area lends itself to judicial manipulation and outcome determinative characterization. For example,

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recognition that public employee speech is often mixed in motive by citing precedent that so holds. Knapp v. Whitaker, 757 F.2d 827, 841 (7th Cir. 1985) (teacher financial motivation in proper mileage reimbursement does not displace concurrent motivation to inform public about poor financial administration).

[38] Breuer v. Hart, 909 F.2d 1035, 1039 (7th Cir. 1990) (holding purely personal dispute between deputy and sheriff did not negate Connick protection as to all topics that grew from that dispute).

[39] See, e.g., Biggs v. Village of Dupo, 892 F.2d 1298, 1302 (7th Cir. 1990) (speaker's personal motivation in describing reasons for his failure to be promoted to Chief of Police do not defeat concurrent motivation in describing how political interference hurt the public police force; in fact, the first point was illustrative of the second).

[40] Connick, 461 U.S. at 148. See supra note 36.
This reasoning, that partial personal motivation is not fatal to a "public concern" conclusion is more than logical, it is necessary. The Seventh Circuit Court of Appeals addressed the issue as follows in the context of a 42 U.S.C. §1985(3) action based on a first amendment deprivation:

> The fact that the plaintiffs also sought damages for alleged wrongs is not enough to keep Rice's action from being a matter of public concern. If that be the test, only one not aggrieved could raise a protected matter of public concern, and even the few would-be plaintiffs that could meet this test might find the courthouse door blocked by principles of standing. Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective. It does not depend entirely on the fact the plaintiffs filed a suit for damages and would benefit but also on the other factors discussed in Connick.

Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990). The reasoning is compelling — barring Connick protection on the basis of an element of personal motivation, however slight, may create problems of standing if not deter such actions altogether. See also: Firefighters Association District of Columbia v. Barry, 742 F.Supp. 1182, 1190 (D.D.C. 1990). In Firefighters, the Court suggests a novel approach in dealing with mixed personal and public motive. The Court found bumperstickers used by the firefighters brought to light problems with the Department which could affect public safety, yet also used them to vent their personal grievances with the Department. In finding that the partial personal motivation was not fatal, the Court suggested personal motivation should be weighed against the speaker in the Pickering balance test, the issue of public concern having been determined. See *Interests Balanced*, infra.

in Connick, Ms. Meyers on the one hand may be characterized as a woman of principle, yet on the other a disgruntled employee out for personal gain in avoiding her transfer.[41] After all, her questionnaire followed quickly on the heels of the proposal to transfer her. The problem with this approach is the initial subjective characterization of motive is the writing on the wall for the public concern determination.[42] Regardless of this potential flaw,[43] however, employee motive remains a critical source for the public concern inquiry.[43a]

The final source for the public concern inquiry is whether or not the speech is made in a public setting or attempts are made to communicate with the public. The Supreme Court has unequivocally held that a public employee's choice to communicate matters of public concern to

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[41] S. Shapiro, Remarks at class meeting of Public Personnel Law, Georgetown University Law Center (October 24, 1990) (Professor Shapiro teaches Public Personnel Law at Georgetown University). (Cited with permission). Accord, Massarro, Significant Silences: Freedom of Speech In The Public Sector Workplace, 61 S. Cal. L. Rev. 3, 27-29 criticizing as fatally subjective the entire public concern concept, rather than speaker motive alone).

[42] Id.

[43] Consider how this point is illustrated by a close reading of Rankin v. McPherson. There, recall a clerical deputy constable upon hearing of the assassination attempt on President Reagan said, "If they go for him again, I hope they get him." 483 U.S. at 381. In Rankin, the Court seems to paint the speaker as a controversial critic of the policies of the Reagan administration. Id. at 386-87. On the other hand, the dissent paints a picture of one flirting with criminality by advocating the assassination of the President. Id. at 397. Predictably, these characterizations mirrored the conclusions of the respective opinions. The Court found the speech touched upon a matter of public concern and the dissent did not. See Note, 27 Duquesne L. Rev. 185, 189-93 (1988) (proposing that Justice Scalia's treatment of criminality aspect of statement does not square with precedent on similar threats against a President).

[43a] While the argument can be made that speaker motive becomes irrelevant in certain cases, the alternative argument is also available. For example, in Connick, the Court's treatment of Ms. Myers' question regarding political campaign pressure services as the basis for the position that the speaker motivation becomes irrelevant in certain cases. That is, because the Court had already found that Ms. Myers' motivation was not to speak as citizen, but rather to turn her personal dissatisfaction into a "cause celebre", the substance of the political question, regardless of speaker intent, justifies a finding of public concern. Of course, this logic also moves toward a conclusion that some public employee speech rises to the level of per se matter of public concern, a suggestion made by some courts, while a holding of none. See infra note 71.

The apparent reluctance of the courts to establish rules per se public concern, even in areas which lend themselves to such treatment (racial discrimination, criminal conduct of public officials, tax issues) reflect a sensitivity to the use of groundless complaints (speaker motive) in protected areas as a subterfuge to secure heightened first amendment protection and thus avoid Pickering's emphasis that general standards are neither appropriate or feasible in this area which demands flexibility. See supra note 28. See infra note 100 (difficulty with per se rules in protected speech cases). Therefore it seems speaker motive will always be an area of inquiry, if not always the controlling area of inquiry on the issue of public concern.

her direct supervisor, rather than to the public at large, does not strip the communication of first amendment protection merely because the communication is private.[44] Therefore, if based on content, form, and context, the speech issue is clearly a matter of public concern. Private communication can never take it out of that category.[45] At the same time, mere public communication of a matter which is clearly not public concern under content, form, and context, cannot thrust it into the public concern category.[46] However, if public concern is at issue after review of the content, form, and context and speaker motive is the inquiry, public communication may provide strong circumstantial evidence of the speaker motive in an otherwise difficult case.[47]

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[44] Givhan v. Western Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed 2d 619 (1979).

[45] See Rankin, 483 U.S. at 386, n. 11. There, the Court held that the private nature of McPherson's statement (to her boyfriend and overheard by one co-worker) does not operate to "vitiate the status of the statement as addressing a matter of public concern." Read with Givhan, this suggests that the public versus private communication issue becomes irrelevant if the speech is clearly a matter of public concern. This point is treated infra. Note, however, that this is not to suggest that public communication is to play no part in these cases once a matter is deemed of public concern. On the contrary, it can play a very critical part in the Pickering balancing of interests test, discussed infra, if the speech at issue is deemed a matter of public concern. See, e.g.: Rankin, 483 U.S. at 388. Givhan, 439 U.S. at 415, n. 4. Cox v. Dardanelle Public School District, 790 F.2d. 668, 672 n. 5 (8th Cir. 1986).

[46] See, e.g., Hoffman v. Mayor of Liberty, 905 F.2d 229, 234 (8th Cir. 1990) (Fact that grievance procedure is open to public does not convert otherwise unprotected subject matter of grievance into matter of public concern).

[47] See e.g., Considine v. Board of County Commissioners, 910 F.2d 695, 700. (10th Cir. 1990) (employee communication about ditch, gravel pits, and hazardous waste site locations delivered outside normal chain of command to citizens groups, media, and EPA, moved beyond speakers official duties and evidenced a calculation to disclose matters of public concern). Scott v. Flowers, 910 F.2d 201, 211 (5th Cir. 1990). (open letter by Justice of the Peace critical of appellate court decisions to county officials, which eventually received press coverage, was calculated to attract the attention of the public, and thus evidence of motive to address issue of public concern). Accord: Note, Protecting Public Employees and Defamation Defendants: A Two-Tiered Analysis As To What Constitutes "A Matter of Public Concern", 23 Val. U. L. Rev. 587, 623-26 (1989). (arguing, under a different formulation of the content, form, and context test, that when content alone is not dispositive of the public concern issue, public dissemination, speaker motivation, and currentness of the issue become the relevant areas of inquiry.) But see: Scott, 910 F.2d 201, 211 (holding public interest and media attention in speech is evidence of public concern). Accord Auriema 910 F.2d at, 1461. (suggesting public interest and Chicago Tribune treatment of speech is evidence of public concern). Rynard, The Public Employee and Free Speech in the Supreme Court: Self Expression, Public Access To Information, and the Efficient Provision of Governmental Services, 21 Urb. Lawyer 447, 460 (1989) (author proposed that solicitation of a speaker's opinion is relevant consideration on issue of public concern in that solicitation would not take place if person requesting speech did not deem matter one of public importance). Compare these holdings with note 23 supra, suggesting potential public reaction plays no part in the public concern equation. To hold otherwise would enable newspaper and television tabloid treatment of an issue to act as an ipso facto public concern cloaking.

Consequently, because the issue of public concern is seldom clear, and because it is almost axiomatic that there will be at least some personal motivation behind the speech in these cases, an examination of the public versus private nature of the speech is often important.[48]

To sum up the area of public concern, it is clear that no rigid standards can be set up for uniform concrete application. There are simply too many possible factual scenarios. Moreover, in order to achieve the delicate balance demanded by Pickering, flexibility must prevail. The consistency in this area is to be found in the relevant sources of inquiry to determine the public concern issue rather than the conclusion itself. Consequently, public concern conclusions will vary on the facts,[49] but the analysis which leads to the conclusion should remain somewhat predictable.

After the public concern analysis is undertaken, if the speech is not deemed a matter of public concern, no higher tier of constitutional protection is due. If, however, the speech is deemed a matter of public concern, the analysis must move on to the balancing test.

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[48] See supra note 39, note 40.

[49] See e.g., Henry v. Department of Navy, 902 F.2d 949, 952 (Fed. Cir. 1990) (conceding, for purposes of discussion, that whether or not gospel music is included in government Martin Luther King Jr. birthday celebration could well be matter of public concern, the Court also acknowledged potential Establishment Clause problems with the issue). Kirkland v. Northside Independent School District, 890 F.2d, 794, 798-90 n. 10 (5th Cir. 1989) (and cases cited therein) (holding a public school teacher's use of a non-approved class reading list not a matter of public concern because teacher sought not to speak as citizen). Zellner v. Ham, 735 F. Supp 1052, 1054 (M.D. Ga. 1990) (speaker communication of personal plans to campaign and run for political office matter of public concern). Shockey v. City of Portland, 785 P.2d 776, 778 (Or. App. 1990) (employee petition against employer clean shaven policy is a matter of public concern as it addresses the manner in which government operates). Corum v. University of North Carolina, 97 N.C. App. 527, 535 (1990) (for purposes of summary judgment only, Court appears to hold that relocation of collection of university library books is matter of public concern, however, Court does not fully analyze issue since it dealt with 42 U.S.C.§ 1983 action (was constitutional right duly established) and expressed finding in terms of 'public interest' and 'public issue' which leaves questionable the validity of the finding). But See, Massaro, Significant Silences: Freedom of Speech In The Public Sector Workplace, 61 S. Cal. L. Rev. 3, 25-33 (1987) (arguing that the public concern test results in a variety of holdings not due to the difference in facts presented, but, rather, due to the subjectivity inherent in the test, the lack of definition, and the internal inconsistency in Supreme Court application of the test). Allred, From Connick to Confusion: The Struggle To Define Speech on Matters of Public Concern, 64 Ind. L. Rev. 43, 75 (1988) (agreeing with Professor Massaro and blaming inconsistency in decisions on "unbridled discretion given the courts under Connick").

Interests Balanced

If the speech at issue is deemed a matter of public concern, Connick requires that the first amendment free speech interests of the speaker be balanced against the interests of the government, as employer, in suppressing the speech.[50] Again there is a return to the Pickering premise, but now the interests of the government in efficient operation of the workplace is considered. The courts have looked at various aspects of the effects speech may have on the employer-employee relationship, the workplace, and the public interest in the government's ability to provide essential services in striking this balance.

In Pickering, the Court set out several factors, or areas of importance, to take into account in measuring the government employer's interest in suppressing employee speech. They are: 1) whether the speech impedes the employer's ability to maintain discipline;[51] 2) whether the speech has created disharmony between coworkers;[52] 3) whether the speech has so undermined the reputation of the employer agency that public confidence can no longer be maintained;[53] 4) whether the speech destroys a confidentiality necessary to performance of agency operations;[54] 5) whether the speech undermines a necessary personal and intimate employer-employee relationship;[55] 6) whether the speech itself calls into question the further ability or

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[50] Connick, 461 U.S. at 150. See also: Rankin, 483 U.S. at 388. The courts are to determine both the issue of public concern and the appropriate balance of interests under the Pickering factors as matters of law. See Connick, 461 U.S. at 148, n. 7 issue of whether speech addresses matter of public concern is one of law, not fact). 461 U.S. at 150, n. 10 (courts determine the appropriate balance under the Pickering factors as a matter of law). Accord: Scott v. Flowers, 910 F.2d. 201, 210-211 (5th Cir. 1990). Williams v. Roberts, 904 F.2d. 634, 638 (11th Cir. 1990). Huang v. Board of Governors of Univ. of North Carolina, 902 F.2d. 1134, 1140 (4th Cir. 1990). Wadud v. Willsie, 735 F.Supp. 1488, 1494 (D. Kan. 1990).

[51] Pickering, 391 U.S. at 569-570.

[52] Id. at 570.

[53] Id.

[54] Id. at n. 3.

[55] Id.

competence of the speaker to perform his or her duties;[56] and 7) whether the speech impedes the normal operation of the agency.[57]

Review of the Pickering factors alone leads one to the conclusion that any one or all of these factors can be important in any given case. That is, the nature of the agency responsibilities and the importance of the employer-employee relationship will always drive the relative importance of any or all Pickering factors. Consequently, use of these factors will always be case specific. Nevertheless, the courts always look to these factors to evaluate the effect of the employee speech on the efficient operations of the government agency. With this common decisionmaking goal, it is easy to see that the courts readily embrace the Pickering factors,[58] although they are sometimes recharacterized,[59] to measure speech effect on efficient agency operations.[60] Brown v. Department of Transportation, F.A.A.,[61] a 1984 Federal Circuit Court of Appeals decision is illustrative on the point of application and flexibility of the Pickering factors.

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[56] Id. at 572, 573 n. 5.

[57] Id. at 571, 573.

[58] See e.g., Williams v. Roberts, 904 F.2d 634, 638 (11th Cir. 1990). (Court embraces Pickering factors, after finding tax commission employee criticism of salary scales a matter of public concern as follows:

> There is not a shred of evidence in the record that her speech impeded her ability to do her work, disrupted her working relationships, interfered with the operation of the tax department, threatened Roberts' authority to run his office, resulted in any internal discipline problem, affected the morale of her fellow employees, or created any disrespect for the Tax Commissioner.).

It is clear in this application that no one factor, in and of itself, controls.

[59] See: Johnson v. Ind. School Dist. No. 3 of Tulsa County, 891 F.2d 1485, 1490-94 (10th Cir. 1989) (in extensive discussion of Pickering balance factors, Court holds that speaker's access to other available avenues for speech is important, suggesting this is no more than a time, place, and manner inquiry).

[60] The effect of the speech on agency operations need not be actual, only potential. See: Domiano v. Village of River Grove, 904 F. 2d 1142, 1145 (7th Cir. 1990) (holding focus is the foreseeable effect of the speech and whether it is reasonably calculated to create agency disharmony or impair operations). Darnell v. Ford 903 F. 2d. 556, 561 (8th Cir. 1990) (employer failed to provide evidence that employee speech resulted or would result in workplace inquiry). But see: Fire Fighters Association District of Columbia v. Barry, 742 F.Supp. 1182, 1191 (D.D.C. 1990) (suggesting employer must provide evidence of actual harm from which inferences may be drawn in application of the balancing factors). This distinction is also a point of contention at the Supreme Court level. Note, The Free Speech Rights of Public Employees, 57, Geo, Wash. L. Rev. 1281, 1295-96 (1989) The dissent in Connick v. Meyers would obviously require proof of actual harm under the Pickering balance. 461 U.S. at 166-170 (Brennan, J. dissenting). Accord Note, 55 Tenn. L. Rev. 175, 195 (1987).

In Brown, a 25 year air traffic controller supervisor was dismissed for off duty comments made at a union hall meeting at the height of the air traffic controller strike. Brown's stated reason for appearing at the union hall was to assure the strikers that he had not been fired, but his statements to the strikers, and later to national media representatives, could be construed as supporting or encouraging an illegal federal strike.[62] These statements occurred after the Presidential Order for the strikers to return to work. The Court sustained government disciplinary action against Brown.[63] It found that although his statements were a matter of public concern,[64] the government's interest as employer in suppressing the speech outweighed the free speech rights of the public employee. In so doing, the Court applied the Pickering balance.[65]

At the time of Brown's statement, the agency faced a national transportation emergency. Further, he was, as a supervisor, a person lower level workers looked to for guidance and trust. These factors were most important to the Court in ruling for the agency. They are

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Thereafter, the Rankin decision sharpened this contention. Therein Justice Scalia argues that there was evidence of office disruption based on McPherson's statement. 483 U.S. at 400. However, he also suggests that Connick held that the mere potential for undermining office operations can cause the balance to be struck in favor of the government. Id. at 399. What may be operating here is what the author sees as the friction between court deference to the management function of the agency in judicial review and independent judicial review. See also Note, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 Calif. L. Rev. 1109, 1132-1135 (author proposed public employee free speech cases are susceptible to both approaches, and, while deferential review serves to to promote management needed flexibility, independent review provides a thoroughness necessary to such an important right as free speech and results in more fair and consistent decisions). See also: Note, "Great Subtleties of Judgement": The Fourth Circuit's Approach to the Public Employee Free Speech Doctrine in Jackson v. Bair, 67 N.C. L. Rev. 976, 990-91 (1989) (arguing the Fourth Circuit will now require proof of actual disruption as opposed to potential disruption).

[61] 735 F.2d 543 (Fed. Cir. 1984).

[62] Id. at 545 (specifically, Brown told the strikers, "I wish you'd all come back, 'cause I'm too tired and too old to be working these long hours. I'm happy that you're together. Stay together, please, because if you do, you'll win.", and, to a media representative, "I support some of the strike demands."; Brown also testified that he acknowledged to the media the strike was illegal).

[63] Id. at 548-549 (Although the original agency action taken against Brown and upheld at the administrative level was removal, the Court ordered mitigation of this measure due to Brown's time in service, the potential double meaning of his statements, and his hard work during the strike).

[64] Id. at 546.

[65] Id. at 546-547.

recharacterizations of Pickering's charge to look at, among other things, the agency's ability to perform its duty and the maintenance of discipline and harmony among the workers. Brown also suggests that the "importance of the agency's ability to do its job" factor is turned up several notches when, as here, public safety or need is directly at stake. Finally, the place, timing, and manner of Brown's speech was important to the Court because it occurred in a heated labor relations environment, was presented to the national media, and occurred during a national emergency.[66] This emphasis makes clear the point that the choice of public versus private communication by the speaker can indeed play a large part in the Pickering balancing test, as opposed to the public concern issue, Givhan notwithstanding.[67]

While Brown does not embrace all of the Pickering factors, it demonstrates how they are applied. As is true with the sources of evidence on the public concern issue, none of the Pickering factors are in and of themselves controlling as a rule. In some cases, for example, the close working relationship or the confidential nature of the working relationship at issue became the factor which tip the scales in favor of the government.[68] In other cases, such as Brown, many factors are at play. As a result, the bottom line on application of the Pickering factors is no different than the use of several sources to decide the public concern issue, it simply is not feasible to lay

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[66] Id.

[67] See, e.g., Domiano v. Village of River Grove, 904 F.2d. 1142, 1145 (7th Cir. 1990) (time, place, and manner of speech important in application of Pickering factors, public concern having been found). Ferrara v. Mills, 781 F.2d 1508, 1514 (11th Cir. 1986) (publicity of speech relevant factor to Pickering balance, not public concern).

[68] See, e.g., Breuer, v. Hart, 909 F.2d 1035, 1041 (7th Cir. 1990) (acknowledging the "urgent need for close teamwork among those involved in the 'high stakes' field of law enforcement). Zellner v. Ham, 735 F.Supp. 1054-55 (M.D. Ga. 1990) (acknowledging that some positions require trust and confidence in unsupervised employee work and in such circumstances perceived disloyalty can be devastating to agency operations). Dicomes v. State, 782 P.2d 1002, 1012 (Wash. 1989) (position requiring high degree of discretion and autonomy in government budget administration coupled with public disclosure of budget data could create severe compromise of agency operational ability when such confidential relationship is breached).

down a general standard by which an enormous variety of potential fact situations may be judged.[69]

Protected Union Activity as Opposed to Protected Speech Under The First Amendment

For purposes of this paper it is important to develop the interplay between speech by or for a labor organization and public employee speech in general. There can be little doubt that labor organizations and their activities are critical to labor-management relations, at least in the federal sector, because Congress has deemed labor organizations in the public interest.[70] For this reason, one may well wonder whether, under the law of public employee free speech, communication by or for a labor union is per se a matter of public concern. Although some speech matters have approached this characterization,[71] labor organization speech has not.

There are two lines of cases which have developed regarding first amendment protection for union related speech. One deals with the scenario where union speech is challenged by a private individual under the relevant libel laws. The other deals with challenges to government agency discipline based on union related employee speech. This distinction is important to understand at the outset because it sharpens the focus of the issue which will be presented in the hypothetical Supreme Court case in this paper.

When an individual, rather than an employer, challenges union related speech, responding courts have often relied on the Old Dominion[72] doctrine in resolving the case. The analysis in this

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[69] See: Germann v. City of Kansas City, 776 F.2d 761, 764 (8th Cir. 1985) (Citing: Egger v. Phillips, 710 F.2d 292, 319 (7th Cir. 1983).) (holding that "the Pickering balance is flexible and the weight to be given to any factor varies depending on the circumstances of the case.").

[70] 5 U.S.C. §7101 (a) (1978).

[71] See, e.g., Connick, 461 U.S. at 148, n. 8 (racial discrimination is a matter inherently of public concern). Pollard v. City of Chicago, 643 F.Supp. 1244, 1249 (N.D. Ill. 1986) (citing Connick and holding there can be little doubt incidents of sexual and racial discrimination are matters of public concern given history of legislative prohibition of same).

[72] Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) (union newsletter which described nonunion postal workers as "scabs" is protected speech under federal labor law as it encourages legitimate debate).

type case is much different than the Pickering-Connick-Rankin analysis discussed above.[73] When union speech is challenged by an individual, the issue is whether the state libel law standards are effected by federal labor relations law under a preemption theory. Old Dominion held that a state libel cause of action could not stand insofar as it contradicted the freedom of speech protections afforded by federal labor law.[74] Therefore, public concern and balancing of interests are not even issues under Old Dominion. However, one proposition advanced in Old Dominion is potentially relevant under the Pickering analysis and should be kept in mind. The Court recognized that federal law provides a union much leeway to strike hard critical blows, even abusive or insulting blows, in order to further the robust debate so necessary to a viable labor relations environment.[75]

The second line of cases in the union related speech area has developed due to employer action. Consequently, a Pickering-Connick-Rankin first amendment analysis is undertaken,[76] so public concern becomes the first issue. Upon application of this analysis some federal courts have held that union related speech is not per se a matter of public concern.[77] Rather, one must consider whether the union speech is directed at an internal agency policy with no extra agency application or effect, directed at an individual disciplinary dispute,[78] or, on the other hand, directed at an issue with greater breadth of effect on public issues or the overall labor management relations

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[73] See, Barnes v. Small, 840 F.2d 972, 983-984 (D.C. Cir. 1988) (holding Old Dominion applies only in defense of libel suit, but , where adverse employment action based on speech is at issue Pickering, Connick, and Rankin apply).

[74] Old Dominion 418 U.S. at 283-284.

[75] Id. at 282. It should again be emphasized that this proposition was advanced by the Court under an analysis of applicable federal statute rather than the first amendment).

[76] Barnes, 840 F.2d at 983-984.

[77] See e.g., Boals v. Gray, 775 F.2d 686, 693 (6th Cir. 1985). Monks v. Marlinga, 732 F. Supp. 749, 752 (E.D. Mich. 1990).

[78] Barnes, 840 F.2d 972, 983, n. 13 (employee union president's letters concerned only local union personnel actions as opposed to broader public concern issues such as recognition of the trade union movement).

environment.[79] This rule makes sense because to hold otherwise would allow circumvention of the Connick case merely because the speaker is a union member.[80] It should further be noted that the prevailing view has made no distinction between the Pickering-Connick-Rankin protection afforded public employee speech and public employee association in these cases.[81] Even though one can conclude there is no per se rule about union related speech under the Pickering- Connick-Rankin analysis, this does not mean the union context has no place in the equation. Rather, two vehicles for application are readily apparent.

First, although few courts have undertaken such an analysis,[82] one need not extend the Connick public concern analysis very far to argue that speech in the union context or speech through union channels may provide circumstantial evidence of the speaker's motive to address a matter of public concern when the public concern issue is questionable.[83] For example, agency-

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[79] American Postal Workers Union v. U.S. Postal Service, 830 F.2d 294, 301 (D.C. Cir. 1987) (in affirming District Court on this point (598 F. Supp 564) the Court found union newsletter urging unionization certainly falls within category of "matter of social, political, or other concern to the community). Boals, 775 F.2d 686, 693 (without such breadth, public concern is not realized because mere fact of union relation does not mean speech touches upon matter of public concern as a matter of law). Lynn v. Smith, 628 F.Supp. 283, 290 (M.D. Pa. 1985) (union shop steward in executing his duties did not embrace public component such as that present in both Postal Workers cases cited herein). American Postal Workers Union v. U.S. Postal Service, 598 F. Supp. 564, 569 (D.D.C. 1984) (union speech rose to level of public concern in that it dealt with how unions, as a whole, should respond to the right-to-work movement and addressed overall labor movement orientation).

[80] See: Griffin v. Thomas, 724 F.Supp. 587, 589-590 (N.D. Ill. 1989) (mere use of union vehicle to file personnel grievance does not automatically raise issue of public concern as to speaker's right to actively participate in union, so holding would allow procedural side-stepping of Connick; citing 7th Circuit precedent, the Court added, "personal grievances cloaked in the garb of institutional dress are not thereby made matters of public concern). Lynn, 628 F.Supp. at 290 (to allow status of speaker as union steward to automatically propel substance of speech into public concern category could allow circumvention of Connick).

[81] See e.g.: Boals, 775 F.2d 686, 692 (holding there is "no logical reason for differentiating between speech and association in applying Connick..."); Monks, 732 F.Supp. at, 752; Griffin, 724 F.Supp. at 589 (noting that while there is circuit conflict as to whether Connick applies to association, to draw a distinction between speech and association for purposes of Connick application is "nonsensical"). But see; Hatcher v. Board of Public Education and Orphanage, 809 F.2d. 1546, 1558 (11th Cir. 1987) (holding Connick is inapplicable to freedom of association claims.).

[82] American Postal Workers, 598 F.Supp. at 571 (Judge Gesell appears to have drafted one of the few opinions that treats the place of union related speech in the public concern analysis).

[83] See supra, note 45. This is merely an extension of the proposition advanced supra. The Givhan holding that public communication versus private communication is irrelevant to the issue of public concern does not apply when speech content and context do not reveal whether the subject is a matter of public concern..

wide appeals for worker solidarity may be on firmer public concern footing than an off hand comment at the water cooler. Also, if the content of the union speech itself involves issues of unions in the overall labor management relations scheme, such speech in and of itself may be a matter of public concern regardless of public communication.[84]

Secondly, once the speech is deemed a matter of public concern, it is clear that union relation may play a part in the Pickering test. Many cases have dealt with the protection afforded union speech under federal law.[85] The logical extension of protection under Pickering would be to look with greater disfavor upon agency suppression of union speech in the balancing equation due to the protection it is already afforded under federal or applicable labor law. The formulation for such an approach can be drawn from the Old Dominion holding that federal protection of union speech exists to encourage the robust debate so necessary to viable labor-management relations.

These possible approaches to union related speech under the Pickering-Connick-Rankin analysis show that the Supreme Court could take several approaches if presented with such a case. Clearly, the flexibility of the tests applied under the law in this area lends itself to different results. In fact, the Rankin decision itself is a shining example of the developing dichotomy on the Supreme Court. But taking the two Rankin positions one step further, to the area of union speech, will make the dichotomy that much clearer. The facts and treatment of the case to be presented to the Supreme Court under this scenario will now be addressed.

II — AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ALF-CIO, LOCAL 2031 v. FEDERAL LABOR RELATIONS AUTHORITY

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[84] American Postal Workers Union, 598 F.Supp. at 569 (Judge Gesell suggests that appeals to worker solidarity in the face of right to work movement falls into this category).

[85] See e.g.; Old Dominion, 418 U.S. at 274-275 (Executive Order No. 11491 provides such protection). Eastex Inc. v. National Labor Relations Board, 437 U.S. 556, 570 (1978) (National Labor Relations Act affords such protection). Of course, the FLMRA and NLRA do not reach non-federal public employees. Although, some states may provide similar statutory protection.

Facts

Lonnie Carter was the union president of AFGE Local 2031 which represents a bargaining unit of some 900 employees of the Veteran's Administration Medical Center at Cincinnati, Ohio. Local 2031 publishes a monthly newsletter which is distributed to union employees and various other individuals upon request. The newsletter was edited by Brenda McCullom, Local 2031 secretary treasurer. Raynold Cole was the Chief of Building Management services at the agency facility.

The June 1985 copy of the union newsletter contained an article critical of Cole.[86] The article was written by McCullom and adopted and endorsed by Carter in his capacity as union president. The article was critical of Cole in several respects. It alleged he acted unfairly in work assignments and employee discipline, that he micromanaged employees, that he was hypercritical of employees, and that he was a mere figurehead or unqualified token appointment to the agency EEO Committee. In making these criticisms, the article characterized Cole as "the spook who sat by the door" and "Uncle Tom". The intentional thrust of these terms in the context of the article is revealed by a specific passage from the article:

> Raynold Cole is an exact replica of the house negroes whom in exchange for a lesser burden, kept order among the defiant masses to the extent of initiating penalties if the 'massuh' felt it was warranted...

After publication of the article Carter was issued a reprimand, based on the language quoted, because he adopted and endorsed the language as union president. The reprimand was based on the violation of several agency regulations which prohibited disrespectful conduct and language.[87]

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[86] The full text of the article is set out at Appendix A.

[87] Id.

In response to the reprimand, the union filed an unfair labor practice charge with the Federal Labor Relations Authority Regional Office. The union alleged that the reprimand constituted agency interference with the union right to act in its representational capacity under 5 U.S.C. §7116 (a) (1) and (2). Subsequently, the General Counsel, acting through the Regional Director, issued a complaint on the same grounds. A hearing was held.

Administrative Law Judge Treatment

After making findings of fact, the Administrative Law Judge (ALJ) concluded that the agency had indeed committed an unfair labor practice in violation of 5 U.S.C. 7116 (a) (1) and (2).[88] Curiously, the ALJ did not address the racial tenor of the language at issue. Rather, he based his entire decision on the premise announced in the Old Dominion case[89] discussed above. Emphasizing the proposition that a union had virtual free license, under the protection of federal statutory labor law, to put forth intemperate, abusive, or insulting language short of libel while acting in its representational capacity,[90] especially when working conditions are addressed in the verbal attack,[91] he held the language at issue was really no more than uninhibited, robust, and wide open debate in a labor dispute,[92] a practice which is favored by federal labor policy. Accordingly, the ALJ found that the agency had committed an unfair labor practice. The FLRA, however, treated the matter quite differently.

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[88] 26 F.L.R.A. 114 at 143. The complete ALJ Findings of Fact are set out at Appendix B.

[89] 418 U.S. 264. See supra note 72.

[90] 26 F.L.R.A. at 132, Citing: Linn v. Plant Guard Workers, 383 U.S. 53, 63 (1965).

[91] Id. at 131, Citing: Internal Revenue Service, North Atlantic Service Center, 7 F.L.R.A. 596 (1982) (union newsletter characterization of agency supervisor as "this season's holiday turkey" protected). Distinguishing: Maryland Drydock Co. v. N.L.R..B., 183 F.2d. 538 (4th Cir. 1950) (union newspaper entry characterizing employer as "goose" and "vulture" in attack unrelated to working conditions unprotected).

[92] Id. at 129.

FLRA Treatment

Like the ALJ, the FLRA drew support for its decision from federal policy favoring certain labor activity. Unlike the ALJ, however, the FLRA sought to remedy a different impediment to federal policy-racial discrimination.

The FLRA acknowledged the Old Dominion premise which recognized free and open debate in the labor relations environment,[93] but then went on to seize upon the racial tenor of the statements at issue in overruling the ALJ and dismissing the case. The FLRA found that the language went beyond any statutory protection provided union speech under the Federal Labor-Management Relations Act because the article resorted to name calling by racial stereotyping.[94] The FLRA's position is best summed up in the final statement of its analysis, "Quite simply, the use of these terms has no place in the Federal labor-management relations program".[95] The union took an appeal.[96]

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[93] Id. at 116 (in note 4 the Authority distinguished Old Dominion and cases relying thereon since none dealt with speech involving racial slurs).

[94] Id. at 116-117.

[95] Id.

[96] 5 U.S.C. §7123(a) provides that appeals taken from decisions of the Authority regarding unfair labor practices, as well as certain other matters, are taken directly to the U.S. Court of Appeals for the District of Columbia.

U.S. Court of Appeals Treatment

The U.S. Court of Appeals for the District of Columbia opinion in this case is one of deference and limitation. Prior to the discussion of the legal analysis undertaken by the Court, however, two factual assumptions noted in the opinion bear comment. The Court finds that the union newspaper was distributed, "... to members of the union and of the general public ...".[97] (emphasis added). Although this fact was undeveloped at the administrative level, it is easy to see its importance in a Connick light. Also, the Court notes that Carter, as well as Cole, is African-American.[98]

As to the legal analysis, the Court upheld the Authority's decision on two grounds. First, the Authority was granted due deference in the area of its expertise since its decision was not unreasonable or inconsistent with the policies underlying the Federal Labor-Management Relations Act.[99] The Court recognized that this case presented a close call since the article's language, taken as a whole, could be characterized as legitimate criticism of Cole's performance as a manager, but vindicated the reasoning of the FLRA that the inclusion of the racial comments took the article out from under statutory protection since such statements have no place in the federal labor-management relations program.[100]

Secondly, the Court did not take up the issue of potential protection of the speech under the first amendment and the Pickering- Connick- Rankin analysis. The holding here was not based on

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[97] 878 F.2d at 464.

[98] Id., at 465.

[99] Id., at 464.

[100] Id. at 465-466. But see; Id., 466-468 (Judge Boggs dissented on the ground that while the FLRA could find the racial statements in this case allowed the government to take action after both interests were weighed, the adoption of a per se ban of all racially motivated statements in the labor-relations environment was contrary to precedent. He based this opinion on the conclusion that as noble a cause as discrimination eradication may be, the interests must still be balanced to preserve the equally noble right of free speech. Further, relying on Old Dominion, Judge Boggs proposed that, "words relating to race may be an effective way to convey a work related message to those targeted as the audience...").

a lack of public concern matter in the speech, but rather a failure of the union to raise the issue at the administrative level.[101] Since no "extraordinary circumstances" were present to excuse the failure, the Court did not entertain the issue. Consequently, the untreated first amendment issue is ripe for hypothetical Supreme Court treatment.

III — HYPOTHETICAL SUPREME COURT AFGE DECISION

Introduction

The thesis of this paper is that the two views on public employee speech expressed in the Rankin decision[102] no longer command the same degree of support among the Justices. Mr. Justice Scalia's dissenting view in Rankin would today be the majority view. He would be joined by those that concurred with him in Rankin. The Chief Justice, Justice White, and Justice O'Connor were these Justices. The judgment of the Court would be joined by Justice Kennedy, concurring. Mr. Justice Marshall's Rankin view, and the view of the Court at that time, would now be the minority view. Thus, Justice Marshall would be writing in dissent. Justices Brennan and Powell, who joined the opinion of the Court in Rankin, have since departed. Justice Souter, unpredictable only because of the brevity of his tenure on the Court may side with the Marshall view. However, even if Justice Souter were to side with the Marshall view, the support offered by Justices Stevens and Blackman would still leave Justice Marshall one vote shy of a majority. Given this thesis, the predicted opinion of Justices Scalia, Kennedy, and Marshall will be set out. Then, under the heading *Opinion of the Court*, the position of each remaining Justice will be addressed.

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[101] Id. at 465-466.

[102] See supra note 4.

Justice Scalia delivered the opinion of the Court:

This Court has gone far to eradicate racial stereotyping and discrimination at all levels in our society. Brown v. Board of Education, 347 U.S. 483 (1954). (School systems segregation prohibited). Turner v. City of Memphis, 369 U.S. 350 (1962). (Public restaurant segregation prohibited). Gomillion v. Lightfoot, 364 U.S. 339 (1960). (Racially discriminatory voting practices prohibited).[103] As is true in all facets in our society, this practice has no place in the labor relations environment, especially in the federal labor relations environment where our legislature and chief executive have steadfastly acted to eliminate discrimination at every turn. 42 U.S.C. §1981. 42 U.S.C. §1985(3). 42 U.S.C. §2000e et seq. Executive Order 11246. Our decision today makes clear that such stereotyping, regardless of source, will not be condoned, let alone afforded the type of first amendment protection due public employee speech we recognized in Pickering v. Board of Education, 391 U.S. 563 (1968).

The issue in this case is whether federal agency management is barred by the first amendment from prohibiting public employees from engaging in racial stereotyping under the guise of union representational activity. We hold that management is not so prohibited. This Court has determined that a two-step test is appropriate in public employee free speech cases. First, it must be determined whether the speech at issue touches upon a matter of public concern. If so, the interests of the government, as employer, must be weighed against the free speech rights of the employee. Connick v. Meyers, 461 U.S. 138, 140 (1983). In applying the two pronged analysis of Connick, we hold that 1) the speech at issue did not address a matter of public concern; and 2) assuming arguendo that it did address such a matter, the speaker's interest in making the statements is far outweighed by the government employer's interest in suppressing it.

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[103] J. Nowak, R. Rotunda, J. Young, Constitutional Law 1986 Chpt. 14.

Mr. Carter, a local union president at the Cincinnati Veteran's Administration Medical Center adopted and indorsed a union newspaper article which was critical of agency supervisor Cole. The article criticized Cole, an African-American, on a personal level in certain respects, to include his management skills and insensitivity to workers. However, he did not stop there. The article went on to employ racial name calling tactics and racial stereotyping. These references included the terms "spook" and "Uncle Tom". Based on the use of this language Carter was reprimanded for violation of agency regulations prohibiting use of discourteous and offensive language. While we do not pass on the blanket validity of the regulations, we do hold that as they were applied in this case, no first amendment violation inhered.

The appropriate balance to be applied in evaluating the free speech rights of public employees are now well settled. This Court framed the ultimate issue as follows:

> "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Pickering v. Board of Education, 391 U.S. 563, 568 (1968). This mandate, as applied, has required us to first examine the speech at issue in order to determine if it touches upon a matter of public concern. If it does, and only then, are we required to reach the second step which involves a balance between the interests of the state, as employer, and the of the speaker. Connick, supra, at 140.

In Connick we recognized that the speech of a public employee is severable for purposes of deciding whether each issue addressed by the speaker, in itself, touches upon a matter of public concern. There we held that while the majority of questions appearing on the questionnaire circulated by Meyers were matters that dealt solely with her personal inter-office dispute, and thus did not touch upon matters of public concern, one question, which dealt with alleged political pressure brought to bear on the assistant district attorney, did constitute a matter of public concern. 461 U.S. at 149. Similar reasoning is applicable to the case at bar.

Carter's adopted article addresses two distinct areas, criticism of Cole's performance as a manager in treatment of subordinates and criticism of Cole's appointment to the agency Equal Employment Opportunity Committee. The first subject matter is easily disposed of as it addresses a private union-management dispute about performance of a single supervisor and union dissatisfaction therewith. We have long held that to secure heightened protection under Pickering and Connick the public employee speaker must address a matter of public concern. Pickering, 391 U.S. at 568. Connick, 461 U.S. at 146. Let us not forget that matters which touch upon public concern are those lying within the very heart of the first amendment's protection. First National Bank v. Bellotti, 435 U.S. 765, 776 (1978). Matters of public concern are those matters dealing in some way with "the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Indeed, as we held in Pickering and Connick, the problem in any case is to balance the interests of the employee as a citizen in commenting on matters of public concern. 391 U.S. at 568. Here Carter's references to Cole's management style simply do not reach that level because he advances a purely parochial union dispute with which the public has no concern, nor probably any interest. This is not the first time we addressed an issue that did not touch upon a matter of public concern.

Petitioner complains about an in internal agency personnel dispute, specifically, the union's dissatisfaction with Cole's management style. Such speech is not dissimilar to the personal dispute issues we found unprotected in Connick. There, an assistant district attorney took her personal dispute over a potential transfer to other office personnel and was dismissed therefore. In holding her speech on this matter was not a matter of public concern, the Court found, "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark- and certainly every criticism of a public official- would plant the seed of a constitutional case". Connick, 461 U.S. at 149. In Connick we refused to so hold. This case is no different. Carter's statements went to union dissatisfaction with an agency supervisor. Thus, they did not embrace a matter of public concern. On the other hand, however, Carter's statements regarding Cole's placement on the EEO committee are not so easily resolved.

As to the statements regarding Cole's placement on the EEO Committee, petitioner argues that these statements were an attempt to bring to light the discriminating actions of the agency. Rather, and we hold, these statements amounted to no more than an insensitive attack on Cole.

The administrative law judge found that the reprimand given by the agency was for, "statements which are derogatory, insulting, and disrespectful of Raynold Cole in his capacity of Chief of Building Management Service." Therefore, our focus must squarely be placed on the references to Cole rather than reference to agency action. We have dealt with the references to Cole as a manager supra. Holding they have no protection under Pickering and Connick, we do not decide whether they have protection under the Federal Labor Management Relations Act as that issue is not before us. With respect to his appointment to the EEO Committee, it is clear from the record that any allegation of attempted management discrimination by this appointment was not the subject of the reprimand. Rather, it was the name calling and racial sterotyping pointed at Cole which triggered the discipline. Indeed, the agency regulations proffered as the basis of the action address courtesy, dignity, and abusive language. Therefore, it is only use of the terms "spook who sat by the door" and "Uncle Tom" which we need concern ourselves with here. We specifically do not decide whether the allegations that the agency used Cole to perpetuate discrimination touched upon a matter of public concern since such speech was not the subject of the discipline and is thus not an issue before this Court.

As to the subject comments, petitioners argue that their motive was inextricably tied to an overall criticism of agency perpetuation of discrimination. Such post hoc rationalization is unconvincing. First, just because one portion of a statement is arguably a matter of public concern (allegations of agency discrimination perpetuation) does not result in an ipso facto conclusion that the entire substance of the speech may be so characterized. Indeed, in Connick supra, this Court held quite to the contrary. Secondly, the motive for bandying about racial slurs in the federal workplace is surely not a public concern lifeline to speech so far removed from first amendment protection, and, in some circumstances prohibited by law. Speech of this kind is quite close indeed to "statements that we have previously held entitled to no first amendment protection even in the

nonemployment context — including assassination threats against the President (which are illegal under 18 U.S.C. §871), See Frohwerk v. United States, 249 U.S. 204, 206 (1919); "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); epithets or personal abuse, Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940); and advocacy of force or violence, Harisides v. Shaugnessy, 342 U.S. 580, 591-592 (1952)." Rankin, 483 U.S. at 397 (dissenting opinion). In my dissent in Rankin v. McPherson, I illustrated this concept in noting that to magically convert the motive for speech into its context would require a conclusion by logical extension that "a political assassination preceded by a harangue [is] nothing more than a strong denunciation of the victim's political vices." 483 U.S. at 397-398. This logic is not consistent with our holdings in Pickering and Connick. Post hoc statements of noble motive do not provide carte blanche public concern protection to speech. The speech must be judged on its content. This we have done.

Petitioner seeks to persuade us that any union speech offered within the labor relations environment is per se a matter of public concern because union activity has been declared a necessary part of labor-management relations in this country by our legislature. However, the law holds no support for this proposition. This Court has long recognized that blanket and rigid rules are inappropriate to public employee free speech cases due to the "enormous variety of fact situations" which may arise. Pickering, 391 U.S. at 569. Therefore, these cases must be decided individually, not by uniform application of rigid rules which is so futile in this area of the law.

Union freedom to engage in robust, sometimes sharp, debate has its bounds. The court below set such bounds under the Federal Labor Relations Act. 878 F.2d. 460, 465 (D.C. Cir. 1989). We do not disturb this holding. We further hold that there is no per se first amendment protection for racial stereotyping whether or not it is advanced in the name of robust union debate. Racial stereotyping cannot be tolerated regardless of its source, let alone afforded heightened first amendment protection.

Assuming, arguendo, that the speech at issue here did touch upon a matter of public concern, first amendment protection also fails to attach because the interest of the agency, as employer, in suppressing such speech far outweighs the interest of Carter in publishing the article.

The government's interest in suppressing the speech in this case is simply put: to check the proliferation of racial stereotyping in the workplace. Such is a legitimate interest vindicated by the holdings of this Court. Our very goal is elimination of racial distinction in the workplace and throughout society. To allow racial stereotyping to occur in the workplace unchecked would surely impede the agency's ability to maintain discipline because such inaction would lead to employee conclusion that the agency condoned such conduct. For the same reason, public confidence in the agency's ability is impaired. Also, to allow such language to permeate the workplace can clearly lead to worker disharmony and racial tension. These are but a few of the agency interests in suppression which legitimize the agency action in this case.

Carter's interests, on the other hand, are not nearly so great because his goal, to criticize Cole, could have been accomplished no less sharply in many different ways. Indeed he utilized such other avenues within the article, but when he engaged in racial stereotyping, he stepped over the line. The first amendment does not protect epithets and abusive remarks. Cartwell v. Connecticut, 310 U.S. 296, 309 (1940). Similarly, it does not protect racial stereotyping at any level. Nor does the protection of robust debate as an essential part of labor-management relations save such speech. The content of this speech serves to destroy, rather than promote, a viable labor-management relations environment. Affirmed.

The Opinion of Mr. Justice Kennedy

Mr. Justice Kennedy, concurring in result.

I write separately because while concurring in the judgment of the Court, I reach this conclusion on different grounds. Like the majority opinion, I agree that all references to Cole as a

manager were parochial union criticism which did not touch upon matters of public concern. ante. I take issue with the conclusion that the use of the terms "spook" and "Uncle Tom," when read within their context, are not matters of public concern. Here, I agree with the dissent that these terms were indeed used in criticism of potentially discriminating practices within a federal agency. On that basis, and read in context, I would characterize these terms as addressing a matter of public concern. However, I concur in the holding by the Court that, even if the speech is a matter of public concern, the government interest in suppression far outweighs the speaker's first amendment interest. The government interest, of course, is the eradication of discrimination in the workplace, a discrimination fostered by the use of racial stereotyping. For this reason I would uphold the reprimand administered by the agency.

The Opinion of Mr. Justice Marshall

Justice Marshall, with whom Justice Blackmun, Justice Stevens, and Justice Souter join, concurring in part and dissenting in part:

The issue in this case is whether a union president and employee of a federal agency was properly reprimanded for criticizing an agency supervisor and that agency's practices vis á vis its Equal Employment Opportunity Committee staffing. Today this Court holds he was properly reprimanded. Because I believe the agency reprimand, in part, infringed upon petitioner's free speech rights as a public employee under the first amendment, I dissent from the Court's opinion insofar as it held use of the terms "spook" and "Uncle Tom" are not due first amendment protection under Pickering v. Board of Education, 391 U.S. 563 (1968).

The facts of this case, some ignored by the Court, must first be recited. Mr. Carter, as local union president, chose to adopt and indorse a newspaper article in his union capacity in order to criticize an agency supervisor for what he saw as inefficient and insensitive management techniques. Further, Carter sought to criticize what he characterized as the discriminatory motives

in the agency staffing of its EEO committee. In his attack on both these fronts Carter chose language which was bold, direct, and possibly offensive to some. Suffice it to say, however, the labor relations environment is no stranger to direct, often harsh, criticisms. See: Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 268 (1974). (Non union striker replacements are referred to as "scab," the "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue"). Rather, they are an integral part thereof. Id. at 286. After the article was published, the union, as was its practice, provided copies of the paper to both employees and members of the public at large, 878 F.2d. at 461, in order to fully disseminate the union perspective on current labor relations issues in the federal sector. Finally, it should be noted, and the record below makes clear, that both Carter and supervisor Cole are African Americans. 878 F.2d. at 465.

II

Long ago this Court held that an individual does not give up his or her constitutional rights as a condition of public employment, nor can he or she be compelled to do so. See Weiman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). More specifically, in the area of free speech of the public employee we have held that a balance must be struck. We must balance, on the one hand, the right of the employee, as a citizen, to speak on matters of public concern, and, on the other hand, the right of the government, as employer, to insure efficient operations of the instrumentality it is charged to manage. Pickering, 391 U.S. at 568. In striking this balance we have held the process is twofold in our decision in Connick v. Meyers, 461 U.S. 138 (1983). First, we must decide whether the substance of the speech at issue is a matter of "public concern". Id. at 146. Secondly, if we so hold, we must then determine whether the speaker's interest in making the statement outweighs the government's interest in suppressing it. Id. at 150. Carter's references to Cole as "spook" and "Uncle Tom", in context address a matter of public concern, and, further, no legitimate government interest outweighs Carter's interest therein. However, insofar as the Court holds that

Carter's other references to Cole as a manager do not address matters of public concern, but rather parochial union complaints, I concur in the Court's opinion.

III

Whether speech is a matter of public concern is to be determined from the context, form, and content of the speech itself. Connick, 461 U.S. at 147-148. Here, the Court characterizes the remarks at issue, as no more than racial stereotyping at its plainest under the guise of robust labor relations debate. ante. To so characterize this speech totally misses the thrust of the article and the coverage of first amendment protection in this area.

This article, and all the language contained therein, must be viewed in context on the record as a whole. Connick, 461 U.S. at 148. Isolated piecemeal characterization of certain words serves little purpose in the analysis. In fact, to do so frustrates the analysis. "Spook" and "Uncle Tom" are racial slurs in the abstract. However, the perspective required by this Court's precedent is not in the abstract. Connick's charge that we examine the context, form, and content on the record as a whole cannot be ignored, yet the Court chooses to do so. Carter's words, in context, are pointed criticism rather than racial stereotyping. They express ideas about discriminatory practices. For example, use of the terms "the spook who sat by the door" and "uncle Tom" convey ideas of use by white management of individual African Americans to further discriminatory practices. 26 FLRA 114, 125. In the context of the article the practice of foreclosing minority access to EEO relief by the appointment of a token African American representative as the gatekeeper who will support the discriminatory motivation of white management in that capacity is laid bare. I make no judgment on the propriety of this allegation or its merits. The law requires none. The allegation alone is a matter of public concern.

Classification of an issue as a matter of public concern has been calibrated by the breadth of present political, social, or community interest in that issue. Connick, 461 U.S. at 146. No subject could be a more central issue in any of these areas than government agency sponsored racial discrimination. In fact, our history of national legislation on this point, notwithstanding the precedent of this Court, leaves little doubt that the issue of racial discrimination is per se a matter of

public concern. 42 U.S.C. §1981, 42 U.S.C. §2000e et seq. The dissent in Rankin v. McPherson suggested matters of public concern were those matters dealing in some way with the essence of self government. 483 U.S. 378, 394 (1987). (Citing Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). To be sure, racial discrimination is such an issue.

This Court has recognized that only the speech of an employee as citizen is afforded the protection at issue. Pickering, 391 U.S. at 568. We have determined that employee speech which is motivated solely as a means to further the personal interests of the speaker or to effect some internal agency procedure is not due such protection. Connick, 461 U.S. at 148. To hold otherwise, of course, would turn the office administration of federal agencies into a first amendment roundtable. Id. at 149. But the motive in this case is so far separated from that category that it is hard to understand how the Court justifies its conclusion that we do not deal with a matter of public concern.

Carter's motive was to crystalize his ideas on discriminatory practices by the use of terms which carry meanings relevant to his argument. 26 F.L.R.A. at 126. The record at the administrative level in this case shows the terms were not thoughtlessly uttered in fits of racial rage. Id. On the contrary, the testimony regarding the choice of the terms and the meanings reveal the words were used to make a point. Id. It may be true that Carter also sought to evoke a response or strike an emotional chord. Apparently, this he did. But his method bears little relevance as to the issue of public concern. His motive in context, to speak as a citizen is paramount and he sought to address a matter of public concern. His later public dissemination of his thoughts, a point ignored by the Court, further supports this conclusion. Finally, although the Court finds no motivation in this speaker beyond an attempt to promote racial stereotyping, it is indeed far fetched to suggest Carter would encourage, let alone condone, a practice that has so haunted his own race.

IV

Because we deal with a matter of public concern, the government's interest, as employer, in suppression must be balanced against the first amendment interest of the speaker. Pickering, 391

U.S. at 568; Connick, 461 U.S. at 142; Rankin, 483 U.S. at 384. While the Court treats this analysis as an academic exercise, ante., the outcome is based on the faulty premise that this speech is no more than racial stereotyping. If it were, I would agree with the Court that the government would indeed be within the law in stamping such out. However, as I explained supra, this speech attacks government discriminatory practices. Under this premise, the balance calculus is quite different.

As we held in Pickering, the fruitful areas of examination to determine government interest in employee speech suppression are the continued ability to maintain discipline, co-worker harmony, the preservation of necessary confidential relationships, and the ability of the worker and the agency to perform the public duties with which they are charged. 391 U.S. at 569-573. There is no evidence of record that the agency in this case was harmed in any of these areas, regardless of the Court's references to "potential" areas of harm. We know of no greater inconvenience to the agency than the alleged violation of several regulations. Yet the Court would have us believe that the very fabric of the federal employment structure is challenged by this "racial stereotyping". It is not stereotyping or challenged.

Carter has an obligation in his capacity as union president, and as a citizen, to disseminate criticism of agency practices he perceives as discriminatory. His choice for a vehicle for such criticism, public dissemination of a union newsletter, further tips the balance of interests in his favor. Federal law and this Court have long recognized that robust labor debate is in the public interest. Old Dominion Branch No. 496, 418 U.S. at 288 (Douglas, J., concurring in result). Accordingly, we have also held that the special place labor organizations hold in our labor relations environment, and community as a whole, should carry with it the accompanying ability and right to encourage robust debate on important matters within the environment. Id. These legal responsibilities and charges weigh heavy in the balance when the government has produced no evidence of interference with the operation of the agency due to the speech at issue. Therefore, the government reprimand, and the consequential chill on Carter's first amendment rights, is unsupported in the law and on the record.

The Court concludes that union related speech is due no per se protection as matter inherently touching upon public concern. I agree. Indeed, as the Court points out, ante, Pickering so holds. I reiterate, however, that such a holding does not change my opinion that the use of the specific terms at issue are nevertheless, in context, matters of public concern and that the union relation of the speech is a factor in the Pickering balance calculus.

VI

The Court's decision today goes far to eradicate the law which has developed since Pickering. In fact, the Court creates a new category of speech by the public employee that will be protected under Pickering and Connick: speech that addresses a matter of public concern if it is not offensive and if it can only be interpreted as a matter of public concern and no other way.

The Opinion of the Court

Note that Justices White and O'Connor would join the Chief Justice in support of Justice Scalia's opinion. This prediction can be made on the basis of Supreme Court voting records in Rankin and Connick. In Connick, Justice White writing for the Court was joined by then-Justice Rhenquist and Justice O'Connor. As noted supra, in Rankin, Justice Scalia's dissent was joined by the Chief Justice, Justice White and Justice O'Connor. Apparently, therefore, Justice Scalia now speaks for the three justice Connick core.

Based on voting records at the Supreme Court level outside this area of the law, it appears likely Justice Kennedy would join the members of the Rankin dissent.[104] The reasons here are two. First he tends to side with the more conservative elements of the Court headed by the Chief

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[104] See, 104 Harvard L. Rev. 340, 360-365 (1990) (statistical breakdown shows that for the 1989 term Justice Kennedy agreed with the Chief Justice 82.6% of the time, with Justice O'Connor 83.2% of the time, and with Justice Scalia 84.1% of the time). 90 Columbia Rev. 2017-2018 n. 1-5 (noting Justice Kennedy's votes have often been aligned with the conservative approach to such issues as affirmative action, rights of the criminal defendant, and employment discrimination). Accord: Note, Rankin v. McPherson: The Court Handcuffs Public Employers, 19 Pac. L. J. 1543, 1561-62 (1988) (tentatively predicting Justice Kennedy's alignment with the Rankin dissent).

Justice.[105] Secondly, the few available opinions he either drafted, or took part in, while sitting on the Ninth Circuit Court of Appeals reflect a sensitivity to the needs of the state, as employer, in suppressing employee speech under certain circumstances.[106] Therefore, his addition to the Rankin dissent is quite likely. Of course, this addition would create a new majority.

As to Justice Marshall's view, which embraces the more liberal approach to matters of public concern, he has been joined in dissent in Connick, and in the Opinion of the Court in Rankin by Justices Blackman and Stevens. This two case precedent suggests no change in this support.

Justice Souter, as the newest member of the Court is much less predictable. Although commentators have suggested he will be rather conservative in his opinions,[107] there is no Supreme Court record form which to judge. Moreover, New Hampshire case law during his period on the state Supreme Court bench is relatively barren as far as free speech rights of the public employee.[108] The same applies to his short stint on the federal court of appeals bench.[109]

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[105] Id.

[106] See Clark v. Yosemite Community College Dist., 785 F.2d 781, 790, n. 10 (9th Cir. 1986) (Court, Judge Kennedy concurring, recognizes balancing test of Pickering as applicable in free speech cases, but little analysis since not necessary to ultimate holding of case). Kotwica v. City of Tucson, 801 F.2d. 1182, 1184 (9th Cir. 1986) (Court's opinion, per Judge Kennedy, holds public employee's public disclosure of establishment of city competitive gymnastics team, contrary to supervisor direction, touches upon matter of public concern, however, city interest as employer in suppressing outweighed speaker's rights due to its responsibilities to public to function and prohibit public dissemination of misrepresentations of employer positions). See also: Note, Rankin v. McPherson: The Court Handcuffs Public Employers, 19 Pac. L.J. 1543, 1561-62 (1988).

[107] See e.g., Greenhouse, Opponents Find Judge Souter Is Hard Choice To Oppose, N.Y. Times, Sept. 9, 1990 at E4 col. 5 (Cited at 90 Columbia L. Rev. 2017, 2022, n. 15 (1990) (author suggests that while then Judge Souter kept his personal views close to the vest, his record as New Hampshire Attorney General and state judge have caused liberals great fear).

[108] See. Appeal of Manchester Board of School Committee, 523 A.2d. 114 (N.H. 1987) (dealt with issue of whether school principals may be represented by the same union as the teachers they supervise; Connick is cited for proposition that viability of working relationship may be preserved by state action). Otherwise, New Hampshire law appears devoid of Connick or Pickering cases during Judge Souter's tenure on the bench (1983-1990), although some federal cases arose in the state.

[109] The time span of his tenure (May 1990-Oct. 1990) at the First Circuit Court of Appeals also reveals no Pickering or Connick cases.

IV — CONCLUSION

There are four conclusions to be drawn from the hypothetical Supreme Court Treatment of the FLRA case. First, the place of speaker motive in the public concern analysis has become less clear. Secondly, subjectivity reigns. Third, racial discrimination, as an issue, is almost per se a matter of public concern, unless it is addressed inappropriately. Finally, speech made in the context of union representation is not per se a a matter of public concern. Rather, it is subject to the Pickering-Connick analysis like any other public employee speech. These areas will be addressed in turn.

As noted supra, Justice Scalia's approach to this subject matter as expressed in Rankin clearly seems to call into question the continuing viability and utility of speaker motive in the public concern analysis.[110] Rather, he appears inclined to take the exact words at issue, examine them in a vacuum, and determine whether the words spoken alone constitute matters of public concern.[111] Indeed, that was his approach in Rankin. He justifies this approach by concluding that content alone is the true determining factor in the analysis. However, such an approach is not true to the Connick mandate that content, form, and context based on the record as a whole be examined. Nor is it true to the Pickering premise, requiring a determination of whether the speaker spoke as citizen or employee. To this issue speaker motive is critical. Therefore, Justice Marshall's continued respect for the content, form, and context and motive subject areas as fruitful sources of circumstantial evidence are much more consistent with the holdings of Pickering and Connick.[112]

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[110] While it may be argued that the approach of Justice Scalia completely takes motive out of the equation, the abundance of lower court reliance thereon, the Rankin majority reliance thereon, and the proven usefulness of this tool in close cases, make such a conclusion premature.

[111] 483 U.S. at 396-97.

[112] See Note, The Free Speech Rights of Public Employees, 57 Geo. Wash. L. Rev. 1281, 1284-86, 1292 (1989). (the author describes this Rankin content versus context conflict as it appears in several lower court decisions, and, later argues against a content limited analysis as it prevents full consideration of many otherwise meritorious claims). But See: Note, Rankin v. McPherson: The Court Handcuffs Public Employers, 19 Pac. L.J. 1543, 1559-1560 (1988) (proposing that the Rankin holding broadens the concept of public concern beyond prior Supreme Court precedent, and, consequently, moves the covered speech from matters of public concern to matters of public interest).

Moreover, Justice Marshall's approach is also more consistent with the holdings of lower federal courts in their interpretation of Connick and Pickering.

As to subjectivity, there simply is no escape. Each lower court decision cited in this paper, as well as Supreme Court precedent, makes clear this flaw in this area of the law. Recall McPherson was viewed as a motivated critic of the Reagan administration, although lacking some good judgment in exact expression, on the one hand, and a cop who cheers for the robbers whose speech is no more protected than advocacy of force or violence. Similarly, Mr. Carter may be characterized as an aggressive union president attacking one of the most significant issues of the day, racial discrimination, with a historical and readily understood example which embodies his point. On the other hand, he may also be legitimately characterized as a person who thoughtlessly seeks to stir racial conflict by the use of racial stereotyping which does no more than exacerbate the impetus for discrimination. Between the approaches advanced by Justice Marshall and Justice Scalia, neither is right or wrong. The analytical approach itself lends itself to such manipulation. It is all too easy to reach the conclusion at the outset and use the Pickering-Connick analysis to justify the initial subjective determination. However, as difficult of a problem as this may be at least there is deep exploration of the speaker motive which often tends to legitimize the subjective characterization reached. If the Court continues to erode the breadth of examination into this source of circumstantial evidence, reliance on initial subjective determination would be subject to no justification beyond the words alone. Again, this result is contrary to the Pickering and Connick mandate.

Next, there can be little doubt that allegations of racial discrimination are almost per se matters of public concern.[113] Of course, national legislation and court decisions on this issue leave little qustion that this issue occupies the heights our of national concern. Additionally, lower federal

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[113] But See: Note, The Free Speech Rights of Public Employees, 57 Geo. Wash L. Rev. 1281, 1286-88 (1989) (arguing that a finding that some statements are inherently matters of public concern is no more than a finding of the court that there is an objective speaker motive to address a matter of public concern; in so arguing, the author cites Connick as representative of subjective speaker motive and Givhan as representative of objective speaker motive).

courts have had little trouble in affording this issue public concern protection. The only exception to this rule is when the speech at issue is characterized as serving some other purpose. For example, allegations of individual discrimination in the context of a personal grievance have been held not matters of public concern.[114] Justice Scalia's opinion in AFGE suggests a similar result. Carter did not allege racial discrimination. Rather he sought to exacerbate the same by his use of racial slurs. The problem with this type exception is the same inherent in the subjectivity flaw just discussed. Such exceptions are the product of the inherent subjectivity gamesmanship that goes on in these cases, but are less likely to give unjustified results if the content, form, context, and motive of the speaker are examined rather than content alone. Indeed, Carter's speech in context makes clear he alleged management discrimination by making an ineffectual token appointment to the EEOC Committee. Again, on this point, Justice Marshall's perspective seems more loyal to prior precedent.

In regards to the argument that union related speech is per se a matter of public concern because labor organizations have been declared in the national interest, this proposition does not square well with the Pickering-Connick analysis. This is so because providing such blanket protection would so frustrate the determination of whether the speaker speaks as citizen, and be so susceptible to overwhelming abuse, that an entire facet of the labor community would enjoy immunity from Pickering and Connick. The better approach, it seems, is the one undertaken to date. First, the union speech that draws discipline is measured under ULP standards where management suppression efforts are strictly reviewed. Secondly, union speakers would also be afforded protection under Pickering and Connick, as appropriate, and thus be placed on equal

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[114] Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L. J. 43, 69-70 (1988) (and cases cited therein) (reviewing cases that have held individual allegations of racial and sexual discrimination are actually private disputes).

footing with all other public employees.[115] It may be this reasoning that has kept the courts from extending per se immunity for union related speech from the public concern analysis.

In conclusion, the future is certainly hard to predict in this area given the emergence of Justice Scalia's Rankin view. Curiously, the best approach for the future may not be either Justice Marshall's or Justice Scalia's AFGE opinion, but that of Justice Kennedy. The benefits of this approach are twofold. First, his treatment of the issue of public concern allows examination of the content, form, context, and motive. As a result, the analysis is truer to Pickering-Connick- and Rankin on this issue. Next, and most importantly, his emphasis on the state's interest in the second step balancing places the flexibility where it should be, in balancing of the interests, and, consequently, places less subjectivity on the issue of public concern.[116] As a result, to place the most emphasis on the balance of interests, and to remain flexible on the issue of public concern based on all sources of information, is no more than a return to the Pickering premise — to balance the interest of employee speaking as a citizen against the interests of the state, as employer, in suppression.

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[115] Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L. J. 43, 70-71 (1988) (Prof. Allred's review of several union related speech cases does indeed indicate that a case by case approach is taken in this area rather than a per se characterization as a matter of public concern).

[116] Compare: Note, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 Calif. L. Rev. 1109, 1135-1145 (1988) (arguing that the public concern threshold, failing in significant respects, should be dropped in total in favor of a workplace disruption threshold and subsequent balancing test which would necessarily place greater emphasis on the overall workplace disruption of the speech, a more appropriate first amendment analysis); Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. Cal. L. Rev. 3, 67-77 (1987) (arguing public concern step should be eliminated in favor of initial inquiry whether the speech could be criminally proscribed, and, if not, subsequent requirement that the government show actual versus potential, legitimate and compelling need for suppression). Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L. Rev. 43, 76-81 (1988) (arguing that rather than eliminate the public concern inquiry altogether, merge the inquiry into the overall balancing test thus preventing courts from reaching unjust results by holding speech not stouching upon a matter of public as a matter of law and prematurely ending the inquiry).

APPENDIX A

From the President's Desk...
Raynold Cole — The Polarity Paradox"

When the Chief of Personnel Service and myself are homogeneous on anything, it is indeed an event which is extraordinary but, his captioning of Raynold Cole as a "bozo" is one of the most accurate character assessments I have ever encountered. Raynold Cole is the variable which was most significant in the decadence of Building Management Service. Under the auspices of Raynold Cole Building Management Services employees' motivational levels have plunged to record lows and the entire service has been engulfed in a state of dysfunctionalism. Raynold Cole has an autocratic style of management and consequently believes employees must be closely scrutinized and cannot be entrusted to carry out their respective tasks autonomously. He has abandoned his obligation to communicate with his employees and treat them as if they were on a subliminal level in comparison with himself. He has departed from the historical past practice of having one homogeneous staff meeting for all Building Management Service employees and adapted a new practice of having several isolated section meetings and prohibiting employees from asking questions of any kind. It is often times said that an effective leader is supportive of his subordinates. If support is a prerequisite for the composite parts of an effective leader, Raynold Cole could not be categorized as an effective leader. Under no circumstances does he support his subordinates but rather succumbs in a submissive mannerism to whatever variable is operant, in the absence of sound logic or existent policy or statute Raynold Cole is an exact replica of the house negroes whom in exchange for a lesser burden, kept order among the defiant masses to the extent of initiating penalties if the "massah" felt it was warranted. Expertise in labor/managment, collective bargaining, management or EEO were not prerequisites for his position, because he does not possess any of these things. It is the ardent and vehement manner which he initiates actions and penalties upon instruction in addition to his concurrence with their theories of inferiority. The fact that he came from among rank and file employees has long alluded him. Raynold Cole's appointment as Chairperson for the EEO Committee is a stereotypical response to EEO: Appoint a Black to serve as a figurehead while his anglo saxon counterpart, the Director, makes all the decisions and has absolute authority over the committee. Token appointments such as Raynold Cole's appointment to Chief of Building Management Service are representative of the purported incremental progress the oppressor has attempted to use in the past to mentally enslave blacks and consequently persuade them to deny their heritage in an asinine attempt to substantiate that they are homogenous with their anglo saxon counterparts. It appears that Raynold Cole is ann updated rendition of the infamous era of the past that black artists captioned as "the spook who sat by the door" and the "Uncle Tom" era which plagued and demoralized blacks in the past. AFGE Local 2031 is demanding the removal of Raynold Cole.

Lonnie Carter

APPENDIX B

Administrative Law Judge — Findings of Fact

1. At all times material herein the American Federation of Government Employees, AFL-CIO has been, and still is, certified as the exclusive representative of Respondent's employees at the Medical Center in Cincinnati, Ohio.

2. At all times material herein the Union has been, and still is, the designated agent of American Federation of Government Employees, AFL-CIO, to represent Respondent's employees at its Medical Center in Cincinnati, Ohio.

3. Approximately 900 employees comprise the bargaining unit herein, and these employees are located at Cincinnati, Ohio, Ft. Thomas, Kentucky (about 20 miles from Cincinnati) and Columbus, Ohio.

4. A monthly Newsletter is published by the Union and distributed to unit employees at the three locations of the Medical Center. The intent of the newsletter is to disseminate information to employees, as well as air employee's grievances and their dissatisfactions.

5. The editor of the Newsletter is Brenda McCollum, Secretary treasurer of the Union. Material printed therein is determined by the complaints received from Union members. The executive body of the Union meets and decides which material should be published in a particular issue of the Newsletter. It is then mailed to all bargaining unit members, as well as people who have previously requested copies of newsletters.

6. Prior to June, 1985, employees had complained to the Union about Raynold Cole, Chief of Building Management Services. Cole also occupied the position of chairperson of the EEO Committee. These complaints concerned conduct by Cole involving matters as the following: (a) changing a shift in building management which cleaned an ambulatory and emergency area, thus imposing a hardship on unit members who would be assigned on an ad hoc basis rather than a continuous schedule; (b) AWOLing employees unnecessarily when other action, such as leave without pay, could have been taken; (c) differences of opinion as to protective clothing for employees who had to go outside and empty trash; (d) discontinuance by Cole of staff meetings and substitution of subsection meetings, which discouraged employees from asking questions; (e) giving employees very little leeway in doing their jobs and scrutinizing their actions; (f) volunteering employees for such missions as moving furniture or assisting in disaster drills, but no training was provided them; (g) ineffectiveness of Cole as chairperson of EEO Committee since he had no authority to make decisions, and he assigned his duties to a subcommittee.

7. Brenda McCollum wrote an article in the Union's June, 1985 Newsletter prompted by the numerous complaints about Cole from employees. The article was entitled "Raynold Cole — The Polarity Paradox."[2] It criticized Cole as one who "has an autocratic style of management and consequently believes employees must be closely scrutinized and cannot be trusted to carry out their respective tasks autonomously." It was also stated that expertise

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[2] The Newsletter of June, 1985 stated "From the President's Desk..."

in labor/management, collective bargaining, management or EEO were not prerequisites for his position, because Cole did not possess any of these things. In addition to criticizing Cole for not supporting his subordinates and actions taken by him with attendant penalties if employees fail to abide by them, the Article stated inter alia, as follows:

> "Raynold Cole is an exact replica of the house negroes whom in exchange for a lesser burden, kept order among the defiant masses to the extent of initiating penalties if the 'massah' felt it was warranted...
>
> It appears that Raynold Cole is an updated rendition of the infamous era of the past that black artists captioned as 'the spook who sat by the door and the Uncle Tom' era which plagued and demoralized blacks in the past. AFGE Local 2031 is demanding the removal of Raynold Cole (underscoring supplied).

8. The term "house negroes" in the aforesaid article, as testified to by McCullom, denoted a black person, who, during slavery, was assigned as the house negro. The latter's function was to keep the other blacks in line and be sure they didn't disturb the slavery arrangement. In return, the house negro's burden was lessened.[3]

9. Webster's Third New International Dictionary, Unabridged, refers to "Uncle Tom" as the hero of the novel,"Uncle Tom's Cabin" by Harriet Beecher Stowe, and defines the term "Uncle Tom" as "a negro having a bearable and submissive attitude or philosophy."

10 In respect to the description of Cole as "The spook who sat by the door" in the Union Newsletter, and its intended meanings, McCullom testified as follows:

> ...The Spook Who Sat By The Door was a novel, and it was about a position — a person who was token. He was actually appointed to satisfy an affirmative action quota.
>
> And Mr. Cole's tenure on the EEO Committee is token. Mr. Cole has no authority to make decisions. All he did, the only authority he had, was concerning the actual way the committee was run. But any action, items or anything formidable that the committee was going to do had to be approved by the director, because it's an advisory committee.

11 The term "spook" is defined in Webster's Third new International Dictionary, Unabridged as "ghost," "specter," "apparition." As a slang word is defined as "negro."

12. Respondent sent a written reprimand, dated July 9, 1985, to Lonnie Carter based on the publication and distribution of the June 12 Union Newsletter.[4] The reprimand, which was written by Gary Roselle, Chief of Medical Service, recited that the article contained statements which are derogatory, insulting and disrespectful of Raynold Cole in his capacity of Chief, building Management Service.

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[3] The June, 1985 Newsletter also describes the appointment of Cole as Chief of Building Management Service as token in nature. Mention is made therein that it is typical of a means used in the past to mentally enslave blacks, to persuade them to deny their heritage by substantiating that they are homogeneous within their anglo saxon counterparts.

[4] At the hearing Respondent's Counsel conceded and agreed that the reprimand was not for distributing the Newsletter, but for the contents thereof.

Respondent's letter of July 9, 1985 also stated that Carter violated VA regulations which is as follows:

a. VA Regulation 810(A) and 5 CFR 0.735.10 — Each VA employee shall be expected to serve diligently, and to conduct himself, both on and off duty, in a manner reflecting credit upon himself and the VA.

b. VA Regulation 810(B)(6) and 5 CFR o.735.10 — An employee shall avoid any action which might result in or create the appearance of affecting adversely the confidence of the public in the integrity of the Government.

c. VA regulation 820(B) and 5 CFR 0.735.20(b) which states, in part, an employee shall live up to the common standards of acceptable work behavior. Disrespectful conduct; use of insulting and abusive language about other personnel; making false or unfounded statements about other employees which are slanderous or def□amatory is inappropriate work attitude and work behavior.

13. At the hearing herein Roselle testified that the basis for the reprimand were the remarks in the Newsletter which labeled Cole as "Uncle Tom" and "The Spook who sat by the door."

14. The aforesaid reprimand was put in Carter's file. No further issue has been published or distributed of the Union Newsletter.