Don't Tip the Scales! The Actual Malice Standard Unjustifiably Eliminates First Amendment Protection for Public Employees' Recklessly False Statements

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Susan Carter worked as a teacher in a public high school for five years. Although she received some negative performance reviews, she had few conflicts during her tenure. Ms. Carter became suspicious, however, that school board members were using excess funds to finance their personal needs instead of to increase faculty salaries or to pay school debts. Ms. Carter researched school files and found no evidence to support her suspicions. She nonetheless confronted her supervisor, Mary Larkin, and accused the school board of embezzling money, cheating faculty out of compensation and lying to the school district and the public regarding the allocation of funds. Although the unsupported accusations caused few problems for the school district, Larkin fired Ms. Carter for her statements. Ms. Carter subsequently filed suit claiming her dismissal violated her First Amendment right to freedom of speech. At trial, the school board proved Ms. Carter's statements were recklessly false.

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* J.D. Candidate 1997, University of Minnesota Law School; B.A. 1994, Bowdoin College.


2. "[A] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick, 461 U.S. at 142 (citations omitted).
The issue before the court in the preceding hypothetical case was whether a public employee's recklessly false statements that cannot reasonably be presumed or shown to have had any harmful effects are unprotected by the First Amendment. The federal circuits currently are split over the question: some find no protection, some find no per se nonprotection, and some do not reach a clear conclusion. A clarification of the standard the

3. See Pickering, 391 U.S. at 574 n.6 (refusing to address this issue explicitly).

4. The Sixth, Seventh, and Eighth Circuits hold a public employee's recklessly false statements are unprotected. See, e.g., Williams v. Commonwealth, 24 F.3d 1526, 1535 (6th Cir.) (stating a public employer is entitled to qualified immunity if he reasonably believed the "employee made statements with knowledge of, or reckless indifference to, their falsity" since such statements do not enjoy First Amendment protection), cert. denied, 115 S. Ct. 358 (1994); Brenner v. Brown, 36 F.3d 18, 20 (7th Cir. 1994) (holding an employee's recklessly false statements did not constitute protected speech); McGee v. South Pemiscot Sch. Dist. R-V, 712 F.2d 339, 342 (8th Cir. 1983) (stating that Pickering established a school board may not dismiss an employee for criticizing school policies unless the employee's speech contains knowingly or recklessly false statements).

5. The First, Fourth, Ninth, and District of Columbia Circuits hold a public employee's recklessly false statements are not per se unprotected. Instead, these circuits consider the recklessness of the statement as a factor in the Pickering test. See, e.g., Brasslett v. Cota, 761 F.2d 827, 840-41 (1st Cir. 1985) (stating Pickering expressly declined to adopt a rule that "knowingly or recklessly false statements are per se unprotected," and concluding courts should weigh maliciousness in the balancing of interests); Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985) (recognizing Pickering did not decide whether recklessly false statements were unprotected); Johnson v. Multnomah County, 48 F.3d 420, 423-24 (9th Cir.) (concluding recklessly false statements are not per se unprotected when they substantially relate to matters of public concern, but the recklessness should be considered as part of the Pickering balancing test), cert. denied, 115 S. Ct. 2616 (1995); American Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 308 (D.C. Cir. 1987) (recognizing Pickering demonstrates false statements may qualify as speech on a matter of public concern and may ultimately receive First Amendment protection).

6. The Fifth and Tenth Circuits have not reached a clear conclusion. See, e.g., Moore v. City of Kilgore, 877 F.2d 364, 376 (5th Cir.) (per curiam) (applying the New York Times standard and concluding that because the employer made no showing that the employee's statements were knowingly or recklessly false, the court would not consider the employer's interest in controlling an accurate flow of information to the public in the Pickering balance), cert. denied, 493 U.S. 1003 (1989); D'Andrea v. Adams, 626 F.2d 469, 473-76 (5th Cir. 1980) (stating that the Constitution does not protect knowing or reckless falsehood, but considering recklessness as a factor in a balancing test), cert. denied, 450 U.S. 919 (1981); Moore v. City of Wynnewood, 57 F.3d 924, 933 (10th Cir. 1995) (assuming deliberately or recklessly false statements are either unprotected or that "intentional falsity would weigh heavily against protection"); Johnsen v. Independent Sch. Dist., 891 F.2d 1485, 1493 (10th Cir. 1989) (an employee's
courts should use in these public employee free speech cases is thus in order.

This Note analyzes the division over whether the recklessly false statements of a public employee are unprotected by the First Amendment. Part I details the development of public employees' free speech rights, provides a summary of defamation jurisprudence and the actual malice standard, and discusses the circuit courts' approaches. Part II examines the problems with applying the actual malice standard to a public employee's recklessly false statements, contending that the standard ignores fundamental differences between the public employment and defamation contexts and thus it should not apply to a public employee's speech. Instead, courts should apply a standard founded on a case-by-case balancing of the interests involved. Part III concludes courts should consider the recklessness of the speech as a factor in the balancing test set forth by the Supreme Court in Pickering v. Board of Education.

I. FIRST AMENDMENT JURISPRUDENCE: PUBLIC EMPLOYEES' FREE SPEECH RIGHTS AND DEFAMATION LAW

The Supreme Court historically refused to recognize a public employee's right to object to conditions of employment. In the 1950s and 1960s, however, the Court began to grant public employees some First Amendment protection. The Court

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false statements weighed against protection of his interests); Wulf v. City of Wichita, 883 F.2d 842, 858 (10th Cir. 1989) ("the Supreme Court has left open the possibility that [a knowingly or recklessly false statement] . . . might merit First Amendment protection where no harmful effects can be shown").

7. "Actual malice under the New York Times standard should not be confused with the [common law] concept of malice as an evil intent or as a motive arising from spite or ill will." Masson v. New Yorker Magazine, 111 S. Ct. 2419, 2429 (1991). The actual malice standard requires a public official to prove the defendant made the defamatory remark "with knowledge that it was false or with reckless disregard for whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).


9. See, e.g., Connick v. Myers, 461 U.S. 138, 143 (1983) (for "most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights").

10. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (teachers' refusal to sign a certificate verifying they were not communists did not provide basis for dismissal); Wieman v. Updegraff, 344 U.S. 183, 190-92 (1952) (teachers' refusal to take a loyalty oath did not provide basis for dismissal).
recognized that the First Amendment prohibited states from requiring their employees to take loyalty oaths. Additionally, the Court rejected the premise "that public employment...may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." In so holding, the Court paved the way for an expansion of public employees' First Amendment rights.

A. Pickering v. Board of Education: The Court Establishes the Balancing Test

The expansion of public employees' First Amendment rights occurred in the landmark decision of Pickering v. Board of Education. Mr. Pickering, a public high school teacher, sent a letter to a local newspaper criticizing the Board of Education's handling of a bond issue proposal and its subsequent allocation of funds between the school's educational and athletic programs. The Board believed many of Mr. Pickering's statements were false and claimed his letter undermined the Board's integrity and disrupted faculty discipline, thus justifying his dismissal. Mr. Pickering subsequently filed suit, claiming the dismissal violated his First Amendment right to free speech. Mr. Pickering argued for the application of the actual malice standard, which requires a defamation plaintiff to prove the defendant made statements with knowledge of falsity or with reckless disregard for

12. Keyishian, 385 U.S. at 605. Faculty members of a state university refused to sign a certificate that they were not communists. Id. at 592. The university told them that their failure to sign the certificate required their dismissal. Id. The faculty members filed suit claiming that the state program violated the Constitution. Id. The Court concluded that, "even though the governmental purpose [of protecting its educational system can] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Id. at 602 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
14. Id. at 566. The Court concluded most of Mr. Pickering's remarks consisted of opinion or were accurate. The remarks found to be false were "perfectly consistent with good faith error." Id. at 582.
15. Id. at 566-67. The Board stated Mr. Pickering's letter "unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration." The Board further claimed his letter fostered conflict and tension among teachers, administrators, the Board, and district residents. Id.
16. Id. at 565.
the truth. The Board of Education argued the State could set standards for a public employee's speech.

The Supreme Court rejected the argument that the State could condition public employment on waiving rights, yet recognized the State's interests as an employer in regulating the speech of its employees. The Court declined, however, to establish any specific test to determine when a public employer could discipline a public employee based on the employee's speech. Indeed, it refused to apply an actual malice standard. Instead, it introduced a balancing test: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its

17. Id. at 569; see also New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing actual malice standard).
19. Id.
20. Id.
21. Id. at 568-69. "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," the Court concluded it was not "appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Id.


22. Pickering, 391 U.S. at 574. The Court stated, "[w]e have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism." Id. at 574; see also Barnes v. Small, 840 F.2d 972, 983 (D.C. Cir. 1988) (stating "the Supreme Court has consistently noted that dismissal from employment and libel actions trigger different sorts of First Amendment analysis" and citing Pickering as exemplifying the Court's refusal to equate libel and dismissal of public employment suits); W. Eric Dennison, Note, Constitutional Law—First Amendment Right to Freedom of Speech—Infringement Upon Public Employees' Right to Speak on Matters of Public Concern, 55 TENN. L. REV. 175, 184 n.93 (1987) (stating the Court refused to apply the New York Times standard although Mr. Pickering argued for its application).
Applying this balancing test, the Court considered Mr. Pickering's interest in free expression and society's interest in having unrestricted debate on matters of public importance. The Court balanced these interests against the school's interests in maintaining workplace discipline, harmony, loyalty, confidence, and efficiency. The Court found Mr. Pickering's statements did not threaten discipline or workplace harmony because Mr. Pickering did not direct his statements at someone with whom he worked daily. Additionally, Mr. Pickering's statements did not undermine any close working relationships that required loyalty and confidence. The Court also concluded the alleged falsity of the statements caused no harm because there was little public reaction to the letter. Concluding that Mr. Pickering's interests outweighed the school's, the Court held that "absent proof of false statements knowingly or recklessly made by him," a teacher cannot be dismissed from public employment because he spoke about issues of public concern. In footnote six, the Court noted an unresolved issue:

Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.

24. Id. at 568-73.
25. Id. at 570.
26. Id. The Court recognized, however, that there would be "some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." Id. at 570 n.3.
27. Id. The Court also stated that there are some positions in which the relationship between an employee and their superior is so personal and intimate that certain forms of public criticism would seriously undermine the effectiveness of the working relationship. Id. at 570 n.3.
28. Id. at 570-71.
29. Id. Many courts have construed this holding to mean that the First Amendment does not protect a statement that is knowingly or recklessly false. See supra note 4 (citing cases holding a public employee's recklessly, false statements are unprotected); see also Dennis H. Millbrath, The Free Speech Rights of Public Employees: Balancing With the Home Field Advantage, 20 Idaho L. Rev. 703, 720 (1984) (stating many courts changed the scope of Pickering by holding that unprotected speech need not be balanced).
30. Pickering, 391 U.S. at 574 n.6. The Court also emphasized that Pickering did not involve the question of whether a teacher's statements were so groundless as to call into question his ability to perform his duties. Id. at 572 n.5. "In such a case, of course, the statements would merely be evidence
B. MODIFICATION OF THE BALANCING TEST: PICKERING'S PROGENY

Although the Pickering balancing test increased the rights of public employees, the malleable nature of the test made its manipulation inevitable. The Supreme Court subsequently added to and modified the Pickering test, and public employee First Amendment jurisprudence developed on a case-by-case basis. Despite these developments, however, the Court has never answered the question left open in Pickering of how to treat knowingly or recklessly false statements that have no harmful effects.

The first addition to the Pickering balancing test occurred in Mt. Healthy Board of Education v. Doyle. In Mt. Healthy, a school board declined to rehire an untenured teacher shortly after the teacher disclosed to a local radio station the contents of a
memorandum concerning the school's new dress code. The teacher filed suit, claiming the Board violated his First Amendment rights. In resolving the teacher's claim, the Court established a new causation test requiring the public employee to prove that the First Amendment protected his speech and that the speech was a motivating factor in the Board's decision not to rehire him. If the public employee meets this burden, the Court held that the employer must then show by a preponderance of the evidence that it would have dismissed the employee regardless of his constitutionally protected conduct.

The Supreme Court further refined the Pickering balancing test in Givhan v. Western Line Consolidated School District. Givhan held the First Amendment protects both public and private expression of public employees. The Court explained that when a government employee speaks publicly, the reviewing court must

35. Id. at 282.
36. Id. at 276. The district court held the teacher's call to the radio station was "clearly protected by the First Amendment." Id. at 283. Because the call constituted protected speech and because it played a substantial part in the decision of the school board not to renew the teacher's employment, the district court held the teacher was entitled to reinstatement with backpay. The Supreme Court, however, feared the district court's causation rule would allow an employee to immunize herself or himself against adverse employment actions by engaging in constitutionally protected conduct even though she or he deserves dismissal. Id. at 286.
37. Id. at 287.
38. Id. The Court remanded the case for appropriate application of the new causation test. Id. Commentators criticized the Mt. Healthy decision. See, e.g., Richard H. Hiers, Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?, 40 WAYNE L. REV. 1, 32-33 (1993) (arguing public employees' First Amendment rights are violated with impunity because employers can base adverse personnel actions on employees' faults or deficiencies found through investigation of personnel records); Millbrath, supra note 29, at 711 ("Mt. Healthy effectively eliminated the public employer's perceived jeopardy when action is taken against the 'bold employee' and shifted the advantage back to the employer.").
39. 439 U.S. 410 (1979). In Givhan, the school district refused to renew a teacher's contract, alleging the teacher gave lower grades to white students', attempted to disrupt a meeting on desegregation, threatened not to return to work after the school's desegregation, and protected a student during a weapons search. Id. at 413 n.3. The teacher argued the school's action violated her First Amendment rights. Id. at 412. The district court concluded the teacher's criticism of school district policy served as the primary reason for the non-renewal of the contract and therefore ordered the teacher reinstated. Id. at 413. The Fifth Circuit Court of Appeals, however, reversed, concluding that the private expression of speech does not warrant First Amendment protection. Id. at 418.
40. Id. at 415-16.
address the content of the employee's statements to determine the
effect on the employee's performance or the agency's operation. ¹⁴¹
Privately expressed speech, however, may "bring additional factors
to the Pickering calculus." ¹⁴² When an employee confronts a
superior privately, the Court suggested that "the employing
agency's institutional efficiency may be threatened not only by the
content of the employee's message but also by the manner, time,
and place in which it is delivered." ¹⁴³ For example, if a male
employee continuously requests private meetings with his female
supervisor in which he is physically threatening and demands that
she admit to some perceived wrongdoing, the supervisor may not
only lose authority over and respect from the employee involved,
but may also feel so personally threatened as to affect her perfor-
mance within the entire agency. The agency itself will suffer by
the deterioration of the employee-employer relationship as well as
the supervisor's decreased efficiency.

The third modification of the Pickering test occurred in
Connick v. Myers. ¹⁴⁴ Connick implicitly established a "public
concern threshold" that must be met if a public employee's speech
is to receive constitutional protection. ¹⁴⁵ The Court stated that if

¹⁴¹ Id. at 415 n.4.
¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ 461 U.S. 138 (1983). Ms. Myers was an Assistant District Attorney for
five and a half years when her supervisor told her that she would be transferred
to a different section of the criminal court. Id. at 140. Although, Ms. Myers
opposed the transfer and expressed her concern to several of her supervisors,
the transfer occurred anyway. Id. at 140-41. Ms. Myers subsequently prepared
and distributed a questionnaire to fellow staff members concerning the office's
transfer policy, morale, the need for a grievance committee, the level of
confidence in supervisors, and whether employees felt pressure to work in
political campaigns. Id. at 141. The District Attorney fired Ms. Myers because
of her refusal to accept the transfer and because he considered the distribution
of the questionnaire as "an act of insubordination." Id. Ms. Myers filed suit,
claiming the District Attorney violated her First Amendment rights. Id.

The district court held the questionnaire constituted protected speech and
the Pickering balance weighed in the employee's favor. Id. at 142. The court
concluded the District Attorney could not prove by a preponderance of the
evidence that Ms. Myers would have been terminated regardless of the
questionnaire and ordered her reinstated. Id. at 141-42. The Fifth Circuit
Court of Appeals affirmed the district court's opinion. Id. at 142. The Supreme
Court ultimately held the interests of the employee in commenting upon
matters of public concern outweighed the interests of the employer in promoting
efficiency of public services. Id. at 138.

¹⁴⁵ Id. at 146. Prior to Connick, the Supreme Court only hinted that a
public employee's speech must address matters of public concern to receive First
Amendment protection. See Pickering v. Board of Educ., 391 U.S. 563, 574
an employee's speech does not qualify as speech on a matter of public concern, it is unnecessary to examine the reasons for the employee's discharge.\textsuperscript{46} If the speech addresses a matter of public concern, however, the Court then determines the degree to which the statement is protected by the First Amendment by considering the extent to which the speech addresses the issue of public concern.\textsuperscript{47} In Connick, the Court concluded that the questionnaire distributed by the employee touched upon matters of public concern only in a "most limited sense."\textsuperscript{48} The employee therefore enjoyed a limited First Amendment interest that did not require the employer to tolerate action that it "reasonably believed" would disrupt office efficiency or working relationships.\textsuperscript{49} The Court rejected the employee's argument that an agency must clearly demonstrate that an employee's activities substantially interfered with office operations to justify a discharge.\textsuperscript{50} Such a standard, the Court explained, ignored the conclusion in Pickering that the

\textsuperscript{1968} (holding a "teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment").

\textsuperscript{46} Connick, 461 U.S. at 146. The Court explained that "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." \textit{Id.} The Court qualified its statement by refusing to conclude that speech not on a matter of public concern was totally beyond the First Amendment. \textit{Id.} at 147. Examples of statements held to qualify as speech on a matter of public concern include a deputy's statement to a co-worker that she hoped a presidential assassination attempt was successful, Rankin v. McPherson, 483 U.S. 378, 386 (1987), an employee's statement regarding political patronage practices and corruption in an employment services office, Williams v. Commonwealth, 24 F.3d 1526, 1534 (6th Cir.), \textit{cert. denied}, 115 S. Ct. 358 (1994), and a fire chief's statement in a television interview that the local station had only two working fire trucks, Brasslett v. Cota, 761 F.2d 827, 830 (1st Cir. 1985).

\textsuperscript{47} Connick, 461 U.S. at 152. Many commentators have criticized the public concern test. \textit{See}, e.g., Stephen Allred, Note, Connick v. Myers: Narrowing the Free Speech Right of Public Employees, 33 \textit{CATH. U. L. REV.} 429, 453-54 (1984) [hereinafter Allred, Connick v. Myers] (arguing that the public concern test made it more difficult for an employee to show that the First Amendment protected his or her speech); Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 \textit{IND. L.J.} 43, 50-75 (1988) (discussing the lower court's application of the Connick standard).

\textsuperscript{48} Connick, 461 U.S. at 154.

\textsuperscript{49} \textit{Id.} at 154. The Court emphasized, however, the fact-specific nature of public employee speech claims and refused to establish any general standard. \textit{Id.}

\textsuperscript{50} \textit{Id.} at 150.
state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression.\footnote{51}

Five years after Connick implied a public concern threshold, the Supreme Court conclusively established the threshold as a prerequisite for First Amendment protection in Rankin v. McPherson.\footnote{52} The Court stated that the threshold for applying the Pickering balancing test is whether the employee's "speech may be 'fairly characterized as constituting speech on a matter of public concern.'"\footnote{53} After deciding that the employee's statement addressed a matter of public concern, the Court applied the Pickering balancing test, burdening the public employer with justifying the discharge on legitimate grounds.\footnote{54} The Court considered the effects of the statement on discipline, close working relationships, the speaker's workplace performance, and the

\footnote{51. Id. Stephen Allred argues Connick restricted Pickering by suggesting the employee's speech must address a matter of public concern to receive First Amendment protection and by allowing an employer to base its decision on a "mere apprehension" the speech would disrupt the office. Allred, Connick v. Myers, supra note 47, at 454 (arguing Connick may have been trying to reduce the number of cases in which lower courts use Pickering's balancing test).

52. 483 U.S. 378 (1987). In Rankin, Ardith McPherson worked as a deputy constable in the office of the Constable in Harris County, Texas. Id. at 380. Ms. McPherson was not a peace officer, did not wear a uniform, and did not make arrests or carry a gun. Id. Her duties were entirely clerical, and she worked in an area that was not readily accessible to the public. Id. On March 30, 1981, Ms. McPherson heard on the radio that someone had attempted to assassinate President Reagan. Id. at 381. After hearing the report, McPherson and a co-worker talked about the incident and Ms. McPherson said, "if they go for him again, I hope they get him." Id. Another worker overheard the statement and reported it to Constable Rankin, who immediately fired Ms. McPherson. Id. at 381-82. Ms. McPherson filed suit, claiming her discharge violated her free speech rights. Id. at 382.

53. Id. at 384 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). The Court concluded Ms. McPherson's statement dealt with a matter of public concern because she made the statement in a conversation addressing presidential policies and following a bulletin on an assassination attempt. Id. at 386. Although the Court recognized that a threat to kill the President would not be protected by the First Amendment, it concluded Ms. McPherson's statement did not amount to such a threat. Id. at 387. The Court further stated the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Id. The Court emphasized the importance of debate on issues that include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

54. Id. at 388.
agency's public image.\(^\text{55}\)

Finally, in *Waters v. Churchill*,\(^\text{56}\) the Supreme Court decided whether the public concern test should be applied to what the government employer thought the employee said, or to what the trier of fact ultimately determines the employee said.\(^\text{57}\) Justice O'Connor's plurality opinion cited previous Supreme Court decisions that established procedural checks designed to deter judicial and administrative agencies from chilling free speech.\(^\text{58}\) Although the plurality opinion implied that public employees' free speech rights deserve such procedural protection,\(^\text{59}\) the Court failed to provide a general standard.\(^\text{60}\) Instead, the plurality decided to answer procedural questions on a case-by-case basis, "at

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55. *Id.* at 388-89. The Court concluded the balancing test favored the employee and her employer discharged her improperly because she made her statement in a private office during a private conversation. *Id.* Moreover, the statement did not demonstrate she was unfit to perform her duties. *Id.* at 389.

56. 114 S. Ct. 1878 (1994) (plurality opinion). Cheryl Churchill worked as a nurse in a state hospital. *Id.* at 1882. Several nurses overheard a conversation between Ms. Churchill and a co-worker, in which Ms. Churchill allegedly criticized Ms. Waters, her supervisor, and the hospital's obstetrics department. *Id.* The hospital fired Ms. Churchill based on information from a nurse who overheard segments of the conversation. *Id.* at 1882-83. Ms. Churchill claimed her words addressed concerns regarding the hospital's cross-training program, hospital policies, and potential harmful effects on patient care. *Id.* at 1883. Although she admitted criticizing the vice-president of nursing for policy implementation, she claimed she actually defended Ms. Waters. *Id.* Other nurses who overheard the conversation agreed with Ms. Churchill's summary. *Id.* Ms. Churchill sued the hospital claiming that dismissal violated her free speech rights. *Id.*

The district court granted the hospital's motion for summary judgment, concluding the First Amendment did not protect the conversation because the speech failed to address a matter of public concern. *Id.* at 1883-84. The Seventh Circuit Court of Appeals reversed and remanded, holding Ms. Churchill's speech involved a matter of public concern and there was a material issue of fact regarding the content of her speech. *Id.* at 1884. The appellate court further stated the inquiry must turn on what the employee actually said, not on what the employer thought the employee said. *Id.* The Supreme Court held the public concern test applied to what the employer reasonably believed the employee said, but a genuine issue of fact existed regarding the employer's motivations. *Id.* at 1878.

57. *Id.* at 1882.

58. *Id.* at 1884-85 (citing cases demonstrating the Constitution mandates certain procedural requirements in proceedings that may penalize protected speech).

59. *Id.* at 1884.

60. *Id.* at 1885. As Justice O'Connor explained, the Court has never set forth a general test to determine when the First Amendment requires a procedural safeguard. *Id.*
least until some workable general rule emerges."61

The Waters plurality opinion concluded that the public concern test should apply to what the employer reasonably believed the employee said. The employer's decision to discharge a public employee could be sustained if the employer used reasonably reliable procedures to determine that the First Amendment did not protect the employee's speech.62 In reaching this conclusion, the Court recognized that it must treat public-employee speech differently because of the State's interest in efficiency and service.63 Indeed, the Court suggested that public employees sacrifice some of their First Amendment protection because they are paid to contribute to the government agency's efficiency.64 The plurality opinion stated that any decision requiring a public employer to determine which procedures a jury would find reasonable imposes too heavy a burden on the employer.65 Instead, a standard requiring the care that a reasonable manager would use before making an employment decision would ensure good faith and fairness to the employee without unduly burdening the employer.66

61. Id. at 1886.
62. Id. at 1889.
63. Id. at 1888.
64. Id. at 1887-88. The plurality opinion stated the government as an employer has a far greater interest in effectiveness and efficiency than the government as a sovereign. Id. at 1888. The government cannot restrict public speech to ensure efficiency, but it can restrict the speech of its employees if the speech adversely affects the efficiency of government business. Id.
65. Id. The problem with the Court of Appeals' approach, according to the Court, is "it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. . . . What works best in a judicial proceeding may not be appropriate in the employment context." Id.
66. Id. at 1889. Waters explained the reasonableness standard with a few examples. An employer who discharged an employee for alleged statements with no evidence of those statements would be unreasonable. Id. It also would most likely be unreasonable for an employer to act on extremely weak evidence, such as unreliable hearsay, especially if the employer has an opportunity to verify the facts. Id. The plurality opinion explained precedent did not preclude a reasonableness test, because in previous cases the employer knew the true content of the employee's speech. Id. (discussing Mt. Healthy, Pickering, and Connick).

Applying the reasonableness test to the facts of Waters, the plurality opinion held the employer reasonably believed the stories of Churchill's co-workers based on the investigation conducted by the hospital. Id. at 1890. Justice Scalia, however, argued the reasonableness test would confuse employers and ultimately increase uncertainty because the opinion did not define the test clearly. Id. at 1896-97 (Scalia, J., concurring). Further, he
C. DEFAMATION LAW AND THE ACTUAL MALICE STANDARD

The Supreme Court constitutionalized defamation law in *New York Times Co. v. Sullivan*, holding that a public official argued the proposed right to an investigation before dismissal for speech expands First Amendment procedure and conflicts with Due Process cases that hold public employees lacking a property interest in their jobs are not entitled to a hearing before dismissal. *Id.* at 1894. In his dissent, Justice Stevens criticized the plurality for eroding speech rights of public employees by allowing discharges merely because the employer reasonably believed an employee's speech was unprotected. *Id.* at 1898 (Stevens, J., dissenting).

67. RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.01, at 2-4 (1994). "New York Times Co. v. Sullivan is the starting point for all modern decisions concerning the American law of defamation. The case revolutionized the law of defamation by holding for the first time that the traditional tort rules governing the law of libel were subject to the overriding constraints of the first amendment." *Id.* § 2.01, at 2-4 (citations omitted). Previously, common law defined defamation as that which "tends to . . . diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 773 (5th ed. 1984).

A full review of defamation law is beyond the scope of this Note. For general background and analysis of defamation jurisprudence, see generally Johnson, supra note 21, 21; Donald L. Magnetti, "In the End, Truth Will Out" . . . Or Will It? "Merchant of Venice," Act II, Scene 2, 52 MO. L. REV. 299 (1987); SMOLLA supra, § 3.15, at 3-40 to 3-41.

68. 376 U.S. 254 (1964). In *New York Times Co.*, the Commissioner of Public Affairs of Montgomery, Alabama, sued the *New York Times* for the publication of an article that described the misconduct of various officials during civil rights demonstrations. *Id.* at 256. The Court found that although some of the article's statements were inaccurate, the statements did not satisfy the actual malice standard. *Id.* at 287-292.

The Court's opinion quoted extensively from precedent emphasizing the importance of freedom of debate. *Id.* at 269-73. The Court explained the Constitution safeguards the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). The Court stated "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Id.* at 269 (quoting Bridges v. California, 314 U.S. 252, 270 (1941)). The Court also stressed First Amendment protection does not depend on the "truth, popularity, or social utility of the ideas and beliefs which are offered." *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).


69. The *New York Times Co.* decision applied only to public officials. 376 U.S. at 279-80. *Rosenblatt v. Baer*, defined a public official as any person who holds a government position in which "the public has an independent interest in the qualifications and performance of the person who holds it, beyond the
cannot recover "damages for a defamatory falsehood . . . unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The public official must prove actual malice with "convincing clarity." The Supreme Court defined the standards for determining when actual malice existed on a case-by-case basis. The Court explained that only those statements "made with [a] high degree of awareness of their probable falsity" are made with reckless disregard. It further stated that reckless disregard for the truth exists when "the defendant in fact entertained serious doubts as to the truth of his publication." As one commentator explained, "reckless disregard is more than negligence, it is recklessness so grave that it is tantamount to knowledge of falsity. It is more than ignoring the truth, it is avoiding the truth." Courts generally use a subjective test to determine whether there was knowledge of falsity, focusing on what the defendant

general public interest in the qualifications and performance of all government employees." Curtis Publishing Co. v. Butts extended the actual malice standard to public figures. Public figures included people who commanded a substantial amount of public interest by position alone or people who had thrust themselves into the maelstrom of an important public controversy. The complexities of the definitions of these categories and the various tests applicable to each one is beyond the scope of this Note. For further discussion, see Phelps & Hamilton, supra note 68, at 175-94; Smolla, supra note 67, §§ 2.01-2.30 at 2-1 to 2-104.


71. New York Times Co., 376 U.S. at 285-86. This standard "requires a higher probability than proof by a mere preponderance of the evidence—it must be strong, positive, and decisive—but it is still something less than the proof beyond a reasonable doubt required in criminal cases." Smolla, supra note 67, § 3.07, at 3-21. The plaintiff also has the burden of proof on the issue of falsity. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).


74. Phelps & Hamilton, supra note 68, at 135. Actual malice is thus very difficult to prove in most cases. A plaintiff nonetheless is entitled to broad discovery on the issue, including deposition testimony regarding the defendant's state of mind when he spoke or wrote the statement. Herbert v. Lando, 441 U.S. 153, 177 (1979).
knew at the time of the speech. Nonetheless, courts permit the introduction of objective evidence to prove or disprove the existence of actual malice, considering the conduct of the defendant and what he should have known had he conducted a responsible investigation. Once a public plaintiff proves with convincing clarity that the defamation defendant acted with actual malice, the plaintiff can recover actual damages, and, if state law permits, presumed and punitive damages as well.

75. See Herbert, 441 U.S. at 170 (emphasizing New York Times Co. requires the plaintiff to focus on the defendant's subjective state of mind); see also SMOLLA supra note 67, § 3.14, at 3-36 to 3-37 (discussing a subjective test).

76. See St. Amant, 390 U.S. at 732 (emphasizing the importance of objective evidence to expose a defendant's mental state); SMOLLA, supra note 67, § 3.14, at 3-38 (discussing the use of objective evidence). See also Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982) (stating courts will infer actual malice from objective facts), aff'd, 466 U.S. 485 (1984). Courts consider the conduct of the investigation and the veracity of the sources used. HOPKINS, supra note 70, at 144-45. When publishers establish that they investigated the facts sufficiently, courts have found that there was no reckless disregard for the truth. Id. at 146. "Reckless disregard for the truth can be established when a court determines that an investigation conducted by a publisher is insufficient to support the allegations published in the defamatory article." Id. at 150.

77. The Supreme Court eased the burden of proof for private individuals in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974), holding the burden of proving actual malice does not apply to private plaintiffs. The Court nonetheless made recovery for damages more difficult. Prior to Gertz, courts presumed damage resulted from libelous statements. Gertz held that although the States may define the appropriate standard of liability for a publisher of a defamatory falsehood injuring a private plaintiff, they "may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Id. at 349. Thus, a private plaintiff "who establishes liability under a less demanding standard than that stated by New York Times Co. may recover only such damages as are sufficient to compensate him for actual injury." Id. at 350.

More recently, Dun & Bradstreet, Inc. v. Greenmoss Builders Inc. held a private libel plaintiff need not demonstrate a libel defendant published a defamatory statement with actual malice to recover punitive damages when the statement addressed a matter of private rather than public concern. 472 U.S. 749, 761 (1985). Justice Brennan and others criticized the application of the public concern test in the defamation context. See, e.g., id. at 789 (Brennan, J., dissenting) (arguing the majority erred in relying on the Connick test because "Connick explicitly limited its distinction between public and private concern to the 'context' of a government employment situation") (citing Connick v. Myers, 461 U.S. 138, 148 n.8)); Magnetti, supra note 67, at 328 (stating Dun & Bradstreet further complicated defamation law).

78. Actual damages are damages established by evidentiary proof but of a nonpecuniary nature. SMOLLA, supra note 67, § 9.06(1), at 9-10. Presumed damages are a form of compensatory damages that may be awarded without any actual evidence of injury. Id. § 9.05(1), at 9-8. The jury may presume harm occurred from the mere fact the defendant published the defamatory matter.
D. THE CIRCUIT-COURT SPLIT: DOES THE FIRST AMENDMENT PROTECT A PUBLIC EMPLOYEE'S RECKLESSLY FALSE STATEMENTS?

The federal circuit courts are split over whether a public employee's recklessly false statements are unprotected under the First Amendment.\(^79\) Pickering did not answer this question,\(^80\) yet its holding used language similar to the New York Times actual malice standard,\(^81\) which provides no protection to such statements in the defamation context.\(^82\) Thus, the circuit courts have not agreed on the level of protection that recklessly false statements warrant,\(^83\) resulting in two conflicting approaches to the debate.

The courts stating that a public employee's recklessly false statements are unprotected rely primarily on the Pickering holding that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak" on a matter of public concern cannot serve as a basis for dismissal.\(^84\) These courts conclude that the Court refused to extend First Amendment privileges to recklessly false statements.\(^85\)

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79. See supra notes 4-6 (describing the various circuit courts' positions regarding First Amendment protection for employees' recklessly false statements).

80. Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (1968); see also supra notes 14-30 and accompanying text (discussing Pickering and its holding).

81. Compare Pickering, 391 U.S. at 574-75 (holding that without proof the teacher made the false statements knowingly or recklessly, the teacher's exercise of free speech right cannot be a basis for dismissal) with New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding a public official cannot recover damages unless he proves the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not").


83. See Johnson v. Multnomah County, 48 F.3d 420, 423 (9th Cir.) (discussing circuit court split), cert. denied, 115 S. Ct. 2616 (1995).

84. Pickering, 391 U.S. at 574.

85. See, e.g., Williams v. Commonwealth, 24 F.3d 1526, 1535 (6th Cir.), cert. denied, 115 S. Ct. 358 (1994). Although some decisions in these circuits have recognized the Pickering Court's qualification of its holding, see, e.g., Brewer v. Hart, 909 F.2d 1035, 1037 n.2 (7th Cir. 1990) (citing Pickering, 391 U.S. at 574 n.6, as support that recklessly false statements "might" lose their First Amendment protection), most simply ignore it and do not recognize the circuit...
Some of these courts argue that the *Pickering* decision applied the *New York Times* actual malice standard. Often, these courts analogize a public employee's recklessly false statements to speech deemed unworthy of First Amendment protection, such as profanity, offensive language, and defamatory remarks. In sum, however, these courts' discussions of the topic are limited and underdeveloped.

In contrast, courts holding that a public employee's recklessly false statements are protected recognize the qualification of the *Pickering* holding contained in *Pickering's* footnote six. In footnote six, the Supreme Court declined to decide what protection to provide recklessly false statements. Courts assert this qualification allows the recklessly false statements of a public employee to receive First Amendment protection, and thus courts should consider the recklessness of the statement as one of the factors in the *Pickering* balancing test. Recognizing that an allowance for erroneous statements is important to the freedom of debate, these courts usually consider the recklessness of the statements as a factor weighing against the employee, but split on the issue. See generally supra notes 4–6 (discussing the circuit split).

86. E.g., *Honeymoon v. Brewer*, 528 F.2d 750, 755 (7th Cir. 1976); see also supra notes 21, 21-22 (describing commentators' positions on whether *Pickering* used the *New York Times* standard).

87. See, e.g., *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (citing cases that refused to extend First Amendment protection to such language).

88. See, e.g., *Powell v. Gallentine*, 992 F.2d 1088, 1091 (10th Cir. 1993) (stating that falsity is irrelevant unless knowing or reckless but not discussing recklessness).


91. See, e.g., *Brasslett*, 761 F.2d at 840-41 (citing *Pickering*, 391 U.S. at 574 n.6, and finding that the malicious nature of the statements is a factor in balancing interests).


93. See *American Postal Workers Union v. United States Postal Serv.*, 830 F.2d 294, 306 (D.C. Cir. 1987) (stating no court has summarily denied a public employee's First Amendment claim in absence of clear showing of harm resulting from such speech, yet concluding "intentional falsehoods are among the forms of expression least deserving of first amendment protection, and a public employee's interest in uttering deliberate, harmful lies obviously cannot outweigh the [employer's] interest in promoting the more deserving first amendment activities of its business).
refuse to consider it as dispositive.94

For example, the Ninth Circuit recently held that a public employee's claim for reinstatement should not be rejected simply because the employee's statements were recklessly false.95 Citing the Pickering qualification96 and explaining that protection of false statements ensures the survival of freedom of expression,97 the Ninth Circuit concluded that it should consider the recklessness of the statement "in light of the public employer's showing of actual injury to its legitimate interests, as part of the Pickering balancing test."98 Similarly, the First Circuit concluded that a fire chief's criticisms of the fire department did not justify his discharge even if they were recklessly false.99 In so holding, the court explained that, although a recklessly false statement may "create a pre-sumption that the employee's interest in uttering it is subordinate to the government's interest in suppressing it, the [Supreme] Court has preserved the possibility that such a statement might be protected if it resulted in no actual harm to the employer."100 The First Circuit decided, therefore, that recklessness is only a factor in the balancing test.101

II. THE NEW YORK TIMES STANDARD FAILS TO PROVIDE A PUBLIC EMPLOYEE'S RECKLESSLY FALSE STATEMENTS WITH ADEQUATE FIRST AMENDMENT PROTECTION

When analyzing a public employee's recklessly false statements, courts should use a test that balances each party's interests on a case-by-case basis.102 An appropriate balancing approach would result in a fair and thorough investigation of the employee's and the employer's interests and would recognize the individual right to and social need for free speech among public employees.

94. See Johnson, 48 F.3d at 424 (stating false statements "should be considered in light of the public employer's showing of actual injury to its legitimate interests").
95. Id.
97. Johnson, 48 F.3d at 424.
98. Id.
100. Id. (citing Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (1968)).
101. Id. at 841.
102. Johnson, 48 F.3d at 424 (stating the recklessly false statements of a public employee are not per se unprotected and concluding recklessness should be considered in light of public employer's showing of actual injury to its legitimate interests, as part of Pickering balancing test).
Such balancing would reject the *New York Times* standard which assumes that a public employee’s recklessly false speech is unprotected. Nonetheless, the lower courts often presume an employee’s recklessly false speech is not protected or apply the *New York Times* standard and deny such statements any First Amendment protection. These broad assumptions oversimplify the courts’ analyses and inhibit a thorough investigation of the differences between speech in the public employment context and speech in the defamation context. A careful investigation reveals the inadequacy of applying the *New York Times* actual malice standard in the public employment context and the superiority of a case-by-case, balance-oriented approach.

Critical distinctions between public employment speech and defamation become apparent when lower courts apply the *New York Times* standard to a public employee’s recklessly false speech. The lower courts’ failure to address the procedural and substantive distinctions between the public employment and defamation contexts disrupts the fragile scales of the balancing test, thereby threatening the constitutional protection of a public employee’s recklessly false statements. Because the *New York Times* standard fails to require proof of actual harm, it ignores the careful and thorough balancing that is critical to a fair determination of rights in the public employment context and, in so doing, decreases the public employee’s free speech rights. Furthermore, application of the *New York Times* standard improperly equates the different interests involved in the public employment and defamation contexts, resulting in public employee self-censorship. Finally, the remedies of the *New York Times* standard inappropriately imply a high level of protection for the public employer and thus inadequately reflect the competing values involved.

103. *See supra* notes 4-6 (discussing the circuit court split) and notes 84-88 and accompanying text (discussing the rationale of courts that find statements unprotected).

104. *See generally supra* notes 4-6, 21, 21, and 84-88 and accompanying text (discussing the circuit court split and circuit courts’ application of the *New York Times* standard).

105. *See supra* note 88 and accompanying text (discussing the lack of analysis in circuit courts).

106. *See supra* notes 77-78 and accompanying text (explaining presumed damages are allowed and no proof of harm is required in any case in which actual malice is established or in cases involving a private figure plaintiff and no matter of public concern).
A. THE NEW YORK TIMES STANDARD FAILS TO BALANCE ADEQUATELY THE HARM CAUSED BY THE PUBLIC-EMPLOYEE'S RECKLESSLY FALSE STATEMENTS

Because many recklessly false statements are harmless, a public employer should have to prove actual harm to justify an employment decision based on the recklessly false statements of a public employee. Courts should consider the degree of harm in determining the level of protection that the statement warrants. The New York Times standard, however, does not require proof of actual harm. In so doing, it treats, for constitutional purposes, harmless and harmful speech equally, thus ignoring the basic case-by-case balancing required by a fair and thorough analysis and in turn decreasing the free speech rights of public employees.

Many recklessly false statements in the public employment context are harmless. In American Postal Workers Union v. United States Postal Service, for example, a mail carrier wrote an editorial to his union's newspaper describing how he had illegally opened and read a Congressman's letter supporting a restriction on labor unions. The mail carrier wrote the editorial as fiction, hoping that it would arouse support for unionism. After the editorial's publication, the Postal Service fired the mail carrier. The Postal Service could not prove, however, that the editorial caused any harm: the Service's functions were not impaired, workplace harmony was not disrupted, and the office's

107. If a defamation plaintiff merely proves a statement is false, the statement is still protected by the First Amendment and the plaintiff's claim fails. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). If, on the other hand, the plaintiff proves the statement was made with knowledge of its falsity or with reckless disregard for the truth, the statement does not receive any First Amendment protection and, if state law permits presumed damages, the plaintiff's claim succeeds, regardless of the amount of harm the statement caused. Id; see also supra notes 77-78 (explaining when proof of actual harm is required).

108. If a court requires an employer to only prove the employee's statements are recklessly false, without any proof of harm, the court does not balance the degree of harm caused against the employer's interests. See supra notes 21, 21-23 and accompanying text (discussing the importance of balancing in Pickering).

109. Given this presumption of harm, the court ignores the possibility that recklessly false speech can be harmless.

110. 830 F.2d 294 (D.C. Cir 1987).
111. Id. at 297.
112. Id. at 298.
113. Id. at 298-99.
integrity was not discredited.\textsuperscript{114} Furthermore, the mail carrier duly apologized for writing the editorial and demonstrated no characteristics that would make him unworthy as a public servant.\textsuperscript{115} Although the mail carrier's speech was recklessly false, the Postal Service had no valid reason for firing him.\textsuperscript{116}

Situations such as the postal worker's indicate that harmless, recklessly false speech should be treated differently from harmful, recklessly false speech. A test that balances each party's interest on a case-by-case basis provides for such a distinction. Due to the variety of factual situations that arise in the public employment context, a court should employ a test to function as a flexible scale for weighing the interests of the public employer against the interests of the public employee.\textsuperscript{117} A balancing test, instead of providing a general standard that dictates formulaic solutions, requires courts to consider all of the circumstances as factors; indeed, no individual factor is dispositive.\textsuperscript{118}

This balancing concept requires the employer to show some measure of actual harm to weigh against the employee's free speech interest.\textsuperscript{119} In \textit{Connick}, for example, the Court held that

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 303-06.
  \item \textsuperscript{115} \textit{Id.} at 298.
  \item \textsuperscript{116} \textit{Id.} The \textit{Carter} hypothetical illustrates another situation in which a public employer has no reason to punish an employee's privately expressed statements that do not affect working relationships or office efficiency. \textit{Supra text accompanying note 1;} see also \textit{New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19} ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (quoting \textit{JOHN S. MILL, ON LIBERTY 15} (1947)); \textit{supra} note 68 (discussing value of false or controversial speech to freedom of debate).
  \item \textsuperscript{117} \textit{See supra} notes 21, 21-23 and accompanying text (discussing \textit{Pickering} balancing test).
  \item \textsuperscript{118} \textit{Compare supra} notes 21, 21-23 and accompanying text (discussing \textit{Pickering} balancing test and its application to a variety of factual situations) \textit{with Gertz v. Robert Welch, Inc., 418 U.S. 323, 343} (1974) (stating that the Court must lay down a rule of application because "an ad hoc resolution of the competing interests at stake in each particular [defamation] case is not feasible"). As one court explained, a "whistle blower" will undoubtedly cause disruption in the work environment, but the First Amendment balancing test weighs the disruption against the employee's rights of free speech. \textit{O'Donnell v. Yanchulis, 875 F.2d 1059, 1062} (3rd Cir. 1989).
  \item \textsuperscript{119} \textit{See, e.g., Waters v. Churchill, 114 S. Ct. 1878, 1887} (1994) (plurality opinion) (stating in many situations, government will have to "make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished"); \textit{Rankin v. McPherson, 483 U.S. 378, 388} (1987) (stating the state bears the burden of justifying employee's discharge on legitimate grounds); \textit{Connick v. Myers, 461 U.S. 138, 154} (1983) (requiring employers to show they
when a public employee's speech addressed matters of public concern in a very limited sense, the employer only had to prove that it reasonably believed the speech would cause harm.\footnote{Connick, 461 U.S. at 154.} In contrast, \textit{Rankin} held the public employer had the burden of proving that the speech disrupted the agency's legitimate interests.\footnote{Rankin, 483 U.S. at 388.} \textit{Waters} concluded that an employer must conduct a reasonable investigation into what an employee actually said before making any adverse employment decisions.\footnote{Waters, 114 S. Ct. at 1890.} A balancing test reconciles these varied holdings because it allows courts to increase or decrease the employer's burden of justification based on other factors, such as the public importance of the employee's speech.\footnote{See Connick, 461 U.S. at 154 (stating the limited First Amendment interest of employee's speech permits employer to take action when it reasonably believed speech would cause disruption, yet emphasizing this does not apply to all factual situations).} This flexibility is desirable because it enables courts to protect harmless, recklessly false speech that would otherwise be punished under a per se approach. By protecting such speech, this approach recognizes the employee's right to freedom of expression and the public's need to obtain information on public agencies.

The \textit{New York Times} standard ignores the difference between harmful and harmless recklessly false speech and thus abandons the case-by-case balancing that should serve as the foundation for determining the protection such statements will receive.\footnote{See supra notes 107-109 and accompanying text (discussing the inadequacies of the \textit{New York Times} standard).} Because it does not have a balancing framework, the \textit{New York Times} standard decreases the free speech rights of public employees. Under the standard, if the employer proves the statements were recklessly false, no balancing of interests occurs.\footnote{See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (setting forth an actual malice standard); see also supra notes 107-109 (discussing the actual malice standard's preemption of \textit{Pickering}'s balancing).} This decreases the range of speech that is available to public employees because they never have the opportunity to prove other factors weighing in their favor, specifically, that the speech harmed no one. If, for example, a deputy working in a county police station jokingly states that a sheriff has accepted money to disregard parking tickets, she should be able to show that she at least reasonably believed the employees' speech would cause harm).
made the comment in a private office to just one other colleague and that the comment did not affect the office's efficiency or integrity. Otherwise, the employer can legally fire her because her statement was recklessly false, regardless of the fact that it did not cause harm. The New York Times standard gives the public employer the ability to restrict the employee's expression without any valid justification.

The Court's traditional deference to the decisions of the government as a public employer does not justify giving the employer this advantage. Indeed, the Court has never presumed that a public employee's speech caused harm; the employer must always show some actual detriment. For example, a school that fires a teacher for accusing her supervisor of mismanagement and criminal conduct should be required to show that the teacher's statements destroyed office harmony or disrupted working relationships. The courts applying the New York Times standard to public employment situations fail to recognize that they effectively decrease the free speech rights of public employees because they eliminate the weighing process completely.

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126. Cf. Rankin, 483 U.S. at 378 (granting First Amendment protection to a constable's statement made in a private office).
127. See supra notes 63-65 and accompanying text (discussing the Court's traditional deference to the State as public employer).

In Connick v. Myers, the Supreme Court held the public employer could decide to dismiss an employee if the employer reasonably believed the employee's speech would disrupt workplace efficiency and relationships. 461 U.S. 138, 154 (1983). In so holding, however, the Court still used the Pickering balancing test to weigh the statement's limited relationship to the topic of public concern against the employer's fear of disruption. Id. The Court did not assume there was harm, nor did it purport to dictate a test for future cases. Id.

130. See, e.g., Moore v. City of Kilgore, 877 F.2d 364, 376 (5th Cir.) (per curiam) (applying the New York Times standard to statements a public employee made to the press and not balancing interests or harm), cert. denied, 493 U.S. 1003 (1989); Neubauer v. City of McAllen, 766 F.2d 1567, 1579-80 (5th Cir. 1985) (applying the New York Times standard to factually incorrect statements a public official made to a grand jury and not balancing interests or harm).
B. THE NEW YORK TIMES STANDARD IMPROPERLY EQUATES THE INTERESTS OF THE DEFAMATION DEFENDANT WITH THOSE OF THE PUBLIC-EMPLOYEE PLAINTIFF

A second problem with applying the New York Times standard to a public employee's recklessly false statements is that, in so doing, the courts equate the interests of the defamation defendant with those of the public-employee plaintiff, and the interests of the defamation plaintiff with those of the public-employer defendant. These interests are not parallel. The New York Times standard involves competing individual interests. Adopting it in a context that involves competing individual, governmental, and public interests ignores the public's interest in a public employee's speech and in turn, potentially encourages public employees to censor themselves.

Both parties in defamation cases, whether individuals or organizations, represent primarily individual interests. The defamation plaintiff sues to clear his reputation, name, and dignity. The defamation defendant defends her individual interests.

131. The defamation defendant and the public-employee plaintiff are the speakers. The defamation plaintiff and the public-employer defendant are both the objects of the speech.


133. As one commentator explains, the State in the public employment context has an interest in maintaining employee efficiency and discipline, "a factor essential for the government 'to perform its responsibilities effectively and economically.'" Patricia A. Thompson-Hill, Note, Dun & Bradstreet, Inc., v. Greenmoss Builders: "Matters of Private Concern" Give Civil Libel Defendants Lowered First Amendment Protection, 35 CATH. U. L. REV. 883, 919 (1986) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part)). A court weighs these interests against the public employee's individual interest in free speech. Id. In defamation cases, however, both parties have personal interests, rather than governmental or organizational ones. Id. The plaintiff's interests lie in his or her good name, while the defendant's interests are those of freedom of expression. "Thus, the concerns in government employment and in defamation cases diverge widely." Id.

134. See LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 2, at 2-4, and § 4, at 8-13 (1978) (stating a defamation action protects an individual's interest in reputation); supra notes 131-133 and accompanying text (discussing the interests of parties in defamation suits).

135. See, e.g., Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept
right to speak freely. Although the defendant also represents the public's interest in having access to information, this interest is secondary to the defendant's personal free speech interests. Thus, despite often involving individuals and organizations, defamation cases represent a competition between individual interests.

In public employment cases, however, the plaintiff is always an individual employee and the defendant is always a public employer. The plaintiff sues to protect his individual right to speak freely on matters of public concern and to get his job back. Additionally, the public-employee plaintiff represents the public's interest in remaining informed about the government agency involved and ensuring the agency's continued efficiency, reliability, and accountability. The public-employer defendant's interests, on the other hand, include the government agency's interests in efficiency, reputation, workplace harmony,
and the maintenance of management control and public trust.\textsuperscript{144} The defendant also represents the public's interest in maintaining an efficient government.\textsuperscript{145} Thus, public employment cases represent the conflicting interests of an individual, a governmental entity, and the public.

Because defamation and public employment cases concern two distinct sets of competing interests, application of the New York Times standard is unsound in the public employment context. The New York Times standard provides the defamation defendant with a large degree of protection to further his individual interest in expressing his opinion.\textsuperscript{146} Once the plaintiff proves the speech is recklessly false, however, this protection disappears because the private individual has a limited constitutional interest in false speech.\textsuperscript{147} Because the public's right to know what a private individual thinks about a public official is secondary to this limited individual interest,\textsuperscript{148} there is no reason to extend further protection to the defamation defendant's recklessly false statements.

Public employees' recklessly false statements, on the other hand, deserve greater protection because, unlike defamation defendants, public employees represent more than just their individual interests.\textsuperscript{149} The public has a strong interest in knowing about the activities of public agencies and guaranteeing their efficiency and reliability.\textsuperscript{150} Indeed, because the public relies on public agencies, the public's right to know what public employees know about their agencies outweighs the public's right to know what private individuals think about public officials. Public employees serve this public interest because they are an

\textsuperscript{144} See Rankin, 483 U.S. at 388-89; Pickering, 391 U.S. at 569-70; see also supra note 133 and accompanying text (discussing the various interests involved in a public employment context).

\textsuperscript{145} See Pickering, 391 U.S. at 568 (noting importance of efficiency of public services); see also supra note 133 and accompanying text (discussing the various interests involved in a public employment context).

\textsuperscript{146} See generally New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (explaining the importance of free speech and establishing a high burden of actual malice to protect speech). Compare supra notes 71-74 (discussing the heavy burden of actual malice standard) with supra note 138 (discussing the importance of individual interest in defamation context).

\textsuperscript{147} Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

\textsuperscript{148} See supra note 138 and accompanying text (discussing the importance of individual free speech right in defamation context).

\textsuperscript{149} See supra note 133 and accompanying text (discussing the various interests involved in a public employment context).

\textsuperscript{150} See supra note 143 (discussing the importance of a well-informed electorate).
important, and often the only, information source regarding public agencies.\textsuperscript{151}

A court applying the New York Times standard improperly equates the defamation defendant's predominantly individual free speech interests with the public employee's more expansive free speech interests as a public representative and a vital information source about government agencies. By adopting the New York Times standard in the public employment context, therefore, courts do not grant public employees' recklessly false speech the protection it merits. Although an employee's recklessly false statements may not be useful in and of themselves to the public, punishing the employee regardless of the harm caused would deter the employee from making future statements that could be reliable. If a public employee knows a court will punish him, regardless of harm, for recklessly false statements, he will likely censor his own speech and refrain from speaking out about an agency's suspicious or illegal activities.\textsuperscript{152} The application of the New York Times standard may not harm the employee's limited individual interests,\textsuperscript{153} but it decreases the scope of the employee's speech and thus diminishes the likelihood that the public will discover an agency's undesired activities.

C. THE REMEDIES OF THE NEW YORK TIMES STANDARD INADEQUATELY REFLECT THE COMPETING VALUES OF THE PUBLIC EMPLOYEE AND THE PUBLIC EMPLOYER

Defamation cases and public employment cases involve different remedies.\textsuperscript{154} These differing remedies imply that courts

\textsuperscript{151} Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994) (plurality opinion) (stating "[g]overnment employees are often in the best position to know what ails the agencies for which they work").

\textsuperscript{152} For example, consider the importance of free speech for police officers. A suppression of information does not serve the public's interest in maintaining a reliable and law-abiding police department. Courts thus should not punish a deputy's false statement that a sheriff is accepting bribes to disregard parking tickets so that, when the deputy learns about the sheriff's actual involvement in narcotics, she will be willing to speak and expose his activity to the public.

\textsuperscript{153} A public employee's interests are limited when his speech is recklessly false. See Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (stating knowingly false statements do not enjoy constitutional protection). The employee's interests are limited further because he has partially waived his free speech rights in exchange for a government job. See Waters, 114 S. Ct. at 1885 (explaining a public employer can prohibit its employees from using offensive speech with the public or with co-workers).

\textsuperscript{154} Compare Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-48 (1974) (stating a plaintiff may recover special, compensatory, and punitive damages for
distinguish the interests involved in one context from the interests involved in the other context. Indeed, the remedies reflect the speech's value in each context. Accordingly, by applying the New York Times standard to a public employee's recklessly false speech, courts fail to understand the underlying values of the speech in each context. In so doing, the courts disregard the balancing of interests appropriate and necessary in the public employment context.

The appropriate remedy in a defamation suit includes actual, presumed, and punitive damages. This compensation scheme reflects the courts' understanding of the interests involved, the most important of which is the defendant's free speech right. The actual malice standard protects that right by establishing a high burden of proof for the plaintiff. The Court nonetheless recognizes the need to punish and deter defamatory remarks. Accordingly, the defamation plaintiff is entitled to punitive damages, which can devastate the defendant. Punitive damages give the jury an opportunity to punish the defendant for his speech and provide deterrence for similar future speech. A large award can destroy current business activities and cripple any potential business ventures. This compensation scheme thus


155. See, e.g., American Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 308 (D.C. Cir. 1987) (stating defamation cases involve civil liability for damage to a person's reputation and Pickering cases involve disciplining public employees in response to speech that allegedly harms government).

156. See supra notes 77-78 and accompanying text (discussing damages in defamation actions).

157. See supra note 138 and accompanying text (discussing importance of individual free speech right in a defamation context).

158. See supra note 71 (discussing the heavy burden of actual malice standard).


160. See generally supra notes 77-78 and accompanying text (discussing defamation damages).

161. See, e.g., New York Times Co., 376 U.S. at 277-78 (stating judgment awarded in trial court was 1,000 times greater than the maximum fine provided by state criminal statute and questioning whether, because there is no double-jeopardy limitation on civil lawsuits, a newspaper can survive a succession of such judgments); see also Thompson-Hill, Note, supra note 133, at 885 n.8 (stating that increase in defamation litigation has led to increase in insurance costs).
serves to protect free speech yet, once the plaintiff proves actual malice, severely punishes the defendant thereby deterring defamatory remarks.

In the public employment context, however, the courts consider the interests involved to be far more balanced.¹⁶² Neither party has an interest that heavily outweighs an interest of the other. Courts, therefore, often award a public employee with reinstatement and backpay.¹⁶³ Reinstating the public employee simply returns the employee to his pre-speech status. Moreover, it does not sharply discipline the public employer and does not deter it from making future employment decisions. Neither party, therefore, gains or loses much in this context. This more balanced approach, void of severe penalties for the employer, reflects the Court's traditional deference to a public employer's employment decisions.¹⁶⁴ Further, this approach does not restrict the decision-making power necessary for agency efficiency and does not burden the public-employee plaintiff with a high burden of proof. Courts should not apply the actual malice standard in the public employment context because it gives the employer too much protection and places too great a burden of proof on the public employee. In doing so, it fails to recognize that the values in the two contexts are distinct and, to be fair, should be treated as such.

III. A PROPOSED STANDARD:
CONSIDERING RECKLESSNESS AS A FACTOR IN THE PICKERING BALANCING TEST

Rather than apply the New York Times standard to a public employee's recklessly false statements, courts should maintain an exclusive focus on a case-by-case balancing test. Pickering and its progeny set forth such an approach.¹⁶⁵ Applying the Pickering balancing test, and considering the recklessness of the employee's false statements as a factor in that test, preserves the emphasis on the balancing of interests deemed essential to the public employment context¹⁶⁶ and furthers freedom of debate by maintaining

¹⁶². See supra notes 21, 21-23 and accompanying text (discussing Pickering's balancing test).
¹⁶⁴. See supra notes 63-65 and accompanying text (discussing the Court's traditional deference to the State as public employer).
¹⁶⁶. See supra notes 21, 21-23 and accompanying text (discussing the importance of Pickering balancing test)
the constitutional protection of a public employee’s recklessly false statements.\(^\text{167}\)

In the \textit{Carter} hypothetical,\(^\text{168}\) if the court applied the \textit{New York Times} standard to Ms. Carter’s statements, as the Sixth, Seventh, and Eighth Circuits’ precedents require,\(^\text{169}\) it would hold that Ms. Carter’s claim failed because her statements were recklessly false and thus unprotected.\(^\text{170}\) The court would deny Ms. Carter her job and her free speech rights because it would never reach the \textit{Pickering} balancing test or the question of harm.\(^\text{171}\) Furthermore, the decision would chill public-employee speech and thus restrict the public’s ability to obtain information on public agencies.\(^\text{172}\) Thus, if the speech is recklessly false and causes no harm, this standard produces an unsatisfactory result.

Under a \textit{Pickering} approach, in contrast, after first determining the extent to which the speech addressed a matter of public concern,\(^\text{173}\) courts would balance the employee’s free speech interest against the employer’s interest in efficiency and workplace harmony.\(^\text{174}\) Within this balancing process, the courts would consider the harm caused by the recklessly false statements.\(^\text{175}\) If the statements did not cause any harm, the employer could not rely on that factor to weigh in its favor on the \textit{Pickering} scales.\(^\text{176}\) Instead, the employer would have to prove

\begin{quote}
\begin{itemize}
  \item 168. \textit{See supra} note 1 and accompanying text (presenting \textit{Carter} hypothetical).
  \item 169. \textit{See supra} notes 4-6 and accompanying text (discussing circuit split).
  \item 170. \textit{See New York Times Co. v. Sullivan}, 376 U.S. 254, 279-80 (1964) (stating statements made with knowledge of their falsity or with reckless disregard for truth are unprotected).
  \item 172. \textit{See supra} notes 146-153 and accompanying text (discussing the effects of equating interests in defamation and public employment contexts).
  \item 174. \textit{See, e.g., Rankin}, 483 U.S. at 388 (balancing interests after concluding that speech addressed matter of public concern); \textit{Johnson v. Multnomah County}, 48 F.3d 420, 423-24 (9th Cir.) (concluding a court should consider recklessness of an employee’s statement as part of \textit{Pickering} balancing test), \textit{cert. denied}, 115 S. Ct. 2616 (1995).
  \item 175. \textit{See Johnson}, 48 F.3d at 424 (advocating “an approach that considers the actual damage done to the government by the reckless statement”).
  \item 176. \textit{See supra} notes 21, 21-23 and accompanying text (discussing \textit{Pickering’s} balancing test).
\end{itemize}
\end{quote}
that it would have made the employment decision regardless of the speech. 177

If the hypothetical Carter court took this approach, for example, it might determine that Ms. Carter's speech deserved First Amendment protection because it was harmless. Because she addressed her concerns privately, the school board's reputation and image remained untainted. Furthermore, assuming Ms. Carter's relationship with Ms. Larkin did not suffer, the court could also find that workplace harmony and discipline remained intact, especially if only a few other teachers knew about her statements and they did not resent her or the school board because of the incident.

On the other hand, if the school in Carter alleged and proved harm, this approach does not preclude a finding that the speech is unprotected. Indeed, the Pickering test considers harm as a factor weighing against the employee.178 Thus, if the statements caused moderate, but not extreme harm, a court should weigh that harm against the employee. The employer could rely on the harm to weigh in its favor, but would still have to prove that its interests substantially outweigh those of the employee.179

Finally, if the school proved that Ms. Carter's speech caused severe harm, the court should weigh that harm heavily against her. The school would then only have a slight burden of proof, showing that it reasonably believed that its actions were appropriate.180 This sliding scale approach forces courts to use a more flexible and adaptable analysis in the public employment context—a flexibility intended in Pickering.181 Although this per-

180. Cf. Connick v. Myers, 461 U.S. 138, 154 (1983) (requiring a public employer to show only that he reasonably believed the statement would cause harm when the statement addressed matters of public concern in limited sense).
181. Pickering, 391 U.S. at 569 (discussing the need for a flexible test that applies to variety of fact situations); see also supra notes 21, 21-23 and accompanying text (discussing the application of Pickering's balancing test to a variety of factual situations).
haps creates more work for the courts, it is more faithful to the *Pickering* framework because it refrains from prematurely tipping the scales in favor of either party.

**CONCLUSION**

Courts should determine the First Amendment protection that a public employee's recklessly false statements warrant by employing a test based on a case-by-case balancing of interests. Such a test distinguishes between harmful and harmless speech, thoroughly investigates each party's interests, and determines a fair equilibrium of rights between the parties. The *New York Times* standard does not adequately address these issues. Indeed, it does not require proof of actual harm, incorrectly equates the interests involved in each context, and its compensation scheme incorrectly reflects the respective values involved. Courts should not, therefore, apply the *New York Times* standard to find that a public employee's recklessly false statements are unprotected by the First Amendment.

Instead, courts should consider the recklessness of a public employee's false statements as a factor that weighs against the employee in a *Pickering* balancing test. This approach is faithful to a standard with a balancing foundation but does not decrease the free speech rights of the public employee. Furthermore, it requires courts to examine the respective interests involved and reinforces the Supreme Court's recognition that the defamation and public employment contexts are distinct and require separate standards. A *Pickering* analysis affords the courts an opportunity to shape the rights of public employees and employers as each factual situation requires. It permits a court to circumscribe public employee speech when the public employer has a sufficient countervailing interest, and to expand public employee speech opportunities when the public employer is unharmed. Indeed, it precludes courts from dismissing free speech cases simply because the speech is reckless, and forces them to confront the more difficult choices that arise when balancing the speech's recklessness with the harm it did or did not cause. In so doing, courts can ensure that the rights of public employees are not arbitrarily

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182. Some may contend this proposal is too unpredictable. Nonetheless, "we should not abdicate [our role of examining difficult problems] by formulation of *per se* rules with no justification other than the enhancement of predictability and the reduction of judicial investigation." United States v. Topco Assocs., 405 U.S. 596, 622 (1972) (Burger, J., dissenting).
decreased while retaining the flexibility essential to the survival of the *Pickering* doctrine.