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UNCONSTITUTIONAL RETALIATION AGAINST EMPLOYEE'S FREE SPEECH?

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As illustrated by the *Schuler* opinion described herein, the First Amendment protects public employees from employer retaliation for employee speech which can be "fairly characterized as constituting speech on a matter of public concern."

In determining whether an employee's First Amendment rights have been violated, courts will apply what is sometimes referred to as the "Pickering test," based upon the analysis of the U.S. Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). In applying this test, courts will balance the interests of the employee, as a citizen, in commenting upon matters of public concern, against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Matters of public concern include matters of political, social, and other concern to the community. In evaluating speech to ascertain matters of public concern, courts will examine the content, form, and context of the speech as revealed by the entire record.

Speech that criticizes a public employer in his capacity as a public official also addresses matters of public concern. Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern. Heightened public interest in a particular issue, while not dispositive, may also indicate that the issue is one of public concern.

On the other hand, not every statement made by a public employee about his or her job addresses a matter of public concern. When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern . Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment.

Even when the content of a public employee's speech addresses matters of public concern, the form and context of the speech are also relevant. Although the context of the speech must be considered, the fact that a plaintiff made statements in a private conversation about a public official toward whom she may have harbored personal animosity does not necessarily eliminate the status of a particular statement as addressing a matter of public concern. Private statements are particularly suitable for First Amendment protection when they are made to a public official in his official capacity. The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern. Moreover, the presence of unsavory personal motives does not preclude the protection

of the First Amendment, so long as the speech itself addresses matters of public concern.

Having determined that an employeee spoke on a matter of public concern, the courts will next determine whether the actions of the employer were improper under the Pickering test. This highly fact-specific balancing requires full consideration of the government's interest in effective and efficient fulfillment of its responsibilities to the public. Government entities, in their capacities as employers, have wide discretion and control over personnel decisions, internal affairs, discipline, and office policy.

Under the Pickering test, a number of interrelated factors are taken into account in balancing the competing interests of government-employer and citizen-employee. These factors include: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

In cases where the public employer can not demonstrate that the employee's speech disrupted the workplace, however, the court need not proceed to a specific Pickering factor analysis absent exceptional circumstances. In other words, to put the Pickering balancing test at issue, the public employer must proffer sufficient evidence that the speech had an adverse impact on the workplace. The more the employee's speech reflects matters of public concern, the greater the employer's showing must be that the speech was disruptive before the speech can be punished.

Mere allegations of disruption are insufficient to put the Pickering balance at issue. Where there is no evidence of disruption, resort to the Pickering factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests. A government employer must, therefore, make a substantial showing that the speech is, in fact, disruptive before the speech may be punished.

On the other hand, the doctrine of qualified immunity protects governmental officials from civil liability when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Qualified immunity, however, only applies in a case of employer retaliation if (1) the plaintiff has asserted a violation of a constitutional or statutory right, and (2) that right was not clearly established when the plaintiff was discharged.

If the unlawfulness of the official's conduct is apparent in view of pre-existing law, the qualified immunity defense ordinarily fails, since a reasonably competent public official should know the law governing his conduct. Since the U.S. Supreme Court has found a clear First Amendment protection for public

employees, the qualified immunity defense was denied in *Schuler*. In so doing, *Schuler* reiterates the general principle of constitutional law enunciated by the Supreme Court, i.e., a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. (Citations omitted.) See *Belk v. City of Eldon*, No. 99-3911 (8th Cir. 2000)

THE "PEEPING TOM" INCIDENT

In the case of *Schuler v. City of Boulder*, 189 F.3d 1304 (10th Cir. 1999), plaintiff Caroline Schuler alleged that her First Amendment rights were violated by her employer, the City of Boulder, Colorado. As described by the federal appeals court, the facts of the case were as follows:

> Schuler is a former employee of the City of Boulder, working full-time as a "facilities service assistant" for the Parks and Recreation Department's North Boulder Recreation Center (NBRC). Schuler's supervisor at the NBRC was defendant Alan Quiller. NBRC's manager, defendant Linda Kotowski, who was the Recreation Superintendent for the Parks and Recreation Department, was Quiller's supervisor.
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> In November 1994 Schuler became concerned whether a janitor at the NBRC was spying on women from a crawlspace in the ceiling above the women's locker room. Schuler told Kotowski of her suspicions, and Kotowski informed the Boulder police and instructed Schuler not to discuss her suspicions with anyone else, including Quiller. [Quiller and the janitor were personal friends.]
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> On December 15, 1994, Schuler telephoned the police, who came to the NBRC, investigated the scene and detained the janitor on suspicion of third degree sexual assault. Charges were not filed against the janitor but the police continued an investigation.
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> Immediately following the incident, a committee was established to investigate the matter and determine a course of action. Quiller was made the chairman of the committee. After conducting the investigation, the committee recommended that the janitor not be terminated but be suspended without pay for two weeks. Quiller accepted the recommendation and suspended the janitor.
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> During this time, NBRC employees were cautioned not to spread rumors about the "peeping Tom" incident. Schuler, who believed that the janitor should have been terminated from his position, expressed her dissatisfaction in a seven page memorandum to Kotowski. In particular, Schuler voiced concern over Quiller's objectiveness in

handling the investigation because of his personal friendship with the janitor. Moreover, Schuler found inconsistencies between the Review Committee's report and the police report regarding the incident.

Prior to the "peeping Tom" incident, Quiller had promoted Schuler to the position of daytime facilities services assistant, which included the responsibilities of bookkeeping, payroll and charge-back duties for NBRC. Schuler did not begin her work as daytime facilities service assistant until after the janitor's arrest. When she started her new position, she discovered that the bookkeeping duties had been given to a newly hired evening facilities service assistant. Schuler viewed the removal of the duties as a "slap in the face."

On January 10, 1995, Quiller called Schuler into his office and verbally berated her for approximately an hour. Quiller told Schuler that he believed he could no longer work with Schuler and suggested she find another job. Schuler left the meeting in tears, and on January 13, 1995, submitted a complaint form, through her union representative, against Quiller.

At a farewell party for a colleague, Schuler discussed with other NBRC employees the "peeping Tom" incident. Following the party, on January 24, 1995, Schuler received a written reprimand, while the others who participated in the Discussion were not reprimanded. Schuler contacted an attorney, who contacted Boulder's City Attorney's Office on April 7, 1995. Following the communication between Schuler's counsel and the City Attorney's Office, the written reprimand was withdrawn from Schuler's personnel file.

On March 1, 1995, Kotowski met with Schuler regarding the "peeping Tom" incident. Kotowski told Schuler not to discuss the incident with others but to write a memorandum outlining Schuler's views about the committee's findings. Schuler submitted the memorandum on March 13, 1995. Schuler met with Kotowski and Quiller two days later to discuss Schuler's scheduled performance review. Schuler received poor marks. Her review was also the lowest of any facilities services assistant within the previous five years. [Schuler's score was lower than the janitor's score covering the two weeks he was suspended for the "peeping Tom" incident.] Other employees who saw Schuler's review believed that her evaluation contained false and negative statements regarding Schuler's job performance. Schuler filed a grievance to have the evaluation removed from her personnel file.

> On May 25, 1995, a local television station conducted an investigation of the "peeping Tom" incident. The station interviewed Schuler and attempted to interview the janitor. The same day as the television interview, Kotowski notified Schuler that Schuler was to be transferred to a different recreation center effective June 5, 1995. The transfer did not affect Schuler's title, compensation or duties. However, Schuler stated she did not want to leave her position. Moreover, the involuntary transfer appeared to be contrary to city policy for filling such vacancies.
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> On June 23, 1995, Schuler filed a grievance to protest the involuntary transfer. During Schuler's last day at NBRC, Quiller called Schuler into his office and, with another NBRC employee present, verbally chastised her. Schuler was then transferred to the East Boulder Recreation Center (EBRC). Schuler stayed with EBRC at that point but then resigned in August 1996.

In November 1996, Schuler sued the City of Boulder, Quiller, and Kotowski, alleging "unconstitutional retaliation against her in violation of her First Amendment rights." In May 1997, a motion for summary judgment was filed by Quiller and Kotowski, asserting qualified immunity.

The district Judge denied the motion with respect to the First Amendment claim, rejecting the qualified immunity defense. In so doing, the judge said "the question before her was whether Schuler had a First Amendment right to make certain statements critical of Schuler's government employer, the City of Boulder, and two of her supervisors and whether that right was clearly established at the time defendants took purported adverse employment actions against Schuler":

> The question is whether she had a First Amendment right to make the statements she did, and whether those are protected and whether those rights outweighed defendants' interest in keeping an even or productive office environment, and they do.
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> First Amendment rights are important. It appears to the Court that there is no-- on the first claim--no qualified immunity defense. It certainly has been known for a long time, and it is well established that employees can speak out and exercise First Amendment rights and cannot have discriminatory actions taken against them because of this, so as far as the first claim [based on the First Amendment] is concerned, the first claim stands.

Quiller and Kotowski appealed. As characterized by the federal appeals court, the issue was "whether the defendants' actions as alleged by Schuler amounted to unconstitutional retaliatory infringements on Schuler's First Amendment rights."

COMMENTING ON MATTER OF PUBLIC CONCERN?

In the opinion of the federal appeals court, “Schuler's right to speak out in criticism of defendants' actions is not the real area of dispute here.” Rather, as noted by the court, “[t]he central issue before us is whether the allegedly retaliatory actions of defendants Quiller and Kotowski violated plaintiff Schuler's clearly established First Amendment rights.”

In addressing this issue, the appeals court found the “critical time frame” began “in January 1995 when Quiller suspended the janitor for two weeks without pay” giving rise to the following alleged retaliatory actions:

> Shortly thereafter Quiller called Schuler into his office and had an angry Discussion with Schuler. Then on January 20 at a party for city employees, Schuler discussed the "peeping Tom" incident and questioned the response that had been made to the incident.
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> On January 24, Kotowski gave a reprimand verbally to Schuler and a written memorandum to Schuler cautioning that "any further breaches of confidentiality will be addressed by further discipline."

Accordingly, the federal appeals court focused on these events in “the early part of 1995... to determine... the First Amendment rights of a party such as Schuler.” As cited by the court, earlier federal court opinions had held that “a State could not condition public employment on a basis that infringes the employee's protected interest in freedom of expression.” Moreover, the court noted that “[t]he protected freedom of expression of public employees includes their interests as citizens in commenting upon matters of public concern."

In this particular instance, the federal appeals court found that the City had not raised any argument questioning “the employee's right to speak on matters of public concern... balanced against the government employer's interest in efficiency.” The federal appeals court, therefore, found that “Schuler's speech meets the ‘public concern’ test.” In so doing, the court noted that “[s]peech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of public officials, in terms of content, clearly concerns matter of public import."'

FREE SPEECH RETALIATION?

On appeal, the City and its supervisors did not contend that “matters of public concern were not touched upon by Schuler's criticisms of the defendants' handling of the "peeping Tom" incident.” Instead, the defendants had argued on appeal that “their alleged retaliatory actions against Schuler were

not sufficiently onerous to rise to the level of clearly established constitutional violations of Schuler's First Amendment rights." Specifically, the defendants maintained that " it was unclear in 1995 and remains unclear today whether the alleged conduct they took against Schuler rose to the level of a constitutional violation." The federal appeals court rejected this argument.

As a general rule, the federal appeals court noted "a government employer's conduct in retaliation against the exercise of a protected right may be actionable when it involves promotion, transfer, recall after layoff, and hiring decisions, although not amounting to termination of employment or the substantial equivalent of dismissal." Applying this principle to the alleged facts in this particular instance, the appeals court found this "clearly established" contour of First Amendment rights "cover[ed] plaintiff Schuler's actions as of the critical time frame in 1995 for this case."

> [There are] deprivations less harsh than dismissal which nevertheless violat[e] a public employee's rights under the First Amendment... Actions short of an actual or constructive employment decision can in certain circumstances violate the First Amendment...
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> In the instant case the record shows that defendants retaliated against plaintiff Schuler by: (1) removing job duties from Schuler, "specifically payroll which is important to get accurate." (2) giving Schuler a written "reprimand," dated January 24, 1995 referring to Schuler's talking about the incident at NBRC with several other staff members. (3) giving Schuler a low score on her performance evaluation, below that received by the janitor while he was suspended. and (4) involuntarily transferring Schuler to another facility, the East Boulder Recreation Center, although with the same title and responsibilities.
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> The fact that Schuler subsequently enjoyed her new position does not defeat her First Amendment claim for the action taken against her earlier. At the time the defendants transferred Schuler, she did not want to be moved to the new facility.

Accordingly, in the opinion of the federal appeals court, "it was clearly established as of 1995 that the defendants' alleged conduct in retaliation for Schuler's protected speech was actionable." The federal appeals court, therefore, found the federal district court judge had "properly denied the defendants' motion for summary judgment on Schuler's First Amendment claim."

POSTSCRIPT

Rather than continue to litigate this case, the City of Boulder ultimately decided to settle the case. As

described in a May 5, 2000 news release entitled “City of Boulder settles lawsuit filed by former employee,” the City characterized its decision to settle as a “business decision,” rather than an admission of any wrongdoing on the part of its supervisors:

> The city of Boulder has paid $150,000 plus $100,000 in attorney fees to a former employee who filed a federal lawsuit against the city in a controversy concerning one of the city's recreation centers.
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> Carolyn Eader, formerly known as Carolyn Schuler, accused a male co-worker of spying on women in the locker room at North Boulder Recreation Center in 1994. No criminal charges were filed, and Eader later left city employment, saying the discipline action the city imposed on her co-worker was inadequate and the city's handling of her own work status was unfair by comparison.
> "In this situation, settling the case became a business decision," said City Attorney Joe de Raismes. "The cost of settling is only slightly higher than the cost of proceeding to try the case, and settling allows us to end the disruptions for the city's recreation division and our employees that any lawsuit causes."
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> This is believed to be the largest employment settlement ever by the city of Boulder. The settlement will be paid almost entirely by the city's insurance carrier, as litigation expenses for the case already have amounted to $142,700, which is nearing the city's insurance deductible of $150,000. The insurance carrier determined the amount of the settlement.
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> "It was a difficult decision to make because of the size of the settlement and because we believe our managers acted in good faith," de Raismes said. "Nevertheless, there were enough mistakes made throughout the city organization to make the outcome of a trial unpredictable. We will try to learn from these mistakes and to put this matter behind us."