FIRST AMENDMENT EMPLOYMENT

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CHAPTER 9

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FIRST AMENDMENT EMPLOYMENT

I. SCOPE OF ARTICLE

This article covers the law of employment claims under the free speech clause of the First Amendment. By necessity, this article will cover some issues common to employment or civil rights law in general.

II. THE PROPER DEFENDANT

The proper Defendant is usually the municipality itself, rather than a department of the municipality. Even then, under 42 U.S.C. § 1983, municipalities are not liable except for actions pursuant to a "custom or policy" of the municipality or the action of the municipality's top policy making official. *See Brady v. Fort Bend County*, 145 F.3d 691, 698 (5th Cir. 1998). While employees are rarely terminated pursuant to a custom or policy of the municipality, oftentimes, the official taking the adverse employment action against the employee is the top policy making official of the municipality. The issue, of course, is who is the top policy making official over the specific adverse employment action in question. *Brady*, 145 F.3d at 701. With respect to the appointment of sheriff deputies, for example, it is clear that the sheriff is the top policy making official in terms of hiring and firing deputies under Texas law. *Id*. at 701-02. In reaching this conclusion, the Court emphasized that 1) state or local law usually supplies the answer; and 2) it is the official that sets the *policy* for employment decisions, rather than the person that made the decision that is the issue.

III. THE ELEMENTS OF THE PLAINTIFF'S CLAIM

Generally, in order to prove a claim of First Amendment retaliation, the Plaintiff must prove the following elements:

1. the plaintiff suffered an adverse employment decision;
2. the plaintiff's speech involved a matter of public concern;
3. the plaintiff's interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and
4. the protected speech motivated the defendant's conduct.

See Board of County Commissioners v. Umbehr, 518 U.S. 668, 675 (1996); *Alexander v. Eeds*, 392 F.3d 138, 144 (5th Cir. 2004); *Johnson v. Louisiana*, 369 F.3d 826, 830 (5th Cir. 2004); *Kinney v. Weaver*, 367 F.3d 337, 356 (5th Cir. 2004); *Lukan v. N. Forest ISD*, 183 F.3d 342, 346 (5th Cir. 1999). *See also Martinez v. Center for Health Care Services*, 2005 WL 1606419 (W.D.Tex. 2005).

A. The Plaintiff Suffered an Adverse Employment Decision

Whether the term is called "adverse employment action," "tangible employment action," or "ultimate employment action," the plaintiff has to show in virtually all employment cases that the employee was subjected to some type of harm that the law recognizes. The Supreme Court has provided significant guidance on this issue in several sexual harassment cases. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the court held that:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. 742, 761 (1998); *Faragher*, 524 U.S. at 781.

1. Economic harm

In other words, a tangible employment action in most cases inflicts direct economic harm and must involve an official act by the company or organization. *Ellerth*, 524 U.S. at 760; *Mota v. University of Texas*, 261 F.3d 512, 520 (5th Cir. 2001). As *Ellerth* indicates, typically a tangible job detriment must be an action that a supervisor or some other person acting with the authority of the organization could take. *Id*. at 2269. Obviously, such decisions as hiring, firing, failure to promote, and decisions involving significant changes in pay or benefits, would be considered tangible job employment actions. Such actions, however, must "have more than a 'mere tangential effect on a possible future ultimate employment decision.'" *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 191(5th Cir. 2001); *Mota v. University of Texas*, 261 F.3d 512, 519 (5th Cir. 2001).

The Fifth Circuit has held that the discontinuation of $2500 stipend, as well as denial of paid and unpaid leave, all qualified as adverse employment actions by themselves. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 522 (5th Cir. 2001). *See also Fierros v. Texas Dept. of Health*, 274 F.3d 187, 193 (5th Cir. 2001) (denial of $57 per month pay increase, to employee with a salary of $20,924.97, constituted an adverse employment action).

2. Reassignment / Job transfer

However, the law is less settled with respect to reassignment to a job with significantly different

responsibilities. As the Fifth Circuit has stated, "employment actions are not adverse where pay, benefits, and level of responsibility remain the same." *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999). Job transfers are common, and it is often a point of dispute between employer and employee as to whether the transfer was a favorable or unfavorable one and, likewise, whether the reassignment involved significantly different responsibilities. While most of the time a tangible job detriment inflicts direct economic harm on the plaintiff, the Court noted that a job transfer often does not. Thus courts have wrestled with this issue with inconsistent results. *Compare, Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001) (evidence insufficient to establish that plaintiff suffered an adverse employment action when transferred from a unit considered prestigious and desirable to another unit on the police force where the transfer involved no loss in pay or benefits) and *Hunt v. Rapides Healthcare System, Inc., LLC*, 277 F.3d 757 (5th Cir. 2001) (transfer to night shift with same pay and benefits not a tangible employment action), with *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992) (held that a reasonable trier of fact could conclude that the transfer of two sheriff's deputies from duty in the law enforcement section of the sheriff's office to duty as jail guards in the detention center was an adverse employment action) and *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999) (transfer deemed adverse employment action).

According to the Fifth Circuit, changing the plaintiff's work schedule and asking the plaintiff to perform tasks she had never been asked to perform before, are not tangible employment actions. *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999). As the court noted, changing the employee's work schedule does not change the employee's employment status. *Id.* Similarly, expanding job duties of the plaintiff (who worked as a produce clerk in a grocery store) to include mopping, cleaning the chrome in the produce department, and checking with her supervisor before she took breaks caused no change in plaintiff's employment status. *Id.*; *see also Price v. Danka Corp.*, 2000 WL 274276 (N.D. Tex. 2000) (stating that the Fifth circuit defines adverse employment actions as ultimate employment decisions relating to hiring, granting leave, discharging, promoting, and compensating and does not include such tangential actions as disciplinary filings, supervisor's reprimands, or even poor performance by the employee -- actions which might jeopardize employment in the future).

Other courts have similarly noted that what may be a change to the employee's status are changes that significantly affect the employee's ability to earn income. For example, in *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 152-53 (3d Cir. 1999), the court held that the following were tangible job detriments because each significantly affected the plaintiff's ability to earn her pay: removal of a secretary, forcing plaintiff to vacate her office, and files vital to plaintiff's work that turned up missing under suspicious circumstances.

There may be a slightly different standard with respect to First Amendment claims. Transfers can be adverse employment actions if they are sufficiently punitive. *See Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000). Other actions, however, that might have a mere chilling effect on free speech are not deemed adverse employment actions. For example, mere accusations or criticisms, investigations into the Plaintiff's alleged misconduct, psychological testing of the Plaintiff, false accusations against the Plaintiff, and polygraph examination of the Plaintiff are not considered adverse employment actions in First Amendment retaliation claims. *See generally Breaux*, 205 F.3d at 157-58. Ironically, the Defendant's own First Amendment rights can shield them from First Amendment retaliation claims because, for example, charges of criminal conduct against a public official is constitutionally protected unless it is made with knowledge of the falsehood or with the reckless disregard as to whether it is false or true. *See Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999). However, *Colson* also held that a formal reprimand qualified as an adverse employment action when given in retaliation for First Amendment activities. *Id*. at 511. In most employment claims outside the First Amendment context, however, a reprimand by itself would likely not be an actionable adverse employment action.

3. Constructive discharge - *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004)

Interestingly, following *Ellerth* and *Faragher*, the Courts were divided on whether constructive discharge is a tangible job detriment or whether it was really part of hostile work environment claim subject to hostile work environment standards. For the definitive statement on the employer liability standards with respect to hostile work environment cases, see *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In a nutshell, the standard depends on who the harasser is. If it is a co-worker, then employer liability is based on negligence. Employers are liable only if they knew or should have known about the harassment, but did not act reasonably to stop it. *Ellerth*, 524 U.S. at 759.

If the harasser is one with supervisory authority over the plaintiff, then the employer is vicariously liable, but gets an affirmative defense. Under this defense, the employer must prove:

1) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-808.

Finally, if the harasser was so high up in the organization as to be considered an alter ego of the organization, then the organization is liable with no affirmative defense. *See Ackel v. National Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003).

With respect to constructive discharge claims, in *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), the Court decided the open question of whether the *Ellerth/Faragher* affirmative defense would be available in cases involving an allegation of a constructive discharge, an issue which had split the Court of Appeals. In *Suders*, the plaintiff worked as a police communications operator for the Pennsylvania State Police. She alleged her male supervisor subjected her to a continuous barrage of sexual harassment, culminating in a situation in which she was arrested for allegedly taking her ungraded exam scores from a police locker. Shortly after she was arrested, she resigned. The state police did not bring charges, but Suders sued alleging that she had been forced to resign.

The court first noted that it has never specifically held that a Title VII Plaintiff could bring a constructive discharge claim. *Suders*, 124 S.Ct. at 2352. Noting that it had already specifically held that the constructive discharge claim lies in the labor law context, and that the EEOC and virtually every court of appeals had recognized constructive discharge in the Title VII context, the court had no trouble finding that constructive discharge applied to Title VII as well. *Id.*[1]

In *Suders*, however, the district court had granted summary judgment holding that the state police was not vicariously liable for its supervisor's conduct, relying on *Faragher* and *Ellerth.* The district court held that Suders's hostile work environment claim failed because she unreasonably failed to avail herself of the state police's internal procedures for reporting harassment. Because she resigned two days after she mentioned anything about harassment to the EEOC, the court noted that Suders had not given the state police the opportunity to respond to her complaints. *Id.* at 2349.

The Third Circuit disagreed. It held that in the context of a constructive discharge claim, no *Faragher and Ellerth* affirmative defense was available. *Suders v. Pennsylvania State Police*, 325 F.3d 432, 447. The court ruled that because constructive discharge was a tangible employment action under *Ellerth and Faragher*, the employer was strictly liable and no affirmative defense was available. *Id.*

The Supreme Court drew the line differently. As it noted, the distinction under its previous authority of *Ellerth and Faragher* was a clear line divided by whether the employer had committed "an official act of the enterprise, a company act." *Suders*, 124 S.Ct. at 2353 (quoting *Ellerth*, 524 U.S. at 762). Under those circumstances, which would constitute a tangible employment action, the supervisor brings the official power of the enterprise to bear on its subordinates. *Id.* The court in *Ellerth* further noted that ordinarily, tangible employment decision "is documented in official company records, may be subject to review by higher level supervisors." *Id.* Accordingly, when there was a tangible employment action, it was an act of the company or organization, and therefore the company or organization was strictly liable without any affirmative defense. Where a tangible employment action was not part of the sexual harassment, however, *Ellerth* and *Faragher* provide affirmative defense to the employer. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 805-07.

In this regard, the court in *Suders* noted that a constructive discharge claim, while for purposes of damages may be the same as a termination, did not necessarily always involve a tangible employment action. *Suders*, 124 S.Ct. at 2354-55. The court in *Suders* then chose to draw the line for constructive discharge cases just as it did in hostile environment cases. Where the constructive discharge resulted from a tangible employment action, the court held, no *Ellerth*/*Faragher* defense would be available and the employer would be strictly liable. *Id.* at 2355-56. However, when the constructive discharge did not result from a tangible employment action, the employer would be entitled to an *Ellerth* and *Faragher* defense. *Id.*

Moreover, the court specifically defined the circumstances under which plaintiff could prevail in a constructive discharge claim. In doing so, it noted that a constructive discharge claim involved more than just a hostile work environment. *Id.* at 2354-55. As such, the court regarded it as "in an aggravated case of 'hostile work environment.'" *Id.* at 2354. The court defined the standard in two ways. First, the court noted that plaintiff alleging constructive discharge "must show working conditions so intolerable that a reasonable person would

[1] The court noted that the damages flowing from a constructive discharge claim would be the same as a normal termination. The plaintiff would be entitled to back pay, front pay when appropriate, as well as compensatory and punitive damages. *Id.* at 2354, n. 8.

have felt compelled to resign." *Id.* at 2354. The court also stated that the constructive discharge claim would lie when a resignation was a "fitting response" to the intolerable conditions placed on the plaintiff. *Id.*

One thing the court did not clarify was under which circumstances the conditions would be deemed to involve a tangible employment action. For example, the court made no further effort to define a tangible employment action under *Ellerth/Faragher* so as to give guidance as to when the *Ellerth/Faragher* affirmative defense would apply to constructive discharge cases. In *Suders*, for example, it was not clear that the sexual harassment involved a tangible employment action. Arguably, the conduct of the plaintiff's supervisors in arresting her after she took her ungraded exams, constituted a "official act" which would constitute a tangible employment action. The court in *Suders*, however, simply remanded the case for proceedings consistent with its opinion, without indicating whether or not those actions would involve a tangible employment action or not. Instead, the court left a cryptic footnote at the end of the opinion stating:

> Although most of the discriminatory behavior Suders alleged involved unofficial conduct, the events surrounding her computer skills exams, *See supra*, at 2348, were less obviously unofficial.

Id.

The real question then is: what does the court mean by this footnote? Although the events surrounding the computer skills exam, and the arrest of the plaintiff, were "less obviously unofficial," does that mean that it constituted a tangible employment action or not? Apparently, this will be for the Third Circuit to decide. However, this has been a frequently litigated issue among the lower courts, and ultimately the Supreme Court will have to give further guidance in this area, which it did not choose to do in *Suders.*

B. The Plaintiff's Speech Involved a Matter of Public Concern

As an initial matter, however, the employee must set forth speech that was a matter of public concern, as opposed to private concern. *See Connick*, 461 U.S. at 147. After all, if the Plaintiff's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [the adverse employment action]." *Id.* at 146. Whether the Plaintiff's speech is a matter of public concern is determined by the content, form, and context as revealed by the whole record. *Id*. at 147-148; *Teague v. City of Flower Mound, Texas*, 179 F.3d 377, 380 (5th Cir. 1999). The difficulty that frequently arises is in a "mixed speech" situation. *See Teague*, 179 F.3d at 380-383. Mixed speech is that which is particularly important to the employer privately, but also concerns the public interest. For example, an employee's report of sexual harassment which was perpetuated against her and others, obviously concerns the Plaintiff privately but may also be deemed of public interest. *See Wilson v. U.T. Health Center*, 973 F.2d 1263, 1269-70 (5th Cir. 1992).

Ultimately, the three factor test (content, form, and context) is the test governing whether one is speaking as a citizen or as an employee. *Teague*, 179 F.3d at 382. As such, *Teague* held that context is more important than the form or the content. *See also Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir. 1993); *Teague*, 179 F.3d at 382-83. For example, in *Teague*, the Plaintiff spoke about police misconduct, which is undoubtedly public in content. *Teague*, 179 F.3d at 383. However, in *Teague* the Plaintiff raised the police misconduct in the context of an internal grievance, instead of airing the misconduct publically. As such, the context was undoubtably private as opposed to public. Furthermore, the Court in *Teague* found that the form of the speech was also private. The grievance opened with "I was removed from the position of Internal Affairs Investigator . . . with no explanation," and ended with "I believe I have exhausted all reasonable means to clear myself from those allegations which caused my removal from an otherwise routine internal affairs investigation." Accordingly, the Court in *Teague* found this speech to be primarily a private, as opposed to public, concern. *Id.* at 383. Applying the citizen versus employee task, the Court reached the same result. *Id*. The Court noted that while the speech contained apparently genuine concerns about police wrongdoing, the grievances were primarily motivated by, and primarily addressed, concerns particular to private interests. *Id*. at 383-84. As such, the speech was not deemed protected.

Later cases have questioned *Teague's* reasoning. Nonetheless, it is clear that 1) the speech may relate to public concern if it does not involve solely personal matters or strictly a discussion of management policies that is otherwise uninteresting to the public, 2) the speech need not be made to the public, but may relate to a matter of public concern if it is made against the backdrop of public debate, and 3) speech that is made in the furtherance of an employee/employer dispute does not relate to the matter of public concern. *See Kennedy*, 224 F.3d at 372.

C. The Plaintiff's Interest in Speaking Outweighed the Governmental Defendant's Interest in Promoting Efficiency

The law here arises from two often cited Supreme Court cases, *Pickering v. Board of Education*, 391 U.S.

563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). In ultimately arriving at a balancing test (which is referred to as the "*Connick/Pickering*", "*Pickering/Connick*", or "*Pickering*" test) Courts address the competing interest that employers have in promoting the efficiency of the public services it performs through its employees and the employee's right to speak out on matters of a public concern. *See Brady*, 145 F.3d at 704. Whether one speaks on a matter of public concern is a legal question. *See Kennedy v. Tangipahoa Parish Library Board*, 224 F.3d 359, 366 (5th Cir. 2000).

As the Fifth Circuit has stated, this analysis weighs a plaintiff's First Amendment rights on the one hand, against the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees, on the other. *Eeds*, 392 F.3d at 146 (quoting *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)); *Pickering*, 391 U.S. at 570-73. The test "recognizes as pertinent considerations whether the statement . . . interferes with the regular operation of the enterprise." *Id.* The Fifth Circuit further instructs that the employee's statement is not to be considered in a vacuum and that the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. *Victor v. McElvin*, 150 F.3d 451, 457 (5th Cir.1998); *Rankin*, 483 U.S. at 388; *Connick v. Myers*, 461 U.S. 138, 152-53, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Additionally, the Fifth Circuit has recently stated that whether an employee's speech is true or false "plays no role in the determination of whether the speech concerned a matter of public interest." *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 2005 WL 1253868, at *3 (5th Cir.). Of course, the truth or falsity of statements regarding matters of public concern could certainly be relevant for purposes other than determining whether a public concern is implicated. *Martinez v. Center for Health Care Services*, 2005 WL 1606419, *5 (W.D.Tex. 2005).

In *Kennedy v. Tangipahoa Parish Library Board*, 224 F.3d 359, 378 (5th Cir.2000) the Fifth Circuit enumerated three factors to consider regarding the statement. Whether the statement "(1) was likely to generate controversy and disruption, (2) impede the department's general performance and operation, and (3) affected the working relationships necessary to the department's proper functioning").

Some Courts have noted that the defamatory nature of the speech is strong evidence that weighs in the employer's favor. Defamatory speech against a government employer is not protected by the First Amendment. *See Arnett v. Kennedy*, 416 U.S. 134, 160-61, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (government employer may restrict defamatory speech for efficiency of agency) (citing *Pickering*, 391 U.S. at 568 and *Meehan v. Macy*, 392 F.2d 822, 835 (1968)).

Further, Courts must look at the facts as the Defendants reasonably found them. *Johnson*, 369 F.3d at 830-32; *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (employer provided with the authority to act on their reasonable perceptions of Plaintiff's speech, which they found to be plagued with misrepresentations). Generally, it is reasonable to rely on other employees in determining that the speech contained false information and information designed to cast a negative light on the organization. *Johnson*, 369 F.3d at 832 (reasonable to rely upon reports in determining truth of statements made by employees).

For example, in *Churchill*, the Supreme Court found that the employer's termination of the employee -- based upon the facts as the employer reasonably found them -- was appropriate under *Connick*. This was true the Court stated, even if the speech was related to a matter of public concern: "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." *Id.* at 680.

As the above elements indicate, an adverse employment action cannot be taken against an employee based upon the employee's speech as long as speech relates to a matter of public concern and the employee's interest in commenting on that matter outweighs "the public employer's interest in promoting the efficiency of the public services performed through its employees." *Wiggins v. Lowndes County, Mississippi*, 363 F.3d 387, 389-90 (5th Cir. 2004) (quoting *Brady v. Fort Bend County*, 145 F.3d 691, 704 (5th Cir. 1998)).

At one end of the spectrum, employees are fired solely based on their political allegiance. In those cases, little weighing is necessary because the employees are fired "on the sole ground of their private and -- for employment purposes -- all but abstract political views." *McBee v. Jim Hellog County*, 730 F.2d 1009, 1014 (5th Cir. 1984). These people are not fired for their speech; they are fired only for their thoughts. On this end of the spectrum, the employee's interest clearly outweighs the employer's interest since thought without speech could hardly be deemed disruptive.

On the other hand, on the other end of the spectrum, there is speech that incites disturbances and is sufficiently serious to impair the ability of public employers to maintain order. *Id.* In this case, the employer's interest in maintaining authority and order in serving the public is paramount and overrides the employee's interest in speaking. If the employee speaks too much, it could be legitimately questioned as to whether the speech causes so much tension and disruption that the employee cannot reasonably work for the public in general or for the organization. Nonetheless, in between these two extremes, the

Connick/Pickering balancing is clearly the appropriate inquiry under Fifth Circuit law.

As a general rule, Courts readily find that government interests outweigh the employee's interest in speaking when the employee is a policy maker or has a confidential relationship with the employee. *Wiggins*, 363 F.3d at 390.

1. Policy making employee

A policy maker is defined as an employee "whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation or policy determinations made by supervisors." *Wiggins*, 363 F.3d at 393. One factor is whether the employee "acts as an adviser or formulates plans for the implementation of broad goals." *Elrod v. Burns*, 427 U.S. 347, 368 (1976). While titles are not necessarily important, in the context of County Sheriff's departments, deputies as high ranking as lieutenant have been deemed non-policy makers. *Brady v. Fort Bend County*, 145 F.3d at 710. On the other hand, it is clear that Chief Deputies in Sheriff's departments are policy makers. In resolving the *Pickering* balancing test, the Court considers several factors: 1) the degree to which the employee's activities involve a matter of public concern; 2) the time, place, and manner of the employee's activities; 3) whether close working relationships are essential to fulfilling the employee's public responsibilities and its potential effects on the employee's activity on those relationships; 4) whether the employee's activities may be characterized as hostile, abusive, or insubordinate; and 5) whether the activity impairs discipline by superiors or harmony among co-workers. *Brady v. Fort Bend County*, 145 F.3d at 707.

2. Confidential employees

An employee has a confidential relationship with his employee if "he or she stands in a confidential relationship to the policy making process, *e.g.* as an advisor to a policy maker, or if he or she has access to confidential documents or other material that embody policy making deliberations and determinations, *e.g.* as a private secretary to a policy maker." *Wiggins*, 363 F.3d at 391. As one Fifth Circuit case noted, it is also the possibility that a confidential employee may be one who is in a position to subject an elected official to personal liability. *Stegmaier v. Trammell*, 597 F.2nd 1027, 1040 (1979). In *Stegmaier* the Court held that a deputy clerk is confidential because in the course of representing the circuit clerk he may be subject the circuit clerk to civil liability and fines. *Id*. at 1040. Other than those in a close relationship with the top policy making official, such as a personal secretary, it is rare that an employee is held to be a confidential one. *See Wiggins*, 363 F.3d at 391.

Absent a confidential or policy making relationship, normally government's interest in securing effective employees is to be met by "discharging, demoting, or transferring staff members whose work is deficient." *See Rutan v. Republican Party of Illinois*, 490 U.S. 62, 74 (1990).

3. Strategy

Oftentimes causation is one of the most difficult elements to prove in any employment case. An employer's reluctance to admit causation can oftentimes operate to its detriment in the *Pickering* balancing test. If the employer denies that it was motivated by the Plaintiff's speech in taking adverse action against the Plaintiff, it is likely that the employer will deny being concerned about the Plaintiff's speech. In doing so, the employer essentially admits that the Plaintiff's speech was not disruptive and therefore the government had no interest in controlling such speech. For example, in *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), the Court relied upon the trial testimony of the sheriff indicating that the Plaintiff's speech was never a factor in any employment decision that he made with respect to any of the Plaintiffs and that the Plaintiffs' support of another candidate for sheriff did not prevent them for working with him. *See Brady*, 145 F.3d at 710. As a result, the Court found that it would be very difficult for the sheriff to show that the Plaintiffs' support of the other candidate for sheriff would be disruptive to their working relationship. *Id*.

D. The Protected Speech Motivated the Defendant's Conduct

The standard for proving causation in First Amendment retaliation claims is slightly different than typical employment claims. Normally the burden shifting pretext analysis of *McDonnell Douglas* is used for employment cases. First Amendment retaliation claims on the other hand, rely on a mixed motive framework from *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). *See Gonzales v. Dallas County, Texas*, 249 F.3d 406, 412, fn.6 (5th Cir. 2001). *See also Brady v. Fort Bend County*, 145 F.3d 691, 711-12 (5th Cir. 1998). This is of particular importance now that the Fifth Circuit has held that under the *McDonnell Douglas* burden shifting approach, a Plaintiff need not show that the Defendant's articulated reason for the adverse employment action is false. *See Rachid v. Jack in the Box*, 376 F.3d 305 (5th Cir. 2004). Under *Mt. Healthy*, which is the same standard as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and was the standard for all Title VII claims prior to the amendments of 1991, the Plaintiff has to prove that

the Defendant's reasons are false, and if the Defendant has an affirmative defense that it was motivated by an improper reason. If the Defendant can show it would have taken the same action despite the Plaintiff's protected conduct, the Plaintiff loses.

Oftentimes, government employees are entitled to a review of any adverse employment action they suffer. The question sometimes arises as to whether such review cuts off the causal connection between the Plaintiff's protected activity and the adverse employment action. If an employment action is not final until such a review is conducted, then arguably the causal connection is broken. *See Hitt v. Connell*, 301 F.3d 240, 248-49 (5th Cir. 2002). Typically, however, that is not the case. Instead, most such internal appellant bodies review the decision only if the officer chooses to bring it to their attention. In that case, the decision is final prior to the review. In those cases, where the appeal is optional and the review board does not actually finalize the decision, causation is not cut off. *Hitt*, 301 F.3d at 248-49. For example in *Hitt*, the Defendant argued that while the constable arguably had a retaliatory motive, the commission which reviewed the decision, did not. Since Deputy Hitt choose to have the commission review the decision, the Defendant argued that any possible causation between Constable Connell's retaliatory motives and the adverse employment action was cut off. The Fifth Circuit in *Hitt* held that because Constable Connell's decision was final prior to the review, in that the commission did not finalize a decision that Constable Connell had merely recommended or proposed, the retaliatory bias as an element of causation had not been cut off. *Id.*

E. Damages

1. Punitive damages

For causes of action arising under 42 U.S.C. § 1983, municipalities are immune from punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-63 (1981).

2. Mental anguish damages

The standard for mental anguish damages under both State law and Federal law is high. *See Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002); *Parkway Co. v. Woodruff*, 901 S.W.2d 444 (Tex. 1995). Therefore, the Plaintiff has to go to great lengths in order to prove the damages. For example, the Plaintiff must show a specific discernable injury to their emotional state, showing the specific nature and extent of the harm. *Hitt*, 301 F.3d at 250-51. *See also Brady*, 145 F.3d at 718-20. Specifically, it helps to provide medical and psychological evidence of the injury. The Plaintiff can prove mental anguish through his own testimony only if such testimony is "particularized and extensive" enough to show the specific injury and the nature and extent of that injury. *Hitt*, 301 F.3d at 250-51. In this regard, conclusory statements will not support an award of compensatory damages. *Id.* However, some governmental employees when discussing their own mental anguish speak only in conclusory terms, and avoid going into detail about their own injury. As a result, it is not uncommon for their mental anguish awards to be reversed on appeal. *See Brady*, 145 F.3d at 720; *Hitt*, 301 F.3d at 251. When this happens, it is because the Plaintiff's testimony is deemed "vague, conclusory, and uncorroborated." *Id.*

IV. QUALIFIED IMMUNITY - *Kinney v. Weaver*, 367 F.3d 337 (5th Cir.2004)

A. Facts

Plaintiffs-Appellees Dean Kinney and David Hall brought suit against seven law enforcement officials, the seven cities or counties that employ these officials, and the East Texas Police Chiefs Association. The seven law enforcement officials (collectively "the Police Officials") asserting qualified immunity in this case were police chiefs or sheriffs who possessed final authority over the training of the officers employed by their respective agencies.

Kinney and Hall were instructors at the East Texas Police Academy ("ETPA"), in Kilgore, Texas, which provided basic and advanced training for law enforcement officers in East Texas. Kinney and Hall had worked at the academy for several years under renewable one year employment contracts. Before August 1998, several Police Officials in East Texas enrolled their officers in ETPA courses on a regular basis, including courses taught by Kinney and Hall, although they were not contractually bound to continue using either the ETPA's services or the services of Kinney and Hall in particular.

Meanwhile, over 300 miles away, in Kerrville, Texas, Edward Gonzales, a teenager had been fatally shot by a police sniper employed by the city of Kerrville, Texas. The Gonzalez family had sued the Kerrville Police Department claiming it had used excessive force on shooting Edward Gonzalez. That case did not involve officers who had trained at the academy where Kinney and Hall taught.

Having difficulty finding local experts willing to testify against the local police departments, the lawyer for the Gonzalez family asked Kinney and Hall to testify, and they agreed. In August of 1998, Kinney and Hall testified that the Kerrville police officer had used excessive force and that the Kerrville police department had failed to issue the necessary policies for officers acting as snipers. Although Kinney and Hall originally planned to receive payment for their services, they decided, shortly after their depositions and before trial,

that they would decline payment because that they "felt so strongly about the incident and what had happened to Eddie Gonzales" that they concluded that "it wouldn't be right to charge." Kinney and Hall were technically under subpoena in the Kerrville case, but they testified voluntarily.

After Kinney and Hall testified, several East Texas police officials threatened to stop using the ETPA for officer training or otherwise complained about their testimony. The president of the East Texas Police Chiefs Association wrote to the presiding official of the policy academy that "[i]t is not our preference to have these two instructors teach our officers and also engage in legal combat with them in the judicial system," and that "[t]his matter will force us to consider alternative methods to achieve our training needs if not resolved as soon as possible." Later, officials "made it clear" that "they wanted Mr. Hall and Mr. Kinney removed from the faculty because their testimony in the Kerrville trial created a conflict of interest with their responsibilities" and "that they would no longer send officers and recruits . . . for training if Mr. Hall and Mr. Kinney remained on the Academy faculty." These officials later agreed to send students to the ETPA on the condition that their officers not be instructed by Kinney and Hall, but continued to insist that Kinney and Hall also be removed from the ETPA faculty completely.

The defendants repeatedly expressed a concern that Kinney's and Hall's testimony created "conflicts of interest" and violated principles of "cooperative responsibility," but provided no specifics as to how the testimony of Kinney and Hall did this. One officer said publicly that Kinney and Hall broke an "unwritten code." In their depositions, some of the Police Officials admitted that, in their view, an unacceptable conflict of interest exists whenever a police instructor testifies against another officer, regardless of location and regardless of whether the instructor had trained the officer. Such a conflict did not exist, in their view, when an instructor testifies for police officers.

In October of 1998, the East Texas Police Chiefs Association held its quarterly meeting in Kilgore. The minutes from the meeting state that "it was agreed that none of the Chiefs or Sheriffs present would send their officers to any classes taught by either [Kinney or Hall]." The minutes did not reflect discussion of any other complaints concerning Kinney and Hall, nor did they reflect any mention of the substance of the instructors' testimony in Kerrville. Some of the defendants admitted in their depositions that they did not know what Kinney and Hall had said in the Kerrville trial, only that they had testified against the police.

The Police Officials followed through on their threats both by cancelling enrollments in the plaintiffs' classes and by barring their officers from enrolling in the plaintiffs' courses in the future. The boycott worked. Kinney's and Hall's courses "were boycotted by a sufficient number of law enforcement agencies so that enrollment was insufficient to make their classes and, therefore, could not be economically continued." The boycott began in October 1998, and by November 10, 1998, all of Kinney's and Hall's basic classes had been dropped from the ETPA schedule, and many of their off-campus classes had been cancelled. Hall ended up resigning and Kinney was not renewed as an instructor and he was given another position. Prior to the boycott, the academy did not anticipate a change in the teaching assignment for either Kinney or Hall.

On April 7, 1999, Kinney and Hall sued, complaining that the police officials, their respective cities or counties of employment, and the East Texas Police Chiefs Association, retaliated against Kinney and Hall because of their testimony. Kinney and Hall alleged that this retaliation violated (1) their rights to free speech under the First and Fourteenth Amendments, (2) their rights to due process of law under the Fourteenth Amendment, (3) Texas tort law, and (4) constituted a conspiracy under Section 1985.

The defendants (both the Police Officials and the entities) moved for summary judgment on the merits of all four claims, and the Police Officials also asserted qualified immunity from the plaintiffs' federal claims and state official immunity from the state tort claim. The district court denied the defendants' motion for summary judgment on all grounds. *Kinney v. Weaver*, 111 F.Supp.2d 831, 845 (E.D. Tex. 2000).

B. Jurisdiction on Appeal

The court first established the boundaries of the appeal. It noted that under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), officers are entitled to qualified immunity to the extent that their conduct is objectively reasonable in light of clearly established law. First, the district court decides whether a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law. The district court should then decide whether a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct. Courts of Appeals, however, lack jurisdiction to review conclusions of fact. Noting that it had jurisdiction to hear reviews of non-final orders denying qualified immunity but only to the extent such orders turn on an issue of law, the court proceeded to analyze the defendants' immunity appeals. It did so, however, only concerning the purely legal question of the defendants entitlement to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record.

C. Meaning of "Clearly Established"

Harlow sets forth that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. In analyzing defendant's appeal, the court expounded on the meaning of "clearly established." *See Kinney*, 367 F.3d at 349-350. *Kinney* recognized that, according to the Supreme Court, the "of which a reasonable person would have known" language in the qualified immunity standard does not add anything to the "clearly established law" requirement because "a reasonably competent public official should know the law governing his conduct." *Harlow*, at 818-19. The Supreme Court later clarified the qualified immunity standard by defining "clearly established" in a way that encompasses the "objective reasonableness" inquiry: To be "clearly established" for purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Ultimately, as *Kinney* noted, the test is "whether the . . . right was clearly established at the time the defendant acted . . . [which] requires an assessment of whether the official's conduct would have been objectively reasonable at the time of the incident." *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 340 (5th Cir.2001).

However, "clearly established" does not require that "the very action in question has previously been held unlawful," *Anderson*, 483 U.S. at 640; or that facts of previous cases be "materially similar" to the conduct being challenged. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). On the other hand, mere abstract concepts such as "due process" or "cruel and unusual punishments"offer little practical guidance as to the legality of particular conduct. Instead, as *Kinney* noted, issue is one of "fair warning." The law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740. Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be "on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

D. Constitutional Violations

Of course, before a right can be "clearly established," there has to be at least an allegation of unconstitutional conduct. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). In conducting this analysis, the court analyzes the law as it currently exists. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir.2002) (*en banc*) (*per curiam*). Accordingly, the Fifth Circuit in *Kinney* then proceed to assess the substance of plaintiffs' complaints.

1. Conspiracy under 42 U.S.C. 1985

Plaintiffs alleged that Defendants conspired by boycotting Kinney's and Hall's classes and attempting to have them terminated because of their testimony in the Kerrville case. The district court found that the plaintiffs had produced sufficient evidence of an illegal conspiracy and that the plaintiffs' rights under Section 1985 were clearly established at the time. Section 1985 provides a cause of action when:

> . . . two or more persons . . . conspire to deter, by force, intimidation, or threat, *any party or witness* . . . from testifying to *any matter* pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . ..

42 U.S.C. 1985(2) (emphasis added).

The Defendants' primary argument was that Section 1985 protected fact witnesses, not expert witnesses. They claimed that because expert testimony, unlike fact testimony, was readily accessible, there was no need for such protection. Moreover, they noted that Congress could not have known about expert testimony when enacting the statute in the 1860's, and even if they did, could not have known about the realities of today's expert witnesses. While the dissent found these arguments appealing, the majority in Kinney dismissed this argument noting that the statute plainly states that it protects"any party or witness." *Kinney*, 367 F.3d at 352. While no case had ever applied the statute to expert witnesses, the clear language of the statute itself rendered the law, as it applied to expert witnesses, "clearly established." *Id.* at 352, n. 16.

The defendants' better argument, the court found, was that it was not clearly established that by inducing the academy to fire the plaintiffs, it had injured the plaintiffs in their "person or property." The court noted that prior to the Supreme Court's pronouncement in *Haddle v. Garrison*, 525 U.S. 121 (1998), it had not been clearly established. *Haddle*, decided on December 14, 1998, held that the loss of at-will employment, would constitute such an injury under Section 1985. Since some of the acts in furtherance of the conspiracy occurred after the date of the opinion, the court held that the law was clearly established for purposes of defendants' actions. *Kinney*, 367 F.3d at 354-55. The

court noted that if, after *Haddle* had been decided, the defendants would have reversed course and ceased the conspiracy to remove the plaintiffs from the academy, it is reasonably possible that no injury would have occurred.

2. First Amendment claims

Most of the defendants were police officials who did not employ Kinney and Hall. However, the court considered them government "independent contractors" and noted that the analysis is the same for independent contractors and employees. *Kinney*, 367 F.3d at 356. As such, the plaintiffs' First Amendment retaliation claim had four elements: (1) the plaintiff suffered an adverse employment decision, (2) the plaintiff's speech involved a matter of public concern, (3) the plaintiff's interest in speaking outweighed the governmental defendant's interest in promoting efficiency, and (4) the protected speech motivated the defendant's conduct. *Id.* The court noted that the district entered findings substantiating at least a fact issue on each of these elements.

However, as the dissent pointed out, the element balancing of the government's interest in promoting efficiency against the plaintiff's interest in speaking is a legal determination. Thus, it suggested that courts should make their own determination of the facts as they relate to this balancing of interest. The difficulty is in determining what are factual issues (which must be resolved by the jury and viewed in the light most favorable to the plaintiff on summary judgement) as opposed to a legal determination that the court must make independently. This issue has plagued the courts, and specifically, the Fifth Circuit for years. *See Brady v. Fort Bend County* 145 F.3d 691, 708-09, n. 7 (5th Cir. 1998) (noting in detail, but ultimately, *dicta* about the propriety of sending *Pickering* balancing of interests to the jury). Nonetheless, the majority explained that while it is for the court to determine the value of the government's interest and the plaintiff's interest, and to balance the relative weight of each, the court still must accept the plaintiff's version as true, as it would when deciding any motion for summary judgment. *Kinney*, 367 F.3d at 363.

Accepting those facts as true, the court found that while the plaintiffs had an interest in speaking on a matter of public concern (offering public comment about excessive force and the adequacy of police training and supervision), the defendants had little interest in stifling that speech. First, the defendants argued that the boycott caused tension between the plaintiffs and the defendants. The court noted, however, that the boycott was the defendants' response to the speech, and that they would only consider tension, or potential tension, from the plaintiffs' speech itself. *Id.* at 364. The court agreed that it should consider not just actual harm from the speech, but the potential for such harm, as long as the defendants' predictions of harm were reasonable. *Id.* The court could discern no such harm or reasonable potential for such. Instead, in reviewing the record, it was not clear that the defendants were acting out of concern for potential harm, or were just enforcing a "code of silence." *Id.*, at 364-65. Moreover, as the court noted, the defendants argument about its concern for disruption from the speech was undermined by the fact that it did not just refuse to send students to the plaintiffs (a proper response to concerns), but affirmatively tried to get them fired. *Id*. at 365. In this regard, any need for "institutional loyalty," was overbroad, in the court's view. As the court pointed out, such a concern would allow retaliation against those who testify against *any* law enforcement officials. *Id.* at 366.

Noting that testifying at judicial proceedings is inherently a matter of public concern, the court next found that the right to be free from retaliation for giving testimony was clearly established well before any of the events that gave rise to the plaintiff's lawsuit. *Id.* at 367. Nonetheless, defendants argued that while reasonable officers would have known that they could not take action against employees, such officers would not have known that their discretion, in choosing where to send officers for training, was constrained by the constitution. The court, however, held that while the officers had discretion in deciding where to send its officers, it could not make those decisions in order to retaliate against persons who spoke out on matters of public concern. *Id.* at 368-69. While noting that Kinney and Hall had no "right" to have anyone send officers to the academy for training, they did have the right to make sure that their speech was not the basis of those decisions. *Id.* Moreover, the first amendment right of those who had no employment or contractual relationship with the defendants was clearly established when the defendants retaliated against Kinney and Hall. *Id.* at 368-372.

Further, while noting that police officials might not be able to predict the outcome of balancing tests, such as the *Pickering* test, the court found qualified immunity would be denied where the balancing test weighed so strongly in the plaintiff's favor. *Id*. at 372. Furthermore, it noted that numerous other courts, including other panels of the Fifth Circuit, had denied qualified immunity under the *Pickering* balancing test. *Id*. at 371-2, n. 41. Finding that this was not a case where plaintiffs sought to improperly cast bare allegations of wrongdoing at otherwise legitimate conduct, the court denied qualified immunity for the defendants' actions because it found that such allegations were sufficiently supported to raise a genuine issue of fact. *Id.* at 374.