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Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech

Rosalie Berger Levinson

Frequently, we see headlines with “disclosures” being made by government employees who have become disappointed and disillusioned by the operation of government. The question of whether government employees with this inside, critical knowledge should have the right to come forward has been the subject of numerous Supreme Court and lower court decisions, as well as scholarly debate. Employees who criticize their supervisors or challenge the efficacy of departmental policies inevitably trigger the animosity of their superiors and thus face the likelihood of being subjected to transfers, negative evaluations, harassment, or possibly termination. On the other hand, for government to conduct its business in an orderly way, it must have employees who demonstrate loyalty, who seek to work within the system, and who strive to avoid internal conflicts and rebellions that may hamper the ability of government to deliver services to its citizens. A basic tension exists between the government’s right to operate effectively and efficiently and the right of nearly twenty-one million federal, state, and local government employees to disclose what they perceive is government wrongdoing, graft, corruption, or simply ineptitude. Recognizing this tension, the Supreme Court in Pickering v. Board of Education held that courts must in each case “arrive at a balance” between these competing interests.

The history of protecting the speech of government employees has been one of expansion and subsequent contraction of rights. Although, since 1983, the Supreme Court has made it more difficult for employees to win retaliation cases, in general the Pickering test has survived. However, many appellate courts have been busy devising new tools for restricting the speech rights of government employees. Appellate court decisions, primarily from the Second, Fifth, Eighth, and Eleventh Circuits, have borrowed restrictive Title VII law and required that government employees, who seek to recover for retaliatory misconduct, demonstrate a significant alteration of the “conditions of employment” or a “material change in the terms and conditions of employment” in order to establish a prima facie case of a First Amendment violation. Thus, whistle-blowing employees who “merely” suffer involuntary transfers, suspensions with pay, public or internal reprimands, or other forms of retaliation not linked to terms of employment have been barred from pursuing their constitutional claims, even though such forms of retaliatory action might inhibit and deter them from engaging in protected speech. Further, such decisions send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a “material change” in the terms or conditions of employment.

This Article traces the development of Supreme Court doctrine regarding the question of when retaliatory action should be viewed as an infringement of the free speech rights of government employees. For almost forty years, the Supreme Court has ruled that whenever retaliatory conduct chills the reasonable employee from engaging in speech, the threshold of constitutional injury has been met. This standard, which protects government employees from

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any retaliatory action that chills speech, should be preserved, leaving the "severity of the harm" inquiry to assess damages, not the question of liability.

I. INTRODUCTION

Assume you represent a group of government employees who have uncovered what they believe is critical information revealing dishonesty, illegality, or simply gross inefficiency and negligence within their department. They wish to go public with their concerns, but they fear retaliatory action by their supervisors. Frequently, we see headlines with "disclosures" being made by government employees who have become disappointed and disillusioned by the operation of government. The question of whether government employees with this inside, critical knowledge should be protected when they come forward has been the subject of numerous United States Supreme Court and lower court decisions, as well as scholarly debate.

1. Waters v. Churchill, 511 U.S. 661, 674 (1994); accord Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968); Bd. of County Comm’rs v. Umbehr, 518 U.S. 668, 674-75 (1996); see also Spiegla v. Hull, 371 F.3d 928, 937 (7th Cir. 2004) ("[T]he public’s best protection against [unscrupulous public employees] is the insider who is willing to speak up and shed light on her colleagues’ improprieties."); Kinney v. Weaver, 367 F.3d 337, 361-62 (5th Cir. 2004) (noting that "two experienced law enforcement trainers with expertise in weapons and the use of force, are ideally placed to offer valuable public comment about excessive force and the adequacy of police training and supervision," and thus these individuals have "a particularly weighty First Amendment interest on their side of the Pickering scales"); Dangler v. N.Y. City Off Track Betting Corp., 193 F.3d 130, 140 (2d Cir. 1999) (concluding that employee whistle-blowing regarding unlawful employer conduct should be given greater protection than other forms of speech).

2. See, e.g., Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 GEO. WASH. L. REV. 1, 25-51 (1990) (arguing that the Court’s jurisprudence is too restrictive on public employees’ freedom of speech and limits their right to whistle-blow, because it provides judges with too much discretion on
Employees who criticize their supervisors or challenge the efficacy of departmental policies inevitably trigger the animosity of their superiors and thus face the likelihood of being subjected to transfers, negative evaluations, harassment, or possibly termination. On the other hand,

determining what type of speech is a matter of public concern); Lawrence Rosenthal, Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee, 25 Hastings Const. L.Q. 529, 539-67 (1998) (arguing that the Court's current jurisprudence permitting public employees to whistle-blow only if the speech concerns a matter of public concern is inconsistent with other First Amendment jurisprudence and is unduly burdensome on public employees); D. Gordon Smith, Beyond "Public Concern": New Free Speech Standards for Public Employees, 57 U. Chi. L. Rev. 249, 268-76 (1990) (advocating that the Court should replace its current fact-based inquiry on whether a public employee's whistle-blowing conduct was a matter of public concern and therefore protectable, by instead conducting an objective analysis on whether the whistle-blowing conduct caused a "disruption of public efficiency"); Michael L. Wells, Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa), 35 Ga. L. Rev. 939, 986-1005 (2001) (arguing that public employees who wish to whistle-blow are hindered by the Court's vague, inconsistent First Amendment jurisprudence, and advocating that they would be better served if the Court enacted a set of general rules applicable to all circumstances, rather than making a fact-based inquiry in each case as is the current law).


Several of the cases discussed in this Article involve government employees who allege they were retaliated against for disagreeing with their supervisors regarding the operation of government offices, yet who are barred from bringing their First Amendment claims. See Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 579 (5th Cir.), cert. denied, Hernandez v. Crawford Bldg. Material Co., 124 S. Ct. 82 (2003) (mem.) (describing a case in which employees claimed they were retaliated against for participating in a state lawsuit alleging that the School Board's decision to eliminate medical benefits for certain janitorial employees and to reduce their working hours had a disparate impact on female employees in violation of Louisiana state law, because all employees affected were female); Breaux v. City of Garland, 205 F.3d 150, 155-65 (5th Cir. 2000) (describing a case in which the plaintiff alleged he was retaliated against for blowing the whistle on politically motivated investigations of city council members by the city's top employees; further, the jury was required by the court's charge to find that these allegations were true).

On the other hand, it may be argued that an employee who speaks out regarding issues unrelated to his employment is entitled to even greater protection, because then the
for government to conduct its business in an orderly way, it must have employees who demonstrate loyalty, who seek to work within the system, and who strive to avoid internal conflicts and rebellions that may hamper the ability of government to deliver services to its citizens. A basic tension exists between the government’s right to operate effectively and efficiently and the right of nearly twenty-one million federal, state, and local government employees to disclose what they perceive is government wrongdoing, graft, corruption, or simply ineptitude.4 Recognizing this tension, the Supreme Court in *Pickering v. Board of Education* held that courts must in each case “arrive at a balance” between these competing interests.5

The history of protecting the speech of government employees has been one of expansion and subsequent contraction of rights.6 Although, since 1983, the Supreme Court has made it more difficult for employees to win retaliation cases, in general, the *Pickering* test has survived.7 However, many appellate courts have been busy devising new tools for restricting the speech rights of government employees.8 Some have done this by borrowing the Supreme Court’s
holding that policymaking officials do not enjoy First Amendment protection from patronage dismissals and applying it to deny free speech rights of high-level government officials.\(^9\) They have ignored the balancing analysis of *Pickering* and insulated employers from liability in cases where policymakers are dismissed for engaging in protected speech.\(^{10}\)

\(^9\) See *Elrod v. Bums*, 427 U.S. 347, 359-60 (1976) (holding that the First Amendment right to freedom of association forbids government officials from discharging public employees for engaging in partisan political activities). However, the Court also recognized that political affiliation may be a permissible criterion for certain policymaking positions where the government employer can establish that the employee occupies a position for which party affiliation, loyalty, or confidence is necessary. *Id.* at 366-67; see also *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990) (holding that “promotions, transfers, and recalls” based on political affiliation are impermissible infringements of First Amendment rights); *Branti v. Fink*, 445 U.S. 507, 515-16 (1980) (barring a state from firing an employee based on political beliefs unless it can show that political affiliation is an appropriate requirement for job performance). Decisions from several circuits have applied *Elrod* when a policymaking employee is terminated for at least certain types of speech.

\(^{10}\) See, *e.g.*, *Rose v. Stephens*, 291 F.3d 917, 922-25 (6th Cir. 2003) (holding that a police commissioner, who was terminated based on a memo criticizing the current deputy and seeking to eliminate that position, was not protected; applying the *Elrod-Branti* approach, rather than *Pickering* balance, and determining that the government should be permitted to dismiss any policymaking or confidential employee who voices opinions on political or policy-related issues); *Garcia v. Kankakee County* Hous. Auth., 279 F.3d 532, 533-35 (7th Cir. 2002) (holding that the interim director of the housing authority may be discharged for writing memos complaining about the chairman’s conduct because of his policymaking status; relying on *Elrod* and *Branti*, the court reasoned that First Amendment does not protect abstract statements of top employees who are responsible for setting objectives and implementing political decisions, even though the plaintiff presented the case as a *Connick-Pickering* free speech case, rather than a political association case); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 971 (7th Cir. 2001) (holding that *Elrod* applies when policymaking employees engage in speech relating to their political or substantive policy viewpoints: “[T]he First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies."); *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331-32 (9th Cir. 1997) (holding that an assistant district attorney discharged after filing papers to run against the district attorney is unprotected under the *Elrod-Branti* line of cases because he is a policymaker). *But see Curinga v. City of Clairton*, 357 F.3d 305, 312 (3d Cir. 2004) (explaining that “*Pickering* balancing should be used when termination is motivated by both a public employee’s speech and political affiliation,” but that in cases involving policymakers, the government’s interests are more likely to outweigh those of the employee); *Barker v. City of Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000) (holding that where the speech does not implicate the employee’s politics or substantive policy viewpoints, the policymaking exception does not apply and the court should instead apply the *Pickering* balancing test); *Bonds v. Milwaukee County*, 207 F.3d 969, 976-83 (7th Cir. 2000) (holding that because political reasons did not cause the county to withdraw its offer to a city employee who criticized city programs, the *Pickering* balancing test applies rather than the policymaking exception developed in *Elrod*; however, the employee’s policymaking status remains a critical factor in the *Pickering* balance, and here the county’s interest in government efficiency and workplace harmony justified its decision to rescind the offer to the plaintiff because his speech undermined his credibility with several supervisors and there was a
Other appellate court decisions, primarily from the United States Courts of Appeals for the Second, Fifth, Eighth, and Eleventh Circuits, have employed an even more inexplicable mechanism for constraining and inhibiting speech. They have borrowed restrictive Title VII law and required that government employees who seek to recover for retaliatory misconduct demonstrate a significant alteration of the "conditions of employment" or a "material change in the terms and conditions of employment" in order to establish a prima facie case of a First Amendment violation. Thus, whistle-blowing employees who "merely" suffer involuntary transfers, suspensions with pay, public or internal reprimands, or other forms of retaliation not linked to terms of employment have been barred from pursuing their constitutional claims, even though such forms of retaliatory action might inhibit and deter them from engaging in protected speech. Further, such

reasonable belief that his employment would have created workplace dissention); Lewis v. Cowen, 165 F.3d 154, 162-65 (2d Cir. 1999) (holding that the policymaker exception does not apply to free speech cases, although one's status as a policymaker may tilt the Pickering balance toward the government); Flynn v. City of Boston, 140 F.3d 42, 46-47 (1st Cir. 1998) (holding that policymakers who express their disagreements with their superior on a number of policy and personnel issues may be discharged under the Pickering balance when the supervisor no longer has the necessary trust and confidence in them).

11. See discussion infra note 13.

12. The quoted terminology stems from the text of Title VII, as well as cases interpreting that language. See infra notes 65-73 and accompanying text.

13. See Stavropoulos v. Firestone, 361 F.3d 610, 619 (11th Cir. 2004) (rejecting a public employee's First Amendment claim based on the court's ruling that, in order to prove retaliation by a public employer, "the complained-of action must involve an important condition of employment," such as discharge, demotion, refusal to hire or promote, or reprimand; although agents of the Board of Regents rated the plaintiff negatively and voted to terminate her, other agents later overrode the votes, thus allowing the plaintiff to keep her position with the same pay and benefits, and the court reasoned that any emotional distress or costs she incurred incidental to seeking review were too insubstantial to be an adverse employment action); Meyers v. Neb. Health & Human Servs., 324 F.3d 655, 659-60 (8th Cir. 2003) (holding that the employment action must be a "material change in the terms or conditions of ... employment" to be actionable and "[l]oss of status and prestige alone do not rise to the level of an adverse employment action"; however, the district court erred in granting summary judgment when fact questions remained as to whether reassignment caused changes in the intangible employment conditions that were "significant or material"); Jones v. Fitzgerald, 285 F.3d 705, 712-15 (8th Cir. 2002) (finding that neither an involuntary transfer, which resulted in "no diminution in title, position, salary, job responsibilities, benefits, hours, or other material terms or conditions," nor the presence of "negative memoranda in [her] personnel file," nor an internal investigation that resulted in "no material disadvantage in a term or condition of employment" constitutes an adverse employment action; to prove a constitutional injury the employee must establish "a tangible change in duties or working conditions that constitute[s] a material disadvantage" (quotation omitted)); Duffy v. McPhillips, 276 F.3d 988, 992 (8th Cir. 2002) (finding that "minor shifts in employment responsibility [do] not significantly alter the conditions of [the plaintiff's] employment" and, therefore, do not constitute an adverse employment action); Bechtel v. City of Belton, 250 F.3d 1157, 1162 (8th Cir. 2001) (holding that "adverse employment action
decisions send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a "material change" in the terms or conditions of employment.\textsuperscript{14} Although treating policymakers the same regardless of whether free association or free speech rights are at stake may be too simplistic as a matter of constitutional law interpretation,\textsuperscript{15} superimposing federal statutory

must effectuate 'a material change in the terms or conditions of . . . employment'" in order to establish a First Amendment violation) (quoting Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997)); Serna v. City of San Antonio, 244 F.3d 479, 483-84 (5th Cir. 2001) (reversing a trial court's award of damages to the chief of police in a whistle-blowing situation, concluding that no reasonable jury would find that the transfer of the chief of police amounted to "some serious, objective, and tangible harm," even though the transfer meant his pension would be substantially reduced if he retired early); Breaux v. City of Garland, 205 F.3d 150, 156-64 (5th Cir. 2000) (holding that retaliation consisting of "investigations, criticisms, public . . . reprimands, psychological and polygraph testing, suspension with pay, [and a] transfer . . . do not, either individually or collectively, constitute adverse employment actions"; further, rescinded reprimands, even if the correction is unpublicized, and retaliatory threats, which the court considers just "hot air," are not actionable); Benningfield v. City of Houston, 157 F.3d 369, 376-77 (5th Cir. 1998) (finding that an employee subjected to accusations, an investigation, a transfer that involved change in hours, and denial of the opportunity to attend a conference could not allege a First Amendment retaliation claim because such activities do not constitute adverse employment actions); Harrington v. Harris, 118 F.3d 359, 365 (5th Cir. 1997) ("[D]ecisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures, while extremely important to the person who dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation." (quotation omitted)); Mattern v. Eastman Kodak Co., 104 F.3d 702, 705-10 (5th Cir. 1997) (holding that a series of retaliatory actions, including being reprimanded for not being at her work station when the employee was in the Human Resources Department, harassment and threats by coworkers that management ignored, receipt of negative performance appraisal that caused the employee to miss a salary increase, and the requirement that she perform dangerous tasks, were not actionable); see also Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002) ("[T]o prove a claim of First Amendment retaliation in a situation other than the classic examples of discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand, plaintiff must show that (1) using an objective standard; (2) the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical . . . workplace.").

14. The entrenchment of this new requirement is reflected in a recent article discussing the First Amendment rights of government employees, which advises that "[i]n order to constitute an adverse action, the employer's conduct must be materially adverse in nature regarding the employee's terms and conditions of employment." William A. Herbert, The First Amendment and Public Sector Labor Relations, 19 LAB. LAW. 325, 341 (2004).

15. See Levinson, supra note 3, at 48-52 (arguing that policymaking may be a factor in conducting the Pickering balance, but it should not be determinative). The Supreme Court in Pickering noted that the relationship between the employer and the employee and the need for personal loyalty or confidence is a relevant concern, but it is only one of five factors identified by the Court in determining whether First Amendment rights outweigh the government's interest. See id. at 50. For example, if a policymaker discloses serious government corruption or wrongdoing, her right to speak out as well as the public's right to hear this critical information may outweigh the government's interest in having a "harmonious" workplace. See Pickering v. Bd. of Educ., 391 U.S. 563, 570-73 (1968). The
restrictions on First Amendment speech doctrine has no legitimate rationale. There have been instances in which the Supreme Court has used the United States Constitution to interpret statutes adopted by the same Founding Fathers, but there appears to be no sound reason why specific statutory text adopted in the 1960s and 1970s should be used to restrict the breadth of the First Amendment, which became part of our Constitution almost two hundred years earlier.17

This Article traces the development of Supreme Court doctrine regarding the question of when retaliatory action should be viewed as an infringement of the free speech rights of government employees. For almost forty years, the Court has ruled that whenever retaliatory conduct chills the reasonable employee from engaging in speech, the threshold of constitutional injury has been met.18 In Part III, the requirement of an adverse employment action under Title VII is discussed, focusing primarily on Title VII retaliation cases. In Part IV, I demonstrate why the Rutan standard, which protects government employees from any retaliatory action that chills speech, should be

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16. See, e.g., Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 385-86 (1982) (holding that provisions of the Reconstruction Era prohibiting race discrimination, more specifically 42 U.S.C. § 1981(a) (1982), are restricted to intentional discrimination because the same Congress that enacted this law also adopted the Fourteenth Amendment, which has been interpreted to reach only intentional discrimination).

17. See discussion infra Part IV.

preserved, leaving the "severity of the harm" inquiry to assess damages, not determine liability.

II. THE TRADITIONAL View

Before the 1960s, the Supreme Court freely allowed a government employer to retaliate against employees for engaging in First Amendment activities.¹⁹ In his classic articulation of the "right­privilege distinction," then-Massachusetts Supreme Court Justice Holmes in McAuliff v. Mayor of New Bedford stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."²⁰ As late as 1952, in Adler v. Board of Education, the Court continued to reason that although government employees have the right "to assemble, speak, think and believe as they will . . . they have no right to work for the State in the school system on their own terms."²¹

In 1967, the Court overruled Adler and formally rejected this doctrine, declaring that government cannot condition employment on relinquishing First Amendment rights.²² One year later, in Pickering v. Board of Education, the Court held that a public school teacher could not be dismissed for writing a letter to a local newspaper criticizing the School Board's allocation of funds to educational and athletic programs.²³ Justice Marshall observed that courts must strike 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 employees."²⁴ Justice Marshall conceded that free speech rights of government employees do not enjoy the same protection as those of private citizens because the


²². Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quotation omitted)); see also Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989) (discussing how the doctrine of unconstitutional conditions protects employees' free speech rights).


²⁴. Id. at 568.
state’s interest “in regulating the speech of its employees . . . differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” Nonetheless, the Justice also emphasized the importance of “free and open debate . . . to informed decision-making by the electorate.” Because school teachers were most likely to have informed opinions on the topic of school funding and budgetary matters, the Justice stated that “it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” Although the Court did not set down specific standards as to how the balance should be struck, Justice Marshall’s opinion imposed the burden on government to prove the restriction on speech was necessary to prevent actual impairment of the efficient operation of the services it performs as an employer.

Since Pickering, the Supreme Court has rendered a few decisions that, while generally preserving Pickering, have eviscerated the broad protection for speech envisioned by Justice Marshall. In Connick v. Myers, the Court made it more difficult for government employees to succeed in their retaliation claims by requiring them to first prove that their speech involved a matter of public concern. Further, Connick...
established that a likelihood that speech may cause disruption, rather than evidence of actual disruption, sufficed to defeat the employee's speech claim. Subsequently, in \textit{Waters v. Churchill}, the Court made it

\textit{See Levinson, supra note 3, at 30-38 (criticizing this development); see also \textsc{Ivan E. Bodenstein} & \textsc{Rosalie Berger Levinson}, \textsc{State \& Local Government Civil Rights Liability § 1:10 nn.19-40 (1991 \& Supp. 2004)} (collecting cases from various circuits regarding which types of speech will and will not be deemed to be a matter of public concern); \textit{Estlund, supra note 2, at 50-51 (arguing that the "matter of public concern" requirement is vague and subjective); \textit{Herbert, supra note 14, at 328-37 (describing the various types of speech that might or might not qualify as speech of public concern).}}
more difficult for government employees to establish that speech, assuming such is protected, was a substantial or motivating factor in the adverse treatment. The Court, in a plurality opinion authored by Justice O'Connor, held that the public employer need conduct only the same type of reasonable investigation as a private employer would in determining the content of an employee's speech.

Although these decisions have made it more difficult for government employees to bring their actions, the Court has retained the core principle that the public employer ultimately has the burden of justifying its retaliatory action by proving that the employee's speech interfered with, or was highly likely to interfere with, government operations. Many litigants have succeeded in demonstrating that their speech is entitled to First Amendment protection, and that government officials who take retaliatory action may be held individually liable for violating clearly established First Amendment law.

judge because of her expressive conduct could not be dismissed absent real, not imagined, disruption, and here there was no noticeable difference in the working relationship; Curtis v. Oklahoma City Pub. Sch. Bd., 147 F.3d 1200, 1213-14 (10th Cir. 1998) (holding that absent a showing of any actual disruption attributable to comments regarding racial equity made by the school's equity/affirmative action officer, the Pickering balance weighs in favor of plaintiff); Johnson v. Multnomah County, 48 F.3d 420, 426-27 (9th Cir. 1995) (holding that when an employee was critical of her supervisor, the county had to show more than mere disruption; actual injury to legitimate interests is required because, otherwise, allegations of wrongdoing would be suppressed because disruption necessarily accompanies such exposure).

32. Id. at 676-77. Justice Souter, in a concurring opinion, emphasized that “in order to avoid liability, the public employer must not only reasonably investigate the third-party report, but must also actually believe it.” Id. at 682-83 (Souter, J., concurring); see also Weichcrding v. Riegel, 160 F.3d 1139, 1143 (7th Cir. 1998) (relying on Waters, the court accepted findings of an investigation conducted by defendants in determining whether the employee's speech addressed a matter of public concern; when there is a dispute about what an employee actually said, courts should accept the facts as the employer reasonably found them to be).

33. See United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995); Waters, 511 U.S. at 673-74; see also Spiegla v. Hull, 371 F.3d 928, 935 (7th Cir. 2004) (“[T]he Supreme Court has held that the government may not punish the speech of a public employee if it involves matters of public concern unless the state can prove that the needs of the government outweigh the speech rights of the employee.”).
34. See, e.g., Settlegoode v. Portland Pub. Sch., 371 F.3d 503, 516 (9th Cir. 2004) (holding that the magistrate erred in entering judgment as a matter of law following a jury verdict in favor of a teacher on her First Amendment retaliation claims because the law was clearly established, even under the Pickering balance, that a school teacher who speaks out challenging the deficiency of a school program for disabled students was speaking on a matter of public concern, and evidence of any disruption was minor and was outweighed by the interest in allowing the teacher to express herself; thus, school officials were not entitled to qualified immunity from this claim); Rivera-Jimenez v. Pierluisi, 362 F.3d 87, 95 (1st Cir. 2004) (finding that the defendants did not enjoy qualified immunity from a claim brought by
In general, the following analysis has emerged from the Supreme Court cases. Initially, the court must decide whether the employee engaged in speech addressing a matter of public concern.\(^{35}\) This determination will be made by a full assessment of the content, form, and context of the speech.\(^{36}\) Second, the employee must prove that the retaliatory action was motivated by this speech.\(^{37}\) Third, the court must balance the employee's speech rights against the employer's interest in the efficient functioning of the office.\(^{38}\) Finally, the employer may still

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\(^{35}\) See Connick, 461 U.S. at 146-48.

\(^{36}\) See id. at 147-48.

\(^{37}\) See, e.g., Tharling v. City of Port Lavaca, 329 F.3d 422, 426-28 (5th Cir. 2003) (holding that absent evidence that city council members were aware of employee's speech before they took their discharge vote, it cannot be established that dismissal was "substantially motivated" by that speech); Ambrose v. Township of Robinson, 303 F.3d 488, 493-94 (3d Cir. 2002) (finding that even if there is temporal proximity between the protected activity and the adverse action, an employee must still show that decisionmakers were aware of the protected conduct); Nieves v. Bd. of Educ., 297 F.3d 690, 693-94 (7th Cir. 2002) (deciding that the timing of events was insufficient to create a triable issue of fact when the employee could not show that the actual decision was made after the protected speech, and thus summary judgment was appropriate); Butler v. City of Prairie Vill., 172 F.3d 736, 746-47 (10th Cir. 1999) (holding that mere temporal proximity of the speech to the discharge is insufficient, without more, to establish a retaliatory motive, and thus the employee's First Amendment claim failed).

\(^{38}\) See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Although the court, rather than the jury, engages in the Pickering balancing, generally underlying factual disputes whose resolution might affect this balance should be decided by the jury. See, e.g., Brochu v. City of Riviera Beach, 304 F.3d 1144, 1156-61 (11th Cir. 2002) (holding that although the Pickering balance involves a question of law for the court, there may be cases where factual disputes must be resolved by the jury before the court can make this determination); Gorman-
prevail if it carries its burden of proving by a preponderance of the evidence that the same action would have been taken even if the plaintiff had not engaged in protected speech.\textsuperscript{39}

With regard to the retaliatory conduct, there must be an assessment of whether the adverse action has infringed upon First Amendment rights. Although defining "infringement" has proved to be a difficult task with regard to many fundamental rights,\textsuperscript{40} the Supreme Court has provided fairly clear guidance as to when retaliatory conduct sufficiently burdens speech so as to trigger the \textit{Pickering} balance test. It is important to note that a finding of "infringement" does not mean that a court must find a First Amendment violation. It simply means that the employee has met the threshold necessary to proceed with the First Amendment analysis.

As to this infringement question, the Supreme Court in \textit{Rutan v. Republican Party} explained: "[T]he First Amendment . . . already protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for

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Bakos v. Cornell Coop. Extension, 252 F.3d 545, 556-58 (2d Cir. 2001) (finding that factual disputes precluded summary judgment on the \textit{Pickering} balancing issue; it is only after such disputes are resolved by a fact finder that the court can come to its own legal conclusions about whether the employer's inefficiency outweighs the employee's interest in free speech); Belk v. City of Eldon, 228 F.3d 872, 880-82 (8th Cir. 2000) (reasoning that although the balance of the interests is a matter of law for the district court, the underlying factual questions should be submitted to the jury, generally through interrogatories or a special verdict form); Myers v. Hasara, 226 F.3d 821, 826-28 (7th Cir. 2000) (deciding that factual disputes relating to the factors to be considered in the \textit{Pickering} balance precluded summary judgment).
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39. \textit{See Bd. of Comm'rs v. Umbehr}, 518 U.S. 668, 675-76 (1996) (discussing these elements); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (discussing the last element); \textit{see also} Spiegla v. Hull, 371 F.3d 928, 935 (7th Cir. 2004). \textit{Spiegla} interpreted \textit{Mt. Healthy} to impose a three-step analysis. \textit{Id}. First, the court must determine whether the employee's speech enjoys protection. \textit{Id}. Second, the employee must establish that the speech was a substantial or motivating factor in the retaliatory action. \textit{Id}. Third, the employer has the opportunity to prove it would have taken the same action in the absence of the employee's protected speech. \textit{Id}.
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40. \textit{See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} \S 10.1.2 (2d ed. 2002). Professor Chemerinsky notes that the Supreme Court has provided little guidance as to when government action that burdens the exercise of a right, rather than prohibiting it, should be deemed an infringement. \textit{Id}. As discussed in this Article, the Supreme Court has determined that government action that chills employee speech infringes on the First Amendment. \textit{See infra} notes 41-45 and accompanying text (discussing \textit{Rutan v. Republican Party}, 497 U.S. 62 (1990)). Thus, lower courts are not free to impose new constraints that require employees to prove anything more than that the retaliatory action would deter the reasonable employee from engaging in protected speech.
\end{quote}
exercising her free speech rights." The United States Court of Appeals for the Seventh Circuit had proposed that only politically based employment decisions that are "the substantial equivalent of a dismissal" violate the First Amendment. The Supreme Court found this standard unduly restrictive, because it failed to recognize that less harsh deprivations can also chill speech. Significantly, the Court rejected the employer's argument that patronage practices that did not have an adverse effect on terms and conditions of employment were not actionable. The Court recognized that employers could deter speech through other retaliatory action, even if such could not be characterized as a materially adverse change in the terms or conditions of employment.

This same deep concern about chilling employee speech was a core factor in the Supreme Court's 1995 decision invalidating portions of the Ethics Reform Act that barred employees from receiving honoraria for their speech activities. In United States v. National Treasury Employees Union, the Court recognized that preventing

41. Rutan, 497 U.S. at 76 n.8 (quoting Rutan v. Republican Party, 868 F.2d 943, 954 n.4 (7th Cir. 1989)).
42. Rutan, 868 F.2d at 949.
43. See Rutan, 497 U.S. at 75.
44. See id. at 73. Prior to Rutan some courts had argued that the retaliatory harm must be severe, and thus insubstantial changes in an employee's work conditions, even when retaliatory and even where such might reasonably chill an employee's exercise of the right to free political association, were not actionable. The rationale was that allowing such claims "would cause a level of burden that is almost certainly outweighed by the government's need to protect its own interest." Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1217 (1st Cir. 1989). Rutan made it clear that the relevant question is whether the retaliatory action deters speech. 497 U.S. at 75. Others continue to argue, however, that the assessment of the level of harm should be done at the initial stage in order to prevent "constitutionalizing employee grievances." Bernheim v. Litt, 79 F.3d 318, 329 (2d Cir. 1996) (Jacobs, J., concurring); see also Lybrook v. Members of Farmington Mun. Sch. Bd., 232 F.3d 1334, 1339-41 (10th Cir. 2000) (reasoning that although Rutan made clear that deprivations less harsh than dismissal would violate a public employee's rights, it does not mean that all acts, no matter how trivial, are sufficient to support a retaliation claim; allegations that plaintiff was subjected to a Professional Development Plan, which required her to strive to create a more collaborative work environment, and to attend Monday morning meetings to discuss complaints that had been made about her by other teachers, were "of insufficient gravity to premise a First Amendment violation"); Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97, 101 n.5 (1st Cir. 1997) (holding that Rutan's footnote 8 is "colorful rhetoric" but does not foreclose rules that allow public employers to take actions which fall short of demotions or transfers); Pierce v. Tex. Dep't of Criminal Justice, 37 F.3d 1146, 1150 n.1 (5th Cir. 1994) ("We choose not to read the Supreme Court's dicta literally; rather, we apply the main analysis of Rutan to retaliation claims and require more than a trivial act to establish constitutional harm.").
45. Rutan, 497 U.S. at 73.
compensation for speech may deter, and thus infringe on, protected speech rights.\footnote{See id. at 466-67.} It reasoned that the Act’s “large-scale disincentive to Government employees’ expression . . . imposes a significant burden on the public’s right to read and hear what the employees would otherwise have written and said.”\footnote{Id. at 470.} The determination of whether retaliatory conduct is substantial enough to “chill” speech is concededly open-ended, but Rutan and National Treasury demonstrate that the Supreme Court has broadly construed the “chilling effect” standard to protect government employees who are exercising their First Amendment rights.\footnote{See, e.g., Farmer v. Cleveland, 255 F.3d 593, 602 (6th Cir. 2002); see also infra notes 120-129 and accompanying text (discussing decisions that have specifically rejected the Title VII analysis in favor of the “chilling effect” approach).}

Following Rutan’s lead, many lower courts have recognized that employees alleging free speech violations may proceed with their claims provided the retaliatory conduct would deter the average individual from engaging in protected activity.\footnote{Farmer v. Cleveland Pub. Power, 295 F.3d 595, 602 (6th Cir. 2002) (quotation omitted) (alteration in original); see also Ulrich v. City & County of San Francisco, 308 F.3d 968, 977 (9th Cir. 2002) (stating that “[t]he denial of . . . a ‘trivial’ benefit may form the basis for a First Amendment claim where the aim is to punish protected speech”; thus a hospital could be held liable for subjecting a physician to an investigation that threatened revocation of his clinical privileges and for filing an adverse action report against him).} For example, in Farmer v. Cleveland Public Power, the United States Court of Appeals for the Sixth Circuit held that a plaintiff need only “suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity” in order to state an actionable claim.\footnote{295 F.3d at 602.} In Farmer, the court found that reduction of a plaintiff’s job responsibilities would qualify where the change arguably transformed plaintiff from a policymaking, supervisor-level employee to someone engaged in merely performing clerical tasks.\footnote{371 F.3d 928, 941-42 (7th Cir. 2004); see also Thomsen v. Romeis, 198 F.3d 1022, 1027-28 (7th Cir. 2000), abrogated on other grounds by Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004) (implying that even three reprimands may be actionable if they create the potential for chilling employees’ speech on matters of public concern, even when the

\textit{Farmer v. Cleveland Pub. Power}},
Goldboro, the United States Court of Appeals for the Fourth Circuit held that the First Amendment prohibits an employer from making threats to discharge an employee in an effort to chill the exercise of the employee's First Amendment rights.54

Further support for the notion that any government conduct that chills speech should be actionable as a violation of the First Amendment is found in the Supreme Court's analysis in Board of County Commissioners v. Umbehr.55 In Umbehr, the Court held that the Pickering balancing test should be extended to apply to an independent contractor, who alleged he lost a government contract in retaliation for engaging in speech.56 The Court noted that a contractual relation, like an employment situation, provides a valuable financial benefit and that the loss of this benefit "in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, 'are often in the best position to know what ails the agencies for which they work.'"57 Although it was argued in Umbehr that loss of one government contract should not be equated to loss of one's job, the Supreme Court recognized that the chill on First Amendment rights could nonetheless be real and thus such claims are actionable.58 As in Rutan, the Supreme Court focused on whether certain government conduct chilled speech, not on whether the adverse action could be characterized as a material or substantial employment action.59

consequences might appear somewhat speculative); Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994) ("[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures.").

54. 178 F.3d 231, 246-47 (4th Cir. 1999); see also Belcher v. City of McAlester, 324 F.3d 1203, 1207, n.4 (10th Cir. 2003) (recognizing that "[t]hreats of dismissal based on an employee's speech may constitute adverse employment action"); the court found that reprimanding a firefighter would have a chilling effect on other employees who wished to disclose departmental wrongdoing); Bass v. Richards, 308 F.3d 1081, 1087-88 (10th Cir. 2002) (finding that a reserve deputy who alleged he was stripped of his reserve commission for supporting the sheriff’s opponent in an election was deprived of a benefit “that could inhibit speech and thus could infringe on [the employee’s] First Amendment rights” and “the government infringes upon protected activity whenever it punishes or threatens to punish protected speech”).


56. Id. at 673; see also O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 714-15 (1996) (extending the protection afforded government employees terminated for patronage reasons to independent contractors in a companion case).

57. Umbehr, 518 U.S. at 674 (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)).

58. See id.

59. See id. at 674-76; see also Andersen v. McCotter, 100 F.3d 723, 726-27 (10th Cir. 1996) (holding that exercise of free speech does not depend upon receipt of a full-time salary, and thus volunteers are entitled to First Amendment protection under Pickering and Connick); Brown v. Disciplinary Comm., 97 F.3d 969, 972-73 (7th Cir. 1996) (holding that a
Decisions from the United States Supreme Court have not deviated from the Rutan-Umbhr principle that infringement of First Amendment rights is established when a public employee can show that the government conduct chills the exercise of the right. Further, outside the context of government employment, the need to protect citizens from government action that inhibits speech is a well established part of the Court's First Amendment jurisprudence. It reflects the broader notion that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Nonetheless, decisions from several appellate courts have begun to erroneously borrow the jargon from Title VII case precedent to impose a new obstacle on government employees alleging violation of their First Amendment rights. Rather than demonstrating that the retaliatory conduct chills speech, employees in some circuits are required to make a threshold showing that the retaliation caused a

volunteer firefighter was protected by the First Amendment because under state law he enjoyed some of the benefits of an employee).

60. See Umbhr, 518 U.S. at 674.

61. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that allowing public officials to recover in defamation actions would result in self-censorship by those who wish to criticize the operation of the government and that, absent a showing of actual malice, the imposition of liability would be inconsistent with the spirit and goals of the First Amendment); see also Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) (expressing concern that "the fear of public disclosure of private conversations might well have a chilling effect on private speech"). The same concern is reflected in the Court's standing jurisprudence, which dictates that a person may challenge a statute on the ground that it violates the First Amendment rights of third parties not before the Court, even though the law is constitutional as applied to him, based on the fear that an overbroad law will chill protected speech. See Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). This extraordinary departure from the ordinary rules of who may assert Article III jurisdiction reflects the special value the Court has placed on First Amendment rights. See also CHEMERINSKY, supra note 40, § 11.2.2 (discussing the overbreadth doctrine).

62. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); see also Nouche v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002) ("[C]riticism of public officials lies at the very core of speech protected by the First Amendment."). Constitutional theorists have long recognized that freedom of speech is crucial in a democracy. See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 523, 542 (arguing that freedom of speech serves an essential "checking value" on government, ensuring against abuse of power by government officials); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

63. See Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (discussing divisions among the circuits).
"materially adverse change in the terms or conditions of employment." 64

III. TITLE VII’S REQUIREMENT OF AN ADVERSE EMPLOYMENT ACTION

Title VII of the Civil Rights Act of 1964 prohibits disparate treatment on the basis of race, religion, sex, and national origin with regard to the "terms, conditions, or privileges of employment." 65 Title VII also bans retaliatory discrimination against those who complain of Title VII violations. 66 The retaliation provision makes it "an unlawful employment practice for an employer to discriminate" against someone who has opposed an employer’s unlawful behavior or participated in a Title VII proceeding. 67 Despite the broad language in the text, the federal appellate courts are divided as to how much harm an employee must endure before claims of disparate treatment or retaliation are actionable under Title VII. 68 As to retaliation claims, which are most relevant to the First Amendment question, the United States Court of Appeals for the Ninth Circuit, in Ray v. Henderson, explained that the circuits have aligned themselves with a broad, restrictive, or intermediate position as to what constitutes an adverse employment decision actionable under Title VII. 69 The most restrictive view, which is followed by the Fifth and Eighth Circuits, holds that only "ultimate employment actions" trigger protection under the retaliation provision. 70 The Second, Third, and Sixth Circuits have adopted an intermediate position, which requires that the employee demonstrate a "materially adverse change in the terms and conditions of employment." 71 In contrast, the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted an expansive view, which refuses to categorically limit the types of retaliatory action that can be

64. See cases cited supra note 13.
66. Id. § 2000e-3(a).
67. Id.
70. Id. at 1242 (citations omitted). Under the "ultimate employment decision" standard, a negative employment action is not actionable if the decision is subsequently reversed by the employer and the employee is put in the position he would have been in absent the negative action. See Smith v. City of Salem, 378 F.3d 566, 576-77 (6th Cir. 2004).
71. Ray, 217 F.3d at 1242 (quoting Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997)).
considered an adverse employment action. Other courts have recognized this same division among the circuits.

The U.S. Equal Employment Opportunity Commission (EEOC), in its Compliance Manual, has interpreted the retaliation provision of Title VII to focus on whether the employer's conduct, even if it falls short of a termination or tangible act, would deter the reasonable person from engaging in protected activity. Although the EEOC's interpretation of Title VII does not have the force of law, it is considered persuasive evidence of congressional intent. The Manual explains that, unlike the general antidiscrimination provisions in Title VII, the retaliation proscription sets no qualifiers on the term "to discriminate" and thus should be read to prohibit any discrimination "that is reasonably likely to deter protected activity ... There is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment." Although some courts have adopted the EEOC position, which tracks the First Amendment/Rutan

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72. Id. at 1242-43.

73. See, e.g., Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 445-46 (2d Cir. 1999) (discussing the disagreement among the circuits over how egregious an employer's conduct must be to give rise to a retaliation claim under Title VII); see also Joel A. Kravetz, Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes, 4 U.PA. J. LAB. & EMP. L. 315, 321-54 (2002) (providing a circuit-by-circuit analysis of retaliation claims brought under Title VII); Rebecca Hanner White, De Minimis Discrimination, 47 EMORY L.J. 1121, 1126 (1998) ("[T]here is a real and growing disarray concerning which improperly motivated employment decisions are legally actionable.").


75. The EEOC is the administrative enforcement arm of Title VII. Indeed, litigants are required to exhaust administrative remedies before they can pursue claims in state or federal court. 42 U.S.C. § 2000e-5 (2000). Although EEOC Guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quotation omitted). In adopting the expansive interpretation of the retaliation provision, the Ninth Circuit relied heavily on the EEOC's guidance. See Ray, 217 F.3d at 1242-43.

76. COMPLIANCE MANUAL, supra note 74, § 8, at iv.

77. See Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 746 (7th Cir. 2002), cert. denied, 124 S. Ct. 472 (2003) (mem.) (noting in dictum that retaliation claims need not involve a materially adverse employment action because "it presumably takes rather little to deter ... altruistic action" by employees who are making or assisting a complaint on behalf of a coworker); Ray, 217 F.3d at 1243 ("This provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination."); Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999) ("Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses."); Knox v. Indiana, 93 F.3d 1327, 1334 (7th
approach, others have required that an employee prove the retaliatory conduct tangibly or materially affects "terms and conditions of employment" in order to be actionable,\textsuperscript{78} and, as noted, some have imposed an even more stringent test, mandating that an employee show she was subjected to an "ultimate employment decision."\textsuperscript{79}

Not surprisingly, the Fifth and Eighth Circuits, which have adopted the most stringent test for employees bringing Title VII retaliation claims, have also most consistently required that government employees who seek to bring First Amendment claims demonstrate a "materially adverse" or "tangible" job action.\textsuperscript{80} The Fifth Circuit has conceded that the demand for an "adverse

\textsuperscript{78} In \textit{White v. Burlington Northern & Santa Fe Railway Co.}, the court, in an en banc ruling, rejected the EEOC's interpretation (five of the thirteen judges advocated its adoption) in favor of a more limited definition of an "adverse employment action" in order "to prevent lawsuits based upon trivialities." 364 F.3d 789, 797-800 (6th Cir. 2004). The court acknowledged the EEOC's position that its definition excludes "'petty slights and trivial annoyances' and anything that is not reasonably likely to deter employees from engaging in protected activity." \textit{Id.} Nonetheless, it concluded that its more limited definition, which requires a materially adverse change in employment conditions, provided guidance to lower courts and was preferable to "requiring district courts to determine on a case-by-case basis what actions by an employer are reasonably likely to deter an employee from engaging in protected activity." \textit{Id.} On the other hand, the court rejected the more restrictive "ultimate employment decision" standard and held that the employee's suspension without pay and job transfer were materially adverse job actions that could be brought under Title VII's retaliation provision. \textit{Id.} at 801-04; see also Stavropoulos v. Firestone, 361 F.3d 610, 617-18 (11th Cir. 2004) (holding that to be considered an adverse employment action, the plaintiff must show either an ultimate employment decision or "meet some threshold level of substantiality"); Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1189 (10th Cir. 2002) (requiring that the retaliation be a "materially adverse" employment action, and finding that neither taking an employee "out of the information loop" or unsuccessfully attempting to transfer him met this standard); Longstreet v. Ill. Dep't of Corr., 276 F. 3d 379, 383-84 (7th Cir. 2002) (finding that an employee's transfer to an allegedly more difficult position and negative performance evaluations were not tangible job consequences and thus could not qualify as adverse retaliatory action under Title VII); Weeks v. New York, 273 F.3d 76, 87 (2d Cir. 2001) (holding that an employee fails to state a claim for retaliation where she does not allege what tangible effect her transfer had on the terms and conditions of her employment), \textit{abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan}, 536 U.S. 101 (2002); Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) (requiring that the plaintiff "identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII"); Munday v. Waste Mgmt. of N. Am., 126 F.3d 239, 243 (4th Cir. 1997) (requiring that adverse action for retaliation claims affect the terms, conditions, or benefits of employment).


\textsuperscript{80} See \textit{Ray}, 217 F.3d at 1242; see also \textit{supra} note 70 and accompanying text (discussing the "ultimate employment decision" requirement).
employment action” for First Amendment litigants is less stringent than the “ultimate decision” test that it has imposed on Title VII litigants.81 In Banks v. East Baton Rouge Parish School Board, the court explained that a retaliatory act under the First Amendment may consist of reprimands, disciplinary filings, or a transfer tantamount to a demotion, even though such conduct would not qualify as an “ultimate employment decision” under Title VII.82 Ultimately, however, the court reasoned that neither the alleged “failure to promote and pay [plaintiffs] at the appropriate rate” nor the “use of [an] inappropriate test to block [employees] rightful positions” would be “an adverse employment action” even in the First Amendment context.83 Being denied a promotion and salary increase would likely chill the average worker from engaging in protected speech, yet the court rejected Banks’ First Amendment claim that she was retaliated against for participating in a lawsuit challenging the allegedly gender-biased decision of the School Board to eliminate medical benefits to certain employees.84

Similarly, decisions from the Eighth Circuit have improperly relied upon Title VII case precedent in determining that retaliatory conduct is not actionable under the First Amendment.85 In Jones v. Fitzgerald, the court held that the First Amendment plaintiff failed to show that the retaliatory conduct resulted in a “‘material employment disadvantage’ necessary to establish an adverse employment action under either Title VII or § 1983.”86 Although Jones was subjected to an involuntary transfer, two internal investigations, and negative memoranda placed in her personnel file, these did not result in loss of “tangible” job benefits, such as salary or job responsibilities.87 Further, the investigations led to no “material” disadvantage, even if such were motivated by a desire to sanction or harass Jones for her speech.88 Rather than inquire as to whether such retaliatory action deters speech, the court reasoned that in order to prove a constitutional injury, an employee must establish “a tangible change in duties or working

82. Id.
83. Id.
84. See id.; see also Breaux v. City of Garland, 205 F.3d 150, 156-61 (5th Cir. 2000) (holding that investigations, public reprimands, a suspension with pay, and a transfer would not be actionable under the First Amendment).
86. Id. at 714.
87. Id.
88. Id. at 714-15.
conditions that constitute[s] a material disadvantage.”

Other Eighth Circuit cases similarly discuss the need to show significant alteration in the conditions of employment or “a material change in the terms and conditions of employment” in order to establish a First Amendment violation.90

In addition to the Fifth and Eighth Circuits, the Second and Eleventh Circuits have also borrowed Title VII terminology in addressing retaliation claims under the First Amendment.91 In *Stavropoulos v. Firestone*, the Eleventh Circuit stated that merely demonstrating a chilling effect would not support a First Amendment claim unless such “resulted from an adverse employment action.”92 Further, the retaliatory action “must involve an important condition of employment.”93 The plaintiff alleged she suffered emotional distress when University of Georgia officials sent her negative memos, including a mental illness memo, and encouraged faculty members with negative comments about the plaintiff to come forward.94 Further, she incurred costs in seeking to review an allegedly retaliatory decision to terminate her employment.95 Nonetheless, the court relied on Title VII case precedent, “because the standards are consonant,” and concluded that the “harm” was too insubstantial because the decision was eventually overridden by other agents of the university.96 Similarly, in *Phillips v. Bowen*, the Second Circuit reasoned that a

89. *Id.* at 713 (quotation omitted). In its analysis, the court suggested that the internal investigations were “warranted” and that there was no “fabrication or factual inaccuracies in the memoranda placed in her personnel file.” *Id.* at 715. This evidence is relevant to the question of retaliatory motive, but the court’s analysis cuts off this inquiry and denies the plaintiff the opportunity to present her case to a jury. *Id.* at 716.

90. *See Duffy v. McPhillips*, 276 F.3d 988, 992 (8th Cir. 2002) (finding that “minor shifts in employment responsibility did not significantly alter the conditions” of the plaintiff’s employment); *Meyers v. Neb. Health & Human Servs.*, 324 F.3d 655, 660 (8th Cir. 2003) (holding that the retaliatory employment action must be “a material change in the terms or conditions of . . . employment” to be actionable); *Bechtel v. City of Belton*, 250 F.3d 1157, 1162 (8th Cir. 2001) (holding that “an adverse employment action must effectuate a material change in the terms or conditions of . . . employment” in order to establish a First Amendment violation (quotation omitted)).


92. *Id.* at 619.

93. *Id.* The court explained that its “dual” test—chilling effect and alteration of an important condition of employment—was necessary to ensure injury in fact. *Id.* at 620. Although the Supreme Court has held that subjective chill is insufficient to create standing, the *Rutan* Court defined injury solely in terms of an objective standard, thus obviating this purported justiciability question. *See Rutan v. Republican Party*, 497 U.S. 62, 73-76 (1990).


95. *See id.* at 615.

96. *Id.* at 619-21.
combination of minor incidents can form the basis of a constitutional retaliation claim if they reach a "critical mass," but it also stated that a First Amendment plaintiff must show that "the total circumstances of [the] working environment changed to become unreasonably inferior and adverse when compared to a typical or normal . . . workplace."97 The focus of the appellate court on the need for a "critical mass of unreasonable inferiority," although understandable to ensure that minor incidents of retaliation do not flood the courts, deviates from the core question of whether the harassment would chill speech.98

As previously discussed, many courts, as well as the EEOC, have determined that interpreting the retaliation clause in Title VII to require materially adverse changes in the terms and conditions of employment is not warranted in light of the provision's clear text and congressional history.99 It is even more inappropriate to superimpose this restrictive interpretation of Title VII on First Amendment litigants. The Supreme Court has not vacillated from the core principle that, absent strong countervailing interests, government should not be permitted to deter employees from exercising their First Amendment rights.100 In addition to case precedent, policy concerns favor a more protective standard where First Amendment rights are implicated. Those courts and commentators who have urged a restrictive interpretation of Title VII's retaliation provision have emphasized their concern that federal courts not become embroiled in the everyday decisionmaking process of

97. 278 F.3d 103, 109 (2d Cir. 2002). In instructing the jury, the district court acknowledged that "[a] position may become unreasonably inferior if there are repeated and severe incidents of harassment that, taken as a whole, would probably deter an average person from the exercise of their First Amendment rights." Id.

98. See id. In Deters v. Lafuente, another Second Circuit panel similarly borrowed Title VII doctrine and used it to deny employees' claims that they were subjected to a hostile work environment in retaliation for engaging in protected speech. 368 F.3d 185, 189-90 (2d Cir. 2004). Citing Title VII case precedent, the court found no pattern of constant harassment, but it failed to ask whether the action was nonetheless sufficient to deter protected speech. Id. In the Title VII context, harassment must be truly egregious in order to demonstrate a change in "terms or conditions of employment." A similar showing should not be imposed on First Amendment litigants. See Levinson, supra note 68, at 623-24.

99. The EEOC has argued that "[i]n enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993); see also Levinson, supra note 68, at 651-52 ("Congress intentionally refused to adopt a more restrictive retaliation provision, recognizing that employees are unlikely to come forward to complain of discrimination against them or another employee if they believe such action will be met with retaliation in any form.").

100. See supra Part II.
private businesses. But when it is a government employer that is retaliating against an employee for challenging the operation of a government agency, the federal judiciary has a significant role to play in safeguarding the public’s right to receive critical information and in protecting those who engage in political debate, including government employees who have a unique access to information that is of public concern. Once it is recognized that the adverse employment action would chill a reasonable employee from engaging in protected speech, the severity of the retaliatory conduct may affect damages, but it should not affect liability.

IV. RETALIATORY ACTION THAT CHILLS SPEECH INFRINGES ON THE FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES

In addressing constitutional rights violations, the Supreme Court in recent years has moved toward a more nuanced balancing approach in lieu of the rigid fundamental right/strict scrutiny analysis reflected in Warren Court decisions. In the context of government employee

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101. See Donna Smith Cude & Bryan M. Steger, Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Matter: Will Courts Know It When They See It?, 14 LAB. LAW. 373, 407-12 (1998); see also Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (predicting if Title VII is broadly interpreted to reach any adverse employment action, “[the Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial”); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995) (“[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers . . . .”).

102. See Power v. Summers, 226 F.3d 815, 821 (7th Cir. 2000) (rejecting Title VII limitations and noting that “[t]here is after all a difference between placing all but the tiniest employers in the nation, most of which are private, under a comprehensive regime of antidiscrimination law, and merely forbidding persons acting under color of state law to infringe constitutional rights”).

103. See, e.g., Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (explicating this liability/damages distinction in the context of a Title VII retaliation claim).

104. See Lawrence Tribe, Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name, 117 HARV. L. REV. 1893, 1933-45 (2004). There has been significant criticism of the Court’s use of balancing tests. For example, conservative Justice Antonin Scalia has vociferously attacked “ad hoc” balancing and has argued for “bright line” rules to reign in the exercise of judicial discretion. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1177-81 (1989). Ironically, this same aversion to balancing was a distinctive feature of the liberal Warren Court; at that time, the concern was that balancing would not be sufficiently protective of free speech interests. See MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 226 (1984); see also T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 972-76, 992-94 (1987) (arguing that courts lack objective criteria for weighing or comparing competing interests and thus subjectivity will determine how the balance will be struck). The liberal Justices on the Rehnquist Court are now advocating a “balancing” test to avoid the minimal
speech, a balancing test was long ago adopted by the Court. Since 1968, the Court has recognized that although employees have the right to comment on matters of public concern and the public has a significant interest in receiving this communication, courts must also take into consideration the interests of the state, as an employer, in promoting the efficiency of the services it performs.

The Court has not made it easy for government employees to succeed under the *Pickering-Connick* test. Initially government employees must demonstrate that their speech addresses a matter of public concern. Satisfying this criterion means that only speech involving public issues, speech that occupies the "highest rung of the hierarchy of First Amendment values," will be protected. Further, even where an employee's speech is deemed to be "of public concern,"
the court may determine that it is so inherently or actually disruptive of government’s ability to function that it will not be protected. Additionally, the court may find that there is no causal connection between the speech and the negative action, or that the employer would have taken the same action even if the employee had not engaged in the protected speech. In short, there are numerous obstacles in place that discourage employees from bringing purportedly “frivolous” suits and that safeguard the government’s interest in protecting the workplace.

Concededly, as with all federally protected rights, there must be an “infringement” in order for government wrongdoing to rise to a constitutional level. However, the Supreme Court ruled long ago that an infringement of the First Amendment occurs whenever an employer’s conduct would deter a reasonable employee from exercising her rights. Lower courts have recognized that some retaliatory conduct may be so trivial or inconsequential that it cannot be said to “chill” speech. But this determination should not be based

109. See supra note 30 and accompanying text; see also Belcher v. City of McAlester, 324 F.3d 1203, 1208-09 (10th Cir. 2003) (finding employer’s action had a chilling effect on speech, but concluding, under the Pickering balance, that the government’s interest outweighed the importance of the employee’s speech).

110. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); see cases cited supra note 37; cf. Spiegla v. Hull, 371 F.3d 928, 941-92 (7th Cir. 2004) (acknowledging that plaintiff must establish a causal link between the contested speech and the adverse employment action, but clarifying that the burden is to prove only that protected activity was a motivating factor, not but-for causation as recited in earlier cases). An employment action may be so trivial that it cannot be said to reflect retaliatory animus. This is very different, however, from saying that certain types of retaliatory conduct are not actionable, regardless of retaliatory motive, simply because they do not constitute a material change in the terms or conditions of employment.

111. See Spiegla, 371 F.3d at 935; see also Wells, supra note 2, at 971 (citing cases that demonstrate employers’ ability to come up with some evidence of insubordinate behavior or other misconduct and to demonstrate that that was a determinative cause of the dismissal).

112. See Wells, supra note 2, at 957-59 (“[T]he general fragility of First Amendment rights is exacerbated in this obstacle-laden remedial scheme.”). Professor Wells describes the restrictions imposed by the Court under the Pickering/Connick balance, as well as the restrictions imposed in bringing retaliatory suits under § 1983. Id.


114. See, e.g., 9, supra note 30, n. 30. Although the Ninth Circuit has been highly protective of employees’ free speech claims, it has made it clear that retaliatory action may be so insignificant that it would not deter the exercise of First Amendment rights. Id. In 9, the court rejected claims of a plaintiff who alleged only that he had been bad-mouthed and verbally threatened by his employer. Id. at 875; see also 9, supra note 30, n. 30. Other circuits have taken a similar approach. See Eaton & Meneley, 379 F.3d 949, 954-56 (10th Cir. 2004) (reasoning that the
on whether an employee can meet some threshold mechanical standard of a tangible or substantially adverse harm to employment, which has been applied in some circuits to limit protection for government employees. Indeed, the retaliatory action should not have to relate to the job at all, but rather impermissibly motivated nonemployment conduct, such as bringing false civil or criminal actions against an employee for engaging in protected speech, should also be viewed as a violation of the First Amendment.

The question of what actions by an employer are reasonably likely to deter an employee from engaging in protected activity will have to be decided on a case-by-case basis, but the definition of a "materially adverse" employment action triggers the same fact objective standard of a person of ordinary firmness is rigorous and "a trivial or de minimis injury will not support a retaliatory prosecution claim" (quotation omitted); sheriff's conduct in running criminal background checks on plaintiffs who attempted to remove him from office would not chill the actions of those who enter the arena of political debate); Naucke v. City of Park Hills, 284 F.3d 923, 928 (8th Cir. 2002) (finding that even if the harassing comments made about the plaintiff were offensive, unprofessional, and inappropriate, the embarrassment, humiliation, and emotional distress the plaintiff allegedly endured would be insufficient to deter a person of ordinary firmness from continuing to speak out, and, in fact, the record demonstrated that the plaintiff continued to speak on numerous occasions); Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000) (holding that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise" (quoting Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982))). Concerns about trivializing the First Amendment or unjustified federal intervention into personnel matters should be allayed by proper application of this "chilling effect" standard. Superimposing Title VII requirements on First Amendment retaliation litigants is unnecessary, as well as inappropriate.

115. See supra notes 80-98 and accompanying text.

116. See Woford v. Lasater, 78 F.3d 484, 488-89 (10th Cir. 1996) (holding that prosecution motivated by a desire to discourage protected speech violates the First Amendment); see also Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000) (holding that adverse action in the First Amendment context is not limited to employment decisions). Note that even in the context of Title VII retaliation claims, some courts have recognized that the retaliation provision is broad enough to cover actions that are not employment related. For example, the Seventh Circuit has held that "non-employment activities such as brick-throwing, tire-slashling or other unfortunate acts," which would not have occurred but for the employee's exercise of protected rights may be brought under Title VII. See Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733-34 (7th Cir. 2002); see also Aviles v. Cornell Forge Co., 241 F.3d 589, 593 (7th Cir. 2001) (acknowledging that the filing of false police reports would violate the retaliation provision); Veprinsky v. Flor Daniel, Inc., 87 F.3d 881, 892 (7th Cir. 1996) (finding that retaliatory motivated threats of violence and tort civil actions could be brought under Title VII); Berry v. Stevenson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (holding that a malicious prosecution action brought against a former employee constitutes an adverse employment action for purposes of retaliation claim); cf. Chock v. Northwest Airlines, Inc., 113 F.3d 861, 865 (8th Cir. 1997) (finding that the employer's alleged obstruction of an employee's studies for an M.B.A. and his attempt to prevent the employee from living with his direct supervisor were not adverse employment actions because neither involved benefits of his employment).
intensive consideration.\textsuperscript{117} Further, lower courts have at their disposal some forty years of case precedent defining when government action chills speech.\textsuperscript{118} Obviously, the magnitude of the harm is a key criterion in determining whether a reasonable employee would be deterred from engaging in First Amendment activity. However, superimposing Title VII requirements on First Amendment litigants simply means that some retaliation claims will be rejected even though the conduct in question would chill the exercise of protected speech, contrary to the purposes and goals of that Amendment.

Once a court has determined that the government employer intended to punish speech (retaliatory motive) and that he has subjected the employee to adverse action that chills speech (an infringement), the question of how severely an employer has harmed the employee should play no role in the \textit{Pickering-Connick} balance.\textsuperscript{119} Allowing employees to be subjected to harassing, retaliatory conduct, just because such conduct does not "substantially change the terms and conditions of their employment," will not promote the efficiency of government. To the contrary, it sends a dangerous message to employers that they can penalize and thus deter speech with impunity—a message that clearly affects employee morale and cuts off debate that could improve the efficacy of government. Further, the fact that the retaliatory conduct falls short of a dismissal or other "tangible" action does not negate the finding of an infringement—

\textsuperscript{117} See, e.g., Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886 (6th Cir. 1996) (recognizing that the existence of a materially adverse employment action cannot be defined by any "list" because courts must consider "indices that might be unique to a particular situation"). Even if Title VII's more stringent test might add some clarity, this is an insufficient justification for restricting First Amendment rights.

\textsuperscript{118} See Rutan v. Republican Party, 497 U.S. 62, 73 (1990); see also cases cited supra note 114.

\textsuperscript{119} However, in \textit{Gross v. Norton}, the court reasoned that a less serious adverse employment action may decrease the burden on the government employer to justify its action. 120 F.3d 877, 879 (8th Cir. 1997). In this case, the retaliatory conduct consisted of the city merely delaying the plaintiff's testimony before the Minnesota legislature by a few days, and thus the court reasoned that a First Amendment violation had not occurred. \textit{Id.} It may be that this action would not chill the reasonable employee from engaging in speech, but this author contends that this is an inquiry that should not affect other aspects of First Amendment analysis, including shifting burdens of proof. If a constitutional infringement has occurred, the magnitude of that infringement should not affect the balance. This should be contrasted to the Court's approach in \textit{Connick}, which suggested that the importance of the speech would determine whether government must show disruptive potential or actual disruption of the workplace in order to justify infringing on speech. See \textit{Connick v. Myers}, 461 U.S. 138, 154 (1983). Because the importance of the speech and the public's need to receive this communication is one of the two aspects of the \textit{Pickering} balance, making this a criterion which affects the government's burden has some justification.
courts should not recognize a "de minimis" exception where critical First Amendment rights are at stake. Rather, the extent of the injury should be addressed only with regard to damages.

Two examples using this approach and expressly rejecting Title VII standards are noteworthy. In Coszalter v. City of Salem, the Ninth Circuit held that, for First Amendment retaliation claims, the adverse employment action "need not be severe and it need not be of a certain kind." The court recognized that although retaliatory action may be so insignificant that it does not deter the exercise of First Amendment rights, the court rejected the use of any "exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment." The court reasoned that a disciplinary investigation, a transfer to new duties, a criminal investigation, repeated and ongoing verbal harassment and humiliation, an unpleasant work assignment, and withholding of customary public recognition would be, either individually and certainly cumulatively, sufficient to sustain a First Amendment retaliation claim. It sufficed that the defendant's

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120. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2323 (2004) (O'Connor, J., concurring) ("There are no de minimis violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."); cf. Eaton v. Meneley, 379 F.3d 949, 955 (10th Cir. 2004) (quoting Tenth Circuit precedent that "de minimis injury will not support a retaliatory prosecution"); White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (6th Cir. 2004) (en banc) ("Employment actions that are de minimis are not actionable under Title VII.").

121. See Bernheim v. Litt, 79 F.3d 318, 325-26 (2d Cir. 1996) (finding that an employee who alleges that her reputation, opportunities for advancement, and earning potential were impaired by her employer's acts may proceed with her First Amendment claim; further, allegation that the employee endured a campaign of harassment that "caused her great worry and unhappiness," constituted compensable injury, even if such did not include monetary losses because emotional distress is a legally recognized and compensable harm; finally, even where a litigant does not prove actual compensable injury, she may be entitled to an award of nominal damages if she proves violation of a substantive constitutional right); see also Wells, supra note 2, at 1015-18 (arguing that § 1983 damage rules are too restrictive, in particular with regard to retaliation claims, in that the law provides no vehicle for recognizing the harm done to the public interest when government employee speech is punished). Although the Supreme Court in Memphis Community School District v. Stachura, 477 U.S. 299, 307 (1986), recognized that harm in First Amendment retaliation cases may include injuries such as impairment of reputation, personal humiliation, and mental anguish and suffering, Professor Wells contends that this ignores the intrinsic actual losses that occur whenever free speech rights are violated. Wells, supra note 2, at 1018. He suggests an award of presumed or punitive damages when compensatory damages fail to "capture the full cost of the harm done by a constitutional violation." Id. at 1019.

122. 320 F.3d 968, 975 (9th Cir. 2003).

123. Id.

124. Id. at 976-77.
action was "reasonably likely to deter" employees from engaging in protected activity.\footnote{125 Id. at 976.}  

Similarly, in *Power v. Summers*, the Seventh Circuit specifically contrasted federal employment discrimination statutes, which limit protection to victims of materially adverse employment action, from constitutional claims where any deprivation that is likely to deter the exercise of free speech should be actionable.\footnote{126 226 F.3d 815, 820-21 (7th Cir. 2000); see also Rivera-Jimenez v. Pierluissi, 362 F.3d 87, 94 (1st Cir. 2004) ("[T]he standard for showing an adverse employment action is lower in the First Amendment retaliation context than it is in other contexts (such as Title VII) ... and the Supreme Court has indicated that even relatively minor events might give rise to liability.")}. The court noted that under the First Amendment adverse action is not limited to employment, but rather includes any retaliatory conduct that effectively deters "exercise of a fragile liberty."\footnote{127 Power, 226 F.3d at 820.} Thus, the district court erred in denying retaliation claims brought by university professors based on its finding that raises were discretionary and thus their reduction was not an adverse employment action. Even though the reduction involved hundreds, not thousands, of dollars, the critical question was whether the reduction was in retaliation for the fact that the professors had been "outspoken" on issues of faculty salaries, and whether such reduction was sufficient to deter the exercise of free speech.\footnote{128 Id. at 820-21.} The court recognized that ""a campaign of petty harassment' and 'even minor forms of retaliation,' 'diminished responsibility, or false accusations' can be actionable under the First Amendment."\footnote{129 Id. at 821 (citing DeGuiseppe v. Vill. of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995)) (quotations omitted).}

V. CONCLUSION  

Retaliatory action, including threats, the reduction of discretionary raises, involuntary transfers, negative memoranda placed in a personnel file, internal investigations, public reprimands, suspension with pay, or nonemployment related forms of harassment may chill the ordinary person from engaging in speech, even if such would not be considered a material or tangible change in the terms and conditions of employment. Yet, employees facing these types of retaliatory action have had their First Amendment claims dismissed in some circuits simply because they failed to meet the heightened injury standard imposed on Title VII litigants. This Article contends that
whenever the retaliatory action meets the threshold “chilling” or deterrence level, a court should address the magnitude of the injury caused by the retaliatory conduct only at the damages phase. Those circuits that have deviated from this standard have ignored clear Supreme Court precedent and have violated core First Amendment principles. It is critical that the Supreme Court step in to reaffirm the *Rutan* standard so that government employees will continue to freely contribute to the public debate on speech that lies at the core of the First Amendment—speech that is necessary to democratic self-government.