Shooting the Messenger: First Amendment Freedom of Speech and the Public Employee

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The First Amendment to the United States Constitution provides Americans with five basic freedoms: Freedom of speech, press, petition, assembly, and religion. While all five are certainly important, the freedom of speech—sometimes referred to as the "freedom of expression," and often recognized as the cornerstone of America's democracy—is arguably the most cherished of the five.

Then along came "social media," available to anyone with access to a computer and coming in a wide variety of forms; i.e. Facebook, Snapchat, Twitter, Instagram, and many others. The advent of social media suddenly empowered the quietest and most introverted of citizens—to whom no one ever before paid attention—with the ability to broadcast his or her views—unpopular or not; truthful or not—around the world with the stroke of a computer key. And along with this new-found uncontrolled power in the exercise of our freedom of expression—sometimes used without giving the words we use or the ideas we express a lot of thought—came the propensity for getting ourselves in trouble.

But we're getting ahead of ourselves. The purpose of this article is to discuss the sometimes contradictory, and most often confusing, case authority that has sought a balance between a public employee's (including a prosecutor's and a cop's) First Amendment inherent freedom of expression, with his or her employer's right to impose restrictions on that employee's rights, at least when the challenged speech affects the employer's smooth and efficient operation of his or her office.

One of the first cases involving a prosecutor getting herself into trouble by exercising what she believed at the time to be her constitutionally protected freedom of speech rights is the United States Supreme Court decision of *Connick v. Meyers*.[1]

Connick v. Meyers:

In *Connick*, Plaintiff/Respondent Sheila Myers was employed by the New Orleans Parish District Attorney's Office as an Assistant District Attorney. Her job was to prosecute criminal cases; a task she had competently performed for some five and a half years. In 1980, Myers was informed that she was scheduled to be transferred to prosecute cases in a different section of the criminal court. She vehemently opposed the proposed transfer, believing that such a move would create a conflict for her in that she was involved in a counseling program for convicted

[1] (1983) 461 U.S. 138 [103 S.Ct. 1684; 75 L.Ed.2nd 708].

defendants released on probation into the section of the criminal court to which she was to be transferred.[2]

Myers' pleas—including those made directly to the District Attorney himself; Defendant/Petitioner Harry Connick—all fell on deaf ears. Not one to just rollover, Myers decided to document her position by preparing a questionnaire seeking out possible issues within the office. She hoped to submit her questionnaire to each of the office's fifteen assistant district attorneys.

Among the fourteen questions on Myer's questionnaire were inquiries as to the office's transfer policy, office morale, the need for a grievance committee, the level of confidence in the office's supervisors including whether the employees "had confidence in and would rely on the word" of various superiors in the office, and whether the questioned employee felt pressure to work on political campaigns.[3]

When District Attorney Connick got word of the questionnaire, described to him as a problem that was generating a "mini-insurrection" within the office, he immediately fired Myers, telling her that the cause of her termination was her refusal to accept the transfer.[4] Myers sued in federal court pursuant to 42 U.S.C. § 1983, attempting to get her job back along with compensatory and punitive damages.

The federal district court, finding that Myer's questionnaire was the real reason for her termination as opposed to her refusal to be transferred, reversed, awarding her back pay, damages, and attorney's fees.[5] The Fifth Circuit Court of Appeal affirmed.[6] The United States Supreme Court granted certiorari.[7]

The United States Supreme Court, in a split 5-to-4 decision, reversed. Citing among others of the High Court's relevant cases[8] the 1968 landmark decision of *Pickering v. Board of Education*,[9] the Supreme Court held that Myers' firing did not violate her First Amendment rights. In so finding, the Court noted that it is an issue of balancing the First Amendment rights implicated by Myers' questionnaire with the District Attorney's right to prevent any disruption in the smooth operation of his office. The Court here ruled in favor of the District Attorney, overruling the lower courts' (trial and appellate) rulings to the contrary. How the Court reached this conclusion is instructive.

Using *Pickering* as its primary authority, the Court noted that in deciding an issue such as this one, a court is required "to seek a balance between [1] the interests of the [employee], as a citizen, in commenting upon matters of public concern, and [2] the interest of the State, as an

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2 *Id.*, at p. 140, and fn. 1.

3 *Id.*, at p. 141, fn. 2, and Appendix at p. 155.

4 *Id.*, at p. 141.

5 *Myers v. Connick* (ED La. 1981) 507 F.Supp. 752.

6 *Connick v. Myers* (5th Cir. 1981) 654 F.2nd 719.

7 1982 U.S. LEXIS 1217 [455 U.S. 999; 102 S.Ct. 1629; 71 L.Ed.2nd 865].

8 See *Keyishian* v. *Board of Regents* (1967) 385 U.S. 589, 605-606 [87 S.Ct. 675; 17 L.Ed.2nd 629]; *Perry* v. *Sindermann* (1972 408 U.S. 593, 597 [92 S.Ct. 2694; 33 L.Ed.2nd 570]; *and Branti* v. *Finkel* (1980) 445 U.S. 507, 515-516 [100 S.Ct. 1287; 63 L.Ed 2nd 574].

9 (1968) 391 U.S. 563 [88 S.Ct. 1731; 20 L.Ed.2nd 811].

employer, in promoting the efficiency of the public services it performs through its employees."[10] In reversing the lower courts' rulings in this case, the Supreme Court held that the rule of *Pickering* had been "misapplied" in this case. "(C)onsequently," it was noted in the majority opinion that both the district (trial) court and the Fifth Circuit Court of Appeal "erred in striking the balance for respondent" Myers.[11]

The Supreme Court held here that it was error in the first instance for the District Court to rule that the questionnaire itself concerned "matters of public importance and concern."[12] To the contrary, the Court found that "Myers' questionnaire, although not 'wholly without First Amendment protection,' primarily concerned only internal office matters and 'that such speech is not a matter of "public concern," as this term is defined in *Pickering*.'"[13]

In so noting, the Court emphasized that *Pickering* points out that public employees do not forfeit their First Amendment constitutional right to comment on matters of public concern merely by the fact of their employment. However, when the employee's comments are not matters of public concern (or maybe only of limited concern), and instead affect only (or primarily) the efficient operation of the public office with whom the person is employed, then the First Amendment does not prevent that employee from being penalized by her employer, whether fairly or not, as Sheila Meyers was in this case.[14]

In its ruling, the Court describes the history behind the development of the rule in *Pickering*," culminating in the *Pickering* decision itself where it was held that a teacher could not constitutionally be fired for expressing his concerns about the internal workings of his school's Board of Education when those concerns dealt with matters of public interest. In *Pickering*, the "matters of public concern related to the allocation of moneys obtained from taxpayers through various public bond issues. Per the *Pickering* Court, the issues raised by teacher Marvin Pickering in a letter he sent to a newspaper editor concerned "a question (about which) free and open debate is vital to informed decision-making by the electorate."[15]

The Court here, in *Connick v. Myers*, further lists its various rulings subsequent to the *Pickering* decision, all dealing with the First Amendment rights of school teachers to comment on issues of public concern, whether done so publicly or privately.[16] In contrast, Myers' questionnaire was held to be of limited public concern, dealing primarily with in-office issues.

It must be noted, however, that the ruling in *Connick* does not mean that the questions raised in Myers' questionnaire did not, in some ways, implicate the First Amendment. Question #11, for instance, asking the individual assistant district attorneys whether they "ever feel

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10 *Connick v. Myers*, *supra*, 461 U.S. at p. 142, quoting *Pickering v. Board of Education* at p. 458.

11 *Ibid*.

12 *Id*., at p. 143, citing *Myers v. Connick*, *supra*, 507 F.Supp, at 758.

13 *Ibid.*

14 *Ibid.*

15 *Id.*, at pp. 143-145, quoting *Pickering v. Board of Education* at pp. 571-572.

16 *Id.*, at pp. 145-146, discussing the following:
Perry v. *Sindermann* (1972) 408 U.S. 593 [92 S.Ct. 2694; 33 L. Ed. 2d 570];
Mt. Healthy City Board of Ed. v. *Doyle* (1977) 429 U.S. 274 [97 S.Ct. 568; 50 L.Ed.2nd 471]; *and*
Givhan v. *Western Line Consolidated School District* (1979) 439 U.S. 410 [99 S.Ct. 693; 58 L.Ed.2nd 619].

pressured to work in political campaigns on behalf of office supported candidates," was noted to deal with an issue of some public concern.[17] However, contrary to the district court's ruling, this fact alone did not shift the burden of proof over to the District Attorney to justify his decision to fire Myers. But rather, the fact that one or more of the questions in Myers' questionnaire may have been of some public concern was merely a single factor to consider when balancing it with the District Attorney's right to subsequently dismiss Myers in the interest of the office's smooth operation.[18]

On the issue of whether the law's balancing requirement justified Myers' dismissal from the office despite some evidence of a First Amendment violation, the Court agree with the district court that there was insufficient evidence here that the questionnaire impeded Myers' ability to perform her responsibilities as an assistant district attorney. What the Court did find, however, was that Myers' questionnaire was an act of insubordination which interfered with the District Attorney's Office's working relationships. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[19]

The Court further failed to "see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[20] In so ruling, the Court specifically noted that question 10—asking whether or not the assistant district attorneys had confidence in and relied on the word of five named supervisors—constitutes "a statement that carries the clear potential for undermining office relations."[21]

In an interesting summation of Sheila Myers' dilemma, the Court noted further that once her questionnaire was determined to be a matter of only limited public concern, she was basically left with no recourse. Whether or not she was unfairly dismissed from her position as a prosecutor is nothing the federal courts can resolve for her. Per the Court: "(O)rdinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."[22] In discussing these limitations on this issue, the Court noted: "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual

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17 *Connick v. Myers*, *supra*, 461 U.S. at p. 149; citing
Branti v. *Finkel*, *supra*, at pp. 515-516; *and*
Elrod v. *Burns* (1976) 427 U.S. 347 [96 S.Ct. 2673; 49 L.Ed.2nd 547].

18 *Connick v. Myers*, *supra*, 461 U.S. at pp. 149-150.

19 *Id*. at pp. 151-152.

20 *Id.*, at p. 152.

21 *Ibid*.

22 *Id*. at pp. 146-147; citing:
Board of Regents v. *Roth* (1972) 408 U.S. 564 [92 S.Ct. 2701; 33 L.Ed.2nd 548;
Perry v. *Sindermann*, *supra*; *and*
Bishop v. *Wood* (1976) 426 U.S. 341, 349-350 [96 S.Ct. 2074; 48 L.Ed.2nd 684].

circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[23]

Highlighting the fact that all this balancing with its legal mumbo jumbo is subject to honest and educated differences of opinion, a four-justice dissent reached exactly the opposite conclusion. Specifically, the dissent summarized it analysis—discussed in detail over some thirteen pages of more legal mumbo jumbo—by simply noting that in the minority justices' opinion, Sheila Myer's dismissal was illegal under the First Amendment "(b)ecause the questionnaire addressed such matters (of public concern) and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees."[24]

Rather than taking the time and effort to analyze the dissenting opinion, which, by itself, is of limited value given that it is just that; a "dissenting opinion," we shall move on to the next important United States Supreme Court case dealing with a prosecutor's exercise of his First Amendment freedom of expression, albeit in a different context, getting that prosecutor into trouble with his bosses.

Garcetti v. Ceballos:

In *Garcetti v. Ceballos*,[25] Plaintiff/Respondent Richard Ceballos was a deputy district attorney for the County of Los Angeles, and had been since 1989. Defendant/Petitioner Gil Garcetti was the elected district attorney at the time. In February, 2000, a defense attorney approached DDA Ceballos about a pending case. Ceballos was a calendar deputy in his office's Pomona branch where he exercised certain supervisory responsibilities over other lawyers. For defense attorneys to informally approach Ceballos, as the calendar deputy, about the underlying issues in their case was not unusual.[26] This is all to say that this wasn't Ceballos' first rodeo.

The defense attorney showed Ceballos where there were certain inaccuracies in an affidavit used to obtain a critical search warrant. Although already having filed a motion to traverse the warrant, the attorney hoped to handle matters informally by warning Ceballos ahead of time that there were problems with the warrant officer-affiant's credibility.[27]

Taking seriously what he saw to be his professional and ethical obligations as a prosecutor, DDA Ceballos took the time to examine the warrant affidavit and even visit the location described therein, concluding that there were in fact some serious factual misrepresentations in the warrant. Discussing the apparent problems with the warrant affiant over the telephone did not alleviate Ceballos' concerns. He therefore discussed the issue with his

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23 *Connick v. Myers, supra*, 461 U.S. at p. 147.

24 *Id.*, at p. 156.

25 **(**2006) 547 U.S. 410 [126 S.Ct. 1951; 164 L.Ed.2nd 689].

26 *Id.*, at p. 414.

27 *Ibid*.

supervisors. He also wrote up a trial memorandum describing the problems as he saw them, and recommended, as a result, dismissal of the entire case.[28]

A meeting was subsequently held between Ceballos, his supervisors, the warrant affiant, and other supervisory employees from the affiant's law enforcement agency. No resolution was reached, however, with the affiant's lieutenant, in a heated exchange, "sharply criticizing Ceballos for his handling of the case."[29] Compounding Ceballos's minority status on this issue was the fact that his own supervisors overruled him, declining to approve the dismissal of the case. And then, adding insult to injury, at the subsequent in-court motion to traverse the warrant (at which Ceballos put in the embarrassing position of being called as a defense witness), the trial court declined to grant the defense motion or to otherwise suppress the evidence.[30] (It is unknown what the ultimate outcome of this criminal case might have been.)

Following this disagreement, DDA Ceballos was reassigned from his calendar deputy position to being a run-of-the-mill trial deputy, and was moved to another courthouse. He also alleged that he was denied a promotion. After an internal employment grievance was denied, it being found that he was not the victim of any retaliation, Ceballos filed a federal lawsuit pursuant to 42 U.S.C. § 1983, alleging that his First and Fourteenth Amendment rights were violated. In his lawsuit, Ceballos alleged that the Los Angeles District Attorney's Office retaliated against him for seeking the dismissal of the criminal case discussed above. Petitioners (i.e., the office) denied any retaliation, claiming that everything Ceballos complained about was explained by "legitimate reasons such as staffing needs."[31]

Using the *Pickering* balancing test, the Federal District Court granted the District Attorney's motion for summary judgment, ruling that Ceballos wrote his memo pursuant to his employment duties and that what he did not involve a public interest. The court ruled that Ceballos was therefore not entitled to First Amendment protections from being disciplined for what he had written in his memo or how he had handled the case in issue.[32]

On appeal, the Ninth Circuit Court of Appeal reversed,[33] holding, in a nutshell, that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment."[34] In other words, the Ninth Circuit determined that contrary to the trial court's findings, Ceballos' handling of the case at issue, being (in the Court's opinion) a matter of public concern, was protected by the First Amendment.

On certiorari, the United States Supreme Court reversed in another five-to-four decision, criticizing the Ninth Circuit for failing to "consider whether the speech was made in Ceballos' capacity as a citizen," The Court noted that instead, the Ninth Circuit "relied on (erroneous) Circuit precedent rejecting the idea that 'a public employee's speech is deprived of First

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28 *Ibid.*

29 *Ibid.*

30 *Id.*, at p. 415.

31 *Ibid.*

32 *Ibid.*

33 *Ceballos v. Garcetti* (9th Cir. 2004) 361 F.3rd 1168.

34 *Id.*, at p. 1173.

Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility.'"[35]

In so ruling, the Court rehashed the judicial history leading up to the *Pickering* balancing test, having developed over the years, case by case, from "the (originally) unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment," to the current rule reflecting the fact that the First Amendment protects even "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[36]

In perhaps a serious understatement, the Court notes that conducting the necessary inquiries under *Pickering* "sometimes has proved difficult." This, the Court says, is a "necessary product of 'the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal.'"[37] The Court, however, makes another stab at it, hoping to simplify the necessary thought process to the degree possible.

> "*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. (Citation omitted.) If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. (Citation omitted.) If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. (Citation omitted.) This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[38]

As with any citizen who enters government service, Ceballos was bound to accept certain limitations on his freedoms; particularly his First Amendment freedom of speech. Adding to Ceballos' dilemma is the fact that government employers, like private employers, need to be able to exercise some degree of control over their employees' words and actions if they are to provide efficient public services. At the same time it is recognized, however, that "a citizen who works for the government is nonetheless a citizen. . . . So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary

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35 *Garcetti v. Ceballos*, *supra*, at p. 416.

36 *Id*., at p. 417, citing;
Pickering, *supra*, at 568; *Connick*, *supra*, at 147;
Rankin v. *McPherson* (1987) 483 U.S. 378, 384 [107 S.Ct. 2891; 97 L.Ed.2nd 315]; *and*
United States v. *National Treasury Employees. Union* (1995) 513 U.S. 454, 466 [115 S.Ct. 1003; 130 L.Ed.2nd 964.

37 *Id*., at p. 418; quoting *Pickering v. Board of Education*, *supra*, at p. 569.

38 *Ibid.*

for their employers to operate efficiently and effectively."[39] Balancing these often conflicting interests is what *Pickering* and its prodigy has attempted to accomplish.

With these principles in mind, as vague and flexible as they may be, DDA Ceballos' situation may be considered.

The Court first noted that Respondent Ceballos believed that there were some serious legal issues in a particular criminal case, and expressed his concerns orally to his supervisors as well as in a written internal office memo. The Court found that the fact that Ceballos did not publicize his concerns beyond the office was not dispositive. "Employees in some cases may receive First Amendment protection for expressions made at work."[40]

Also not dispositive was the fact that the memo concerned the subject matter of Ceballos' employment. As noted by the Court; "(t)he First Amendment protects some expressions related to the speaker's job."[41]

What the Court found to be dispositive in this case was the context in which Ceballos' memo and verbal concerns were expressed; most importantly, "pursuant to his duties as a calendar deputy." With this factor in mind, the Court held that if there is a rule to be discerned from this case, it is this: "(W)hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[42]

In Ceballos' case, it was noted that he was not acting as a private citizen when he went about his daily professional activities as a calendar deputy district attorney, but rather as a paid government employee. Further, he was not speaking as a private citizen in writing the memo at issue here, addressing what he, in his professional capacity, believed was the proper disposition of the criminal case at issue. Under these circumstances, his supervisors were not prohibited by the Constitution from evaluating his performance nor correspondingly determining his office assignments and his pay grade. Ceballos' First Amendment rights, therefore, were not violated by the District Attorney taking what was apparently considered remedial; i.e., reassigning him elsewhere in the office and denying him a promotion.[43]

Again, as with *Connick v. Meyers*, four justices dissented—this time in three separate opinions—while making contrary arguments that when read in a vacuum, make perfect sense.[44] But again, being dissenting opinions, we won't expend the time and space necessary to properly and thoroughly discuss them here. Instead we'll move along to one more case involving the

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39 *Id.*, at pp. 418-419.

40 *Id.*, at pp. 420-421; citing *Givhan* v. *Western Line Consol. School Dist.* (1979) 439 U.S. 410, 414 [99 S.Ct. 693; 58 L.Ed.2nd 619].

41 *Id*, at p. 421; quoting *Givhan v. Western Line Consol. School Dist.*, *supra*, at p. 414.

42 *Ibid.*

43 *Id.*, at pp. 421-422.

44 *See Id.*, at pp. 426-450.

plight of a prosecutor when accused by his bosses of disrupting the smooth operation of his office.

Eng v. Cooley:

The Los Angeles District Attorney's Office was again the subject of another alleged employee-retaliation case when Deputy District Attorney David Eng, taking an unpopular position as a member of an office task force and thus incurring the wrath of the then District Attorney, Steve Cooley, was subsequently disciplined and later fired. The facts and circumstances of this case (taken from the perspective of the plaintiff, David Eng, as an appellate court must do in the context of an interlocutory appeal of a qualified immunity decision[45]) were subsequently reported in the Ninth Circuit Court of Appeals' decision of *Eng v. Cooley*.[46]

In his quest to become Los Angeles' District Attorney, one of Steve Cooley's campaign promises made to the public was to investigate allegations of fraud and environmental crimes related to the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex. Upon election, Cooley formed a task force, comprised of high-ranking deputies from within the office, to do just that. What become known as the Belmont Task Force was headed by Special Assistant Anthony Patchett. Eng—a senior deputy district attorney—was appointed to be a member of the Task Force. Patchett—perhaps unwisely—announced before the Task Force even got under way that he would deliver "slam dunk" indictments of prominent individuals involved with the Belmont project.[47]

Well, things did not turn out as Patchett had hoped. Much to the contrary, the Task Force concluded after a seven-month investigation that the building site for the Belmont Project was, and always had been, environmentally safe, and that no indictments should issue. When Eng briefed Patchett on the Task Force's conclusions, the latter flipped out, telling Eng that if the Task Force did not say what he believed Cooley wanted to hear, Eng himself would suffer "sever [personal] consequence."

Eng did not bow to the pressure, however, declining to tailor the Task Force's report to accommodate Patchett's own political agenda. Instead, he reported the Task Force's conclusions to Cooley as originally written. Patchett, in response, made his own presentation to Cooley, which included proposed indictments against several prominent individuals. Cooley's executive staff chose Eng's recommendations over Patchett's, making for one very unhappy Special Assistant.[48]

Meanwhile, The Los Angeles Times reported in a published article that the Los Angeles Unified School District's lease-purchase agreements (i.e., "Certificates of Participation") used to finance the Belmont project had been canceled and that with the reinitiation of the project, new financing, at substantially higher interest rates, would have to be found. According to Eng, the original agreements had been canceled because Patchett had improperly leaked to the IRS an

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45 See *CarePartners, LLC v. Lashway* (9th Cir. 2008) 545 F.3rd 867, 878.

46 (9th Cir. 2009) 552 F.3rd 1062.

47 *Id*., at p. 1064.

48 *Ibid.*

allegation that the School District had committed fraud in purchasing the Belmont property; an allegation later determined by the Task Force to be false. This, apparently, was all information that Cooley was not happy to hear. Reflecting who's side of this argument Cooley was on, it was noted that during discussions of the Belmont financing issue between Cooley, Patchett and Eng, when Eng purportedly argued at the meeting that the Certificates of Participation used to finance the purchase of the Belmont property were legal and that Patchett's reporting otherwise to the IRS was wrong and should be rectified, Cooley allegedly became angry at Eng, telling him to "shut up."[49]

In what eventually developed into a demonstration of why it's not wise to violate the old adage, "don't shoot the messenger," Cooley and members of his staff (including Patchett, co-defendants Steven Sowders and John Zajeck, who replaced Patchett as head of the Task Force, and others) met frequently to discuss ways of forcing David Eng out of the District Attorney's Office.[50]

The case decision expends several pages discussing various acts of retribution instigated by Cooley's lieutenants in an unsuccessful attempt to convince Eng to resign from the office. Those efforts included accusations of sexual harassment (the alleged victim of which denied ever occurred), a transfer to a branch office's juvenile division (a position typically occupied by new-hires in the office), criminal prosecution for misusing the office's computers (charges that were dismissed due to the sole witness refusing to testify), and various suspensions (with and without pay) that were eventually rescinded by the County Civil Service Commission.[51]

The Los Angeles Times got involved again, publishing an article entitled "*D.A. Accused of Payback Prosecution*." In this article (which included an interview with both Eng and an attorney hired by Eng; Mark Geragos), it was brought to the public's attention that Eng had been prosecuted (as noted above) in alleged retaliation for refusing to file criminal charges against individuals involved in the Belmont School project, and that he was systematically being punished for having complained about Pratchett's leaking of information to the IRS.[52]

The L.A. Times article only served to give new life to the DA's attacks on Eng. Shortly after its publication, co-defendant Steven Sowders (along with co-defendant Curt Livesay) blatantly threatened both Eng and Geragos that the office would "come up with" additional allegations against Eng if he didn't just give up and leave. When Eng failed to succumb to the pressure, Sowders made good on his threats, serving him with yet another formal "Notice of Intent to Suspend without Pay," rehashing some of the same allegations as alleged before while adding additional accusations that had been dug up from incidents that had allegedly occurred years before.[53]

Finally, when Eng ignored a suggestion that all would be forgiven if he would simply agree to publish a retraction of the allegations made in the L.A. Times article, disavowing similar

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49 *Eng v. County of Los Angeles* (2007) 2007 U.S.Dist. LEXIS 111853 (page 7).

50 *Eng v. Cooley, supra,* 552 F.3rd at p. 1065.

51 *Id.*, at pp. 1065-1066.

52 *Ibid*.

53 *Id*., at p. 1066.

accusations Geragos' made that were reported by the Times, and publicly apologizing to Cooley,"[54] all the monkeying around with Eng's career was finally ended with Eng being terminated outright. This lawsuit, filed by Eng in the Federal District Court, followed.

In his lawsuit, filed pursuant to 42 U.S.C. § 1983, Eng alleged that the DA's Office illegally retaliated against him for exercising his right to publicly comment on both the Belmont School Project and Patchett's leaks to the IRS, and to speak through his attorney to the news media, such retaliation alleged to be in violation of the First (freedom of speech) and Fourteenth (due process) Amendments.[55]

The District (trial) Court granted the defendants' (i.e., Cooley and his subordinates) motion for summary judgment with respect to the issues related to Eng's recommendation to District Attorney Cooley that no criminal charges be filed against individuals associated with the Belmont project. The District Court's reasoning was that "Eng was merely fulfilling his job duties when he gave his Task Force recommendation," that such recommendations did not involve a matter of "public concern," and that therefore those statements were "not protected under the First Amendment."[56] This ruling, appearing to be consistent with the rules set out above, were not challenged on appeal. Internal disciplinary measures taken against Eng for making these recommendations, as unfair as they may appear, is also consistent with the rule as noted earlier in *Connick v. Myers* that as an issue that fails to qualify as a "matter of public concern," and merely one of the office's imposition of internal sanctions, it is not something that can be heard in a federal court.[57]

As for Eng's other allegations relative to his publicized comments, whether made by himself or through Mark Geragos as his attorney, the District Court determined that Eng had legitimate First Amendment claims—they involving matters of public concern—that had to be decided by a jury.[58] The District Attorney appealed.

The Ninth Circuit Court of Appeal unanimously affirmed. In so doing, the Court provided us with a more detailed, somewhat more understandable, and certainly more organized, discussion of the *Pickering* elements.

First, however, the Court noted that when alleging a violation of his own First Amendment rights, Eng was allowed to include the retribution he may have suffered from statements made by Mark Geragos; his attorney. Per the Court: "Because Geragos spoke on Eng's behalf in his capacity as Eng's lawyer, his words were Eng's words as far as the First Amendment is concerned."[59] Eng himself therefore had a personal First Amendment interest in Geragos' speech.

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54 *Ibid.*

55 *Ibid.*

56 *Ibid*.

57 461 U.S. at p. 147.

58 *Eng v. County of Los Angeles* (2007) 2007 U.S.Dist. LEXIS 111853.
Eng v. Cooley, supra, at pp. 1066-1067.

59 *Id*., at p. 1070.

That issue resolved, the Court moved onto the *Pickering* elements as they relate to Eng's lawsuit, and whether the District Court correctly decided that Eng did in fact have a viable claim, in effect, that his First Amendment rights had been violated.

Quoting *Pickering*, the Court first noted that "(i)t is well settled that the state may not abuse its position as employer to stifle 'the First Amendment rights [its employees] would otherwise enjoy as citizens to comment on matters of public interest.'"[60] The problem, as noted by the Court, is that the validity of such a claim is dependent upon a "balanc(ing) between the interests of the [public 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."[61]

Considering the relevant factors as described in *Pickering*, and taking into account the cases that have wallowed in this quagmire since, while also noting that the rules have "dramatically, if sometimes inconsistently" evolved, the Court was able to summarize *Pickering's* "tangled history"[62] into five necessary considerations:

> (1) Whether the plaintiff spoke on a matter of public concern;
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> (2) Whether the plaintiff spoke as a private citizen or public employee;
>
> (3) Whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
>
> (4) Whether the state had an adequate justification for treating the employee differently from other members of the general public; and
>
> (5) Whether the state would have taken the adverse employment action even absent the protected speech.[63]

Of particular interest to the Court here was whether the issues raised and commented on publicly by Eng were "matters of public concern." Noting that we have not yet attempted to define in this article what is meant by the phrase, it's worth taking a minute to discuss the Ninth Circuit's explanation of what it means.

First, it is noted that as a "pure question of law," "the plaintiff bears the burden of showing that the speech addressed (is) of public concern."[64] As for what the phrase really means, the Court in previous decisions has held that "(s)peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.' . . . 'Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed

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60 *Ibid*, quoting *Pickering v. Board of Education*, *supra*, at p. 568.

61 *Ibid*, quoting *Pickering*, *supra*.

62 *Id*., at p. 1070.

63 *Id*., at pp. 1070-1072.

64 *Id*., at p. 1070.

by the whole record.'"[65] If it is determined that "the speech in question does not address a matter of public concern, then the speech is unprotected, and qualified immunity should be granted" in favor of the civil defendant.[66]

In this case, the Court necessarily found against the District Attorney on this issue. Of primary importance is the fact that neither Cooley nor any of the other civil defendants ever argued that Eng's statements were anything other than matters of public concern. And even if they had, the Court held that "there is little doubt that Eng's speech did (in fact) address matters of public concern." "'[C]ommunication[s] on matters relating to the functioning of government' . . . are matters of inherent public concern.'"[67]

In so ruling, the Court further noted that "(t)he leaking of information (whether true or false) about the School District's lease-purchase agreements to the IRS was therefore a matter of public concern insofar as it led to the need for additional, more expensive financing for the public school complex." Further; "(s)peech that is 'relevan[t] to the public's evaluation of the performance of governmental agencies' also addresses matters of public concern."[68]

On the issue of whether Eng made the statements in issue as a private citizen and not as a public employee (a mixed question of fact and law), this is again something on which the plaintiff bears the burden of proof. In trying to decipher what this really means, the Court noted that; "(s)tatements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.'"[69] The plaintiff will lose on this issue only if it is shown that he or she had an official duty to utter the speech at issue.[70]

Despite these impediments, the Court found that Eng's statements were made as a private citizen, rejecting the defendants' "great effort" to convince the Court that, at the very least, Eng's public statements about the IRS leak were "inextricably related to his work." Again noting that a court at this stage of the proceedings must assume the truth of a plaintiff's factual allegations, the Court determined here that "Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS or to authorize Geragos to speak to the press about the retaliation being taken against him." As such, the Court determined that Eng's public comments about these issues were made as a private citizen, satisfying this necessary prerequisite to a finding that, if proven at trial, his First Amendment free speech rights were violated.[71]

The third step (i.e., whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action), being a question of fact, and in light of the requirement that the plaintiff's allegations are presumed to be truthful at this stage of the

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65 *Ibid*.; citing and quoting *Johnson v. Multnomah County* (9th Cir. 1995) 48 F.3rd 420, 422.

66 *Id*., at pp. 1070-1071.

67 *Id*, at p. 1072, quoting *Johnson v. Multnomah County, supra*, at p. 425.

68 *Id*., at pp. 1072-1073.

69 *Id.*, at p. 1071, quoting *Posey v. Lake Pend Oreille School Dist. No. 84* (9th Cir. 2008) 546 F.3rd 1127, fn. 2.

70 *Ibid*.

71 *Id.*, at p. 1073.

proceedings (i.e., pre-trial), the Court found that Eng had sufficiently alleged a First Amendment violation of his rights necessary to prevail on this issue.[72]

More specifically, the Court noted that:

> "Eng's account of the meeting with (co-defendants) Livesay and Sowders, for example, plainly undermines the Defendants' contrary assertion that the systematic investigations, prosecution, suspensions, and demotion of Eng were not motivated by his speech. Eng's further accounts of Cooley's meetings with his staff to discuss 'a method of forcing David Eng out of the District Attorney's Office,' and Sowders's threats to both Eng and Geragos following publication of the *Los Angeles Times* article, all also indicate that Eng's speech was a 'substantial or motivating' factor in the adverse employment action."[73]

As to whether the District Attorney's office had adequate justification for treating Eng differently from other members of the general public, the fourth necessary prerequisite to a constitutional violation, the Court first noted that the burden of proof had shifted to the civil defendants to show that under the traditional *Pickering's* balancing test, the District Attorney had legitimate administrative interests allowing him to do so that outweighed Eng's First Amendment rights.[74] As a rule, absent a civil defendant's ability to prove that "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public," the Court must find for the plaintiff.[75]

In this case, it was initially noted that defendants did not argue that the *Pickering* balancing test leaned in their favor. As such, they forfeited this issue.[76]

But even if contested, the Court found that Eng's allegations clearly showed that the defendants would have lost this issue in that "the District Attorney lacked adequate justification for treating Eng differently from other members of the public." In balancing the interests, the Court found that the defendant's overt acts of investigating, suspending, prosecuting, and transferring Eng in retaliation for his speech was not a necessary prerequisite to the District Attorney's Office's ability to operate efficiently and effectively. As such, the Court found that "the full range of adverse employment action appears to have been a politically-motivated effort to silence Eng, who stood to embarrass Cooley by undermining a central plank in his campaign platform." The Court therefore specifically found that Cooley and his co-defendants failed to meet their *Pickering* balancing obligations necessary for a favorable court decision.[77]

Finally, under the fifth element as listed above, having failed the *Pickering* balancing test, it became the District Attorney's obligation to show that he would have imposed the same

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72 *Id.*, at pp. 1071, 1073.

73 *Id.*, at p. 1074.

74 *Ibid*., citing *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3rd 802, 808; and *CarePartners, LLC v. Lashway* (9th Cir. 2008) 545 F.3rd 867, 880.

75 *Ibid*., quoting *Garcetti v. Ceballos*, *supra*, at p. 418.

76 *Id*., at p. 1074.

77 *Ibid.*

disciplinary measures upon Eng despite the fact that Eng's First Amendment freedom of speech rights were violated. "In other words, (the District Attorney) may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action."[78]

This issue being a question of fact, the Court held that they were again bound by the rule that at this stage of the proceedings, they were required to assume that the plaintiff Eng would be able to prove the facts as he described them, assuming the truth of the plaintiff's allegations.[79]

Rather than challenging the *Pickering* balancing issue, the defendants put all their cards into this basket. As noted by the Court: "Defendants argue that they 'would have reached the same [adverse employment] decision even in the absence of [Eng]'s protected conduct.'"[80] Defendants based this argument on the fact that Eng was the subject of other internal investigations, including a criminal prosecution, separate from his tendency to talk to the news media and embarrass his bosses.

The Court rejected this argument, noting that Eng had also alleged (allegations that are presumed to be true) that all these investigations, suspensions, and, as noted by the Court, "apparently baseless charges," were themselves motivated by his exercise of his First Amendment rights.[81]

Defendants further noted that Eng had scored low on a promotion review, arguably undermining his contention that his failure to get promoted was due to his tendency to speak out publicly. Eng's response, however, explained that his low score was a result of the subsequently disproven accusations of sexual harassment and misuse of office computers, these accusations themselves having been motivated by his exercise of his First Amendment rights.

As a result, the Court found that the defendants had failed to meet their burden of showing that Eng's constitutionally protected speech was not a "but-for" cause of the disciplinary actions taken against him.[82]

After findings that both Eng's and Mark Geragos' constitutional rights were clearly established by prior case law, negating the defendants' hopes for a ruling of qualified immunity from any civil liability,[83] the Ninth Circuit affirmed the trial court's rulings in this case. The United State Supreme Court is in apparent agreement, having denied certiorari.[84]

Moser v. City of Las Vegas:

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78 *Id.*, at p. 1072; quoting *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568; 50 L.Ed.2nd 471].

79 *Ibid.*

80 *Id*., at p. 1074, quoting *Thomas v. City of Beaverton*, *supra*.

81 *Ibid.*

82 *Ibid.*

83 *Id*., at pp. 1075-1076.

84 (Jan. 11, 2010) 558 U.S. 1110 [130 S.Ct. 1047; 175 L.Ed.2nd 881].

Before we end our discussions of this very important topic, one more case warrants mentioning. Although not involving a prosecutor's office, it is important because it interjects the issue into this discussion of whether it is wise for a public employee (a police officer, in this case) to use social media when feeling the itch to exercise his or her First Amendment rights, and, as such, how the public employee's freedom of speech rights might thereby be affected. Again out of the Ninth Circuit, the case is *Moser v. City of Las Vegas*.[85]

Officer Charles Moser was a former Navy Seal and current Las Vegas Metropolitan Police Department officer. Beginning in 2006, Officer Moser was a SWAT team sniper and assistant team leader. On December 17, 2015, Officer Moser made the unfortunate (as it turned out) decision to post on his Facebook account a comment about a shooting involving the wounding of a fellow Metro officer.[86]

Officer Moser's Facebook comment read as follows: "Thanks to a Former Action Guy (FAG) and his team we caught that asshole. . . It's a shame he didn't have a few holes in him. . ." (The "FAG" comment, as an abbreviation for the in-house term, "Former Action Guy," was not used in a derogatory sense, and was not an issue in this case.)

Officer Moser posted this comment while off duty, leaving it up for about two months before deleting it of his own initiative. However, someone in the meantime had already read it and anonymously filed a complaint with Metro's Internal Affairs Department, prompting an internal investigation. Admitting to Internal Affairs the inappropriateness of his comment, Officer Moser explained that he only intended to express his frustration with the fact that the suspect had "basically ambushed one of our officers" and that "the officer didn't have a chance to defendant himself" by shooting back. Despite his claim of an innocent intent, Officer Moser was transferred out of SWAT and put back on patrol; an action that also resulted in a pay cut.[87]

His supervisors' concern was that his comment showed that he had become "a little callous to killing." It was also noted that the department's snipers "are held to a higher standard," being faced with difficult and stressful situations, and that his comment could possibly be used against him as in-court impeachment evidence should he ever have to use deadly force in the future. It was therefore believed to be necessary to relieve him of his SWAT responsibilities.[88]

Officer Moser filed a grievance with the city's Labor Management Board, which was denied. He therefore filed a civil action in federal court seeking to get his SWAT job back. After an evidentiary hearing, the district court granted summary judgment in favor of the defendant City of Las Vegas. Officer Moser appealed.[89]

The issue, of course, as it was in the previously discussed cases, was where (and how) to draw the line between the free speech rights of a government employee and the government's interest in avoiding disruption within its agency and maintaining workforce discipline. Again as

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85 (9th Cir. Jan. 12, 2021) 984 F.3rd 900.

86 *Id.*, at pp. 902-903.

87 *Id.*, at p. 903.

88 *Ibid.*

89 *Id.*, at pp. 903-904.

with the cases previously discussed, the Ninth Circuit invoked the *Pickering* balancing test.[90] In reviewing the *Pickering* factors as they apply here, the Ninth Circuit reversed the district court's summary judgment ruling, remanding the case back to the trial court not because the justices necessarily disagreed, but rather for the purpose of reviewing some factual disputes that had not yet been resolved.

The parties did not dispute that Officer Moser's comments constituted a matter of public concern. An issue is of "public concern" if it "relates to any matter of political, social or other concern to the community, . . . (or) is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[91] Police shootings, per the Court, tend to fall into this category.

The parties also did not dispute the fact that Officer Moser spoke as a private citizen and not as a representative of the Las Vegas Metropolitan Police Department. "Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."[92] In this case, the Court found it significant that Officer Moser was home and off duty, using his personal Facebook account, when he made his contested comment.[93]

It was similarly stipulated between the parties that Officer Moser's Facebook posting was the reason he was removed from the SWAT team, with his supervisors concerned that his comment was evidence of Officer Moser "grow(ing) callous(ness) to killing." It was also believed that his comment could be used against him in court should he ever need to use deadly force as a sniper.[94]

With the first three *Pickering* considerations out of the way, the burden shifted to the Metro Police Department to produce evidence supporting either the fourth or fifth Pickering factors; i.e., whether the metro police department had an adequate justification for treating Officer differently from other members of the general public, or whether Metro would have taken the adverse employment action even absent the protected speech. Conceding that the latter did not apply, Metro argued only that it had adequate justification for treating Officer Moser as they did.[95]

In evaluating the fourth factor, the Court noted that the *Pickering* balancing test recognizes that a government employer has "broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[96] On this issue, the Court held that the district court

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90 See *Eng v. Cooley*, *supra*, at p. 1070.

91 *Moser v. City of Las Vegas*, *supra*, at p. 905;
Quoting *City of San Diego v. Roe* (2004) 543 U.S. 77, 83-84 [125 S.Ct. 521 [160 L.Ed.2nd 410].

92 *Ibid*.

93 *Ibid*.

94 *Id.*, at p. 906.

95 *Ibid.*

96 *Ibid.*; quoting *Eng v. Cooley*, *supra*, at p. 1071.

had failed to recognize that several factual disputes remained unresolved; a necessary prerequisite to a final decision on this issue.

First, the meaning of Officer Moser's comment was not determined. Officer Moser argued that he only intended to say that the wounded officer should have had the opportunity to get off some defensive shots. The Metro Police Department, on the other hand, believed that Officer Moser's comment was meant to advocate the unlawful use of deadly force; i.e., that the officers who captured the suspect should have shot him in retaliation for his earlier shooting of a police officer.[97]

Under the *Pickering* balancing test, the former (Officer Moser's version) is entitled to stronger First Amendment freedom of speech protections than that latter; i.e., when an officer advocates the unlawful use of deadly force. So it is important for the trial court to make a factual determination of what Officer Moser was intending to say in his Facebook comment. The trial court failed to do this.

Secondly, there remains an unresolved factual dispute as to whether the Metro Police Department provided any evidence of predicted disruption to its operations. This issue is relevant to the strength of Metro's interest in efficiency and employee discipline. The impact of an employee's speech on the government agency's operations cannot be resolved until it is determined whether the statement in issue in fact impairs discipline administered by the agency's superiors or harmony among its co-workers, whether it has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, whether it impedes the performance of the speaker's own duties, and/or whether it interferes with the regular operation of the law enforcement agency. [98] The district court failed to make any findings relative to these potential factual disputes.

"In sum, material questions of fact remain as to whether (Officer) Moser's comment would likely disrupt Metro's workforce or its reputation. . . . Put differently, Metro has produced no evidence to establish that its interests in workplace efficiency outweigh Moser's First Amendment interests."[99] For these reasons, the case had to be remanded for further evidentiary hearings. Other than a request for an en banc rehearing being denied,[100] there is as of yet no indication in the appellate reports how these evidentiary hearings may be proceeding.

We discuss the *Moser* case here for two reasons. First, it is evident that the Ninth Circuit has become comfortable analyzing these public employee First Amendment cases using the five-factor test as first specifically spelled out in *Eng v. Cooley*, at pages 1070 through 1072, and as described above. The U.S. Supreme Court has not been heard yet as to whether the Ninth Circuit's *Eng* five-step analysis is appropriate. However, by failing to grant certiorari in *Eng v. Cooley*, the High Court has certainly indicated acquiescence by its silence.

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97 *Id*., at pp. 907-908.

98 *Id*., at pp. 908-909; Citing *Rankin v. McPherson, supra*.

99 *Id.*, at pp. 910-911.

100 (Feb. 18, 2021) 2021 U.S.App. LEXIS 4750.

Secondly, and perhaps just as importantly, the *Moser* case demonstrates the inherent dangers whenever a public employee—whether he or she is a prosecutor, a law enforcement officer, or any other public employee—decides to use social media to vent his or her anger or frustrations without first considering the well-known fact that anything put out there is open for anyone and everyone to read. While you may have a First Amendment right to publish your thoughts and frustrations, whether or not you choose to do so is something you might think about. Putting those frustrations in writing and publishing them over the Internet only increases the likelihood that they may come back to bite you.

Conclusion:

Aside from the *Moser social media* issues, this article demonstrates the difficulty courts have had in general, and continue to have, in balancing a public employee's First Amendment freedom of speech rights with that employee's boss's right—or need—to minimize internal discord, hate, and discontent. As can be seen, it's an area of the law with any number of divergent opinions, and is seldom going to be an easy issue to decide. So all we can say at this point is that unless you're adamant about wanting to see your name in a published appellate court decision, take care in what you say, to whom you say it, the means you use in publicizing what you say, and who you might be upsetting when you say it. Your career may be at stake.