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To: Kevin Bommer, Deputy Director
 From: LaRona Mondt, Law Clerk
 Date: February 1, 2016
 Subject: HB 16-1078: First Amendment Protection for Public Employees

Public employees, like all citizens, already enjoy substantial free speech protection under the First Amendment to the United States Constitution.

Garcetti/Pickering Test

The United States Supreme Court has outlined a two-step inquiry into whether a public employee's speech is protected: (1) whether the employee spoke as a citizen on a matter of public concern and (2) whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. *Garcetti v. Ceballos*, 547 U. S. 410, 426 (2006) (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 583 (1968)). This test has been cited as the Garcetti/Pickering Test and includes five prongs in Colorado:

- (1) whether the speech was made pursuant to an employee's official duties;
- (2) whether the speech was on a matter of public concern;
- (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests;
- (4) whether the protected speech was a motivating factor in the adverse employment action;
and
- (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirkpatrick, 553 F.3d 1294, 1301-1302 (10th Cir. Okla. 2009).

Citizen Speech on a Matter of Public Concern

The initial burden is on the public employee to prove both 1) that the employee was speaking as a private citizen and 2) that the speech was a matter of public concern.

The U.S. Supreme Court distinguished employee speech from citizen speech by stating that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Id.* at 421. Thus, any speech outside the employee's official duties is protected citizen speech.

Speech involves matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder v. Phelps*, 562 U. S. 443, 462 (2011). The inquiry turns on the "content, form, and context" of the speech. *Connick v. Meyers*, 461 U.S. 138, 146 (1983). The courts have been quite liberal in finding public employee speech as involving matters of "public concern." Indeed, the United States Court of Appeals for the Tenth Circuit (which includes Colorado) stated that:

"Speech that pertains to a public agency's discharging of its governmental responsibilities ordinarily will be regarded as speech on a matter of public concern," *David v. City and County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996) [additional citations omitted], as will speech "which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials," *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). *Haragan, et. al., v. City of Waurika, et.al.*, 97 CJCAR 2562, 2564 (10th Cir. 1997).

If the public employee meets his burden of establishing that the statement was citizen speech on a matter of public concern, the burden shifts to the government.

Government Justification

The third part of the Garcetti/Pickering Test requires the government to prove it had an adequate justification for the employee's treatment. Courts will make a decision by balancing the citizen's and the employer's interests.

The First Amendment protects speech by citizens on matters of public concern. This protection extends to information related to or learned through public employment. *Lane v. Franks*, 134 S. Ct. 2369, 2384 (U.S. 2014). Even more, the U.S. Supreme Court has stated there is considerable value in encouraging, rather than inhibiting, speech by public employees as they are most likely to know "ails the agencies for which they work." *Id.* at 2377 (citing *Waters v. Churchill*, 511 U. S. 661, 674 (1994)). The Court goes on to say that the interest "is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Id.* (citing *San Diego v. Roe*, 543 U. S. 77, 82, (2004)).

At the same time, the government as an employer has a countervailing interest in controlling the operation of its workplace. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U. S., at 418.

To reconcile these interests, the U.S. Supreme Court has stated "the problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

Additional Inquiry

If the employee has satisfied the first three prongs of the Garcetti/Pickering Test, 1) that the speech was citizen speech 2) on a matter of public concern and 3) the government does not meet its burden of showing that its interests as an employer outweigh those of the employee, then courts recognize two additional prongs in the inquiry. The public employee wins if the employee shows that 4) the protected speech was a motivating factor in the adverse employment action, and 5) the government fails to show that it would have reached the same employment decision in the absence of the protected conduct. *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1301-1302 (10th Cir. Okla. 2009); *Ashcraft v. Beicker*, 2008 U.S. Dist. LEXIS 54500; 2008 WL 538919 (D. Colo. July 9, 2008).

The bottom line is that public employees already have a substantial First Amendment right to speak as citizens on matters of public concern, which will generally include legitimate complaints about governmental wrongdoing. Importantly, the current First Amendment jurisprudence involves the application of a carefully crafted balancing test, in which the interests of the government as employer are balanced against the employee's free speech rights. HB 16-1078 would codify into statute law that differs from current case law because contains no provision for balancing the government's interest against that of the employee. HB 16-1078 also creates an additional cause of action in an area where public employees enjoy substantial protection.