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380 MD 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 380 MD 2017

RACHEL L. CARR

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION AND COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION

Respondents

BRIEF OF RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION

Petition for Review from an Adjudication of the Commonwealth of Pennsylvania, State Civil Service Commission, entered August 1, 2017 at Appeal No. 29058.

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COUNTERSTATEMENT OF STANDARD OF REVIEW

> [The] standard of review of Civil Service Commission adjudications is limited to a determination of whether constitutional rights have been violated, errors of law have been committed, or whether the findings of the agency are supported by substantial evidence. Additionally, the standard involves, where appropriate, consideration of the regularity of the practice and procedure of the Commonwealth agency.

Woods v. State Civil Serv. Comm'n, 912 A.2d 803, 808 (Pa. 2006) (*citing Pa. Game Comm'n v. State Civil Serv. Comm'n (Toth)*, 747 A.2d 887, 889 (Pa. 2000)).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

I. Did the State Civil Service Commission properly dismiss Carr's Appeal on the basis of traditional discrimination and disparate treatment?

The State Civil Service Commission answered in the affirmative.

Suggested Answer: Yes. Furthermore, Carr waived these issues on Appeal by failing to raise the issues in her Petition for Review or Brief.

II. Did the State Civil Service Commission properly dismiss Carr's Appeal on the basis that her violent and inappropriate Facebook comments did not address a matter of public concern and, as such, were not protected speech under the First Amendment?

The State Civil Service Commission answered in the affirmative.

Suggested Answer: Yes.

III. In the event that Carr's Facebook comments constitute protected speech, did the State Civil Service Commission properly dismiss her Appeal because the *Pickering* balancing test weighs in favor of the Department's interests as an employer?

The State Civil Service Commission answered in the affirmative.

Suggested Answer: Yes.

COUNTERSTATEMENT OF THE CASE

This is an appeal by Rachael L. Carr ("Carr") from an Adjudication and Order of the State Civil Service Commission ("Commission") dismissing the appeal challenging her termination on June 17, 2016, imposed by the Department of Transportation ("Department"). Carr filed a timely appeal of the Department's action on July 5, 2016, proceeding *pro se* at the time, alleging that her inappropriate behavior, which resulted in her termination, did not occur on state property. Carr was employed by the Department as a "Roadway Programs Technician 1" in the Department's Engineering District 2-5 located in McKean County. (R.R. 3a).

On March 5, 2016, Carr was promoted to Roadway Program Technician I. (R.R. 3a, 73a–74a). Carr was required to serve a probationary period with a minimum of 180 calendars days in this position. (R.R. 3a, 74a–75a). On March 29 and 30, 2016, Carr attended a new employee orientation where Robert Chiappelli ("Chiappelli"), Human Resource Officer for Department District 2-0, reviewed the Working Rules, Governor's Code of Conduct, and off-duty behavior with Carr. (R.R. 4a–10a, 77a, 81a–83a). Chiappelli also discussed the potential for off-duty behavior to have an adverse effect on her employment. (R.R. 82a–83a).

Carr was removed from her position after the Department discovered that she posted violent comments, from her personal Facebook profile, to a Facebook group

titled "Creeps Of Peeps."[1] (R.R. 31a–32a, 87a, 97a). All of the Facebook comments, relevant to the present Appeal, occurred on May 24, 2016. (R.R. 14a–23a, 69a–70a). On May 24, 2016, Carr posted various Facebook comments over a period of five hours which included her original post and her numerous replies to comments and posts from other Facebook users. (R.R. 26a, 92a–93a, 121a, 131a). Carr's initial Facebook comment consisted of the following statement:

> Rant: can we acknowledge the horrible school bus drivers? I'm in PA almost on the NY boarder bear Erie and they are hella scary. Daily I get ran off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don't give a flying shit about those babies and I will gladly smash into a school bus.

(R.R. 16a).[2] Carr identified herself as an employee of the Department in at least one of her comments. (R.R. 14a, 23a, 129a). Her personal Facebook page also identified her employment and position with the Department. (R.R. 14a). Carr's initial comment was able to be viewed by any and all members of the "Creeps Of Peeps" Group page, which, at the time of her posting, included 1,359 individual Facebook members. (R.R. 15a, 132a–33a). Carr's comments, in response to other Facebook users, included:

> 0 fucks

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[1] At the Commission hearing, the relevant Facebook screenshots were introduced and moved into the record and the screenshots demonstrate that the Facebook group was titled "Creeps Of Peeps." (R.R. 15a). However, throughout the transcript, this group is incorrectly referred to as "Creeps and Peeps." (R.R. 87a, 91a, 130a).

[2] All Facebook comments provided in the Department's Brief are quoted directly from screenshots of the relevant Facebook Group page and without the benefit of editing.

> And that's my problem? They broke traffic law, which I'm abiding and I'm in the wrong Get fucked. What world do you live in that I'd deliberate injure myself in stead of somebody else. Didn't call myself a hero
>
> Transportation…road laws. Right
>
> No I'm saying you don't care about the random fucks that drive your kids and are you serious? Haha
>
> Department of Transportation…that means road laws. Not worrying about your kids that are probably your cities issue
>
> Your children and your decision to chance them with a driver you've never been a passenger with is your problem. A vehicle pulls out in front of me or crosses the yellow line, that's their problem. A sedan, school bus or water truck. You're kids your problem. Not mine
>
> I care about me

(R.R. 18a, 21a–23a).

Several members of the "Creeps Of Peeps" Group notified the Department, *via* the Department's Official Facebook page, about Carr's "rants." (R.R. 17a–19a, 89a). One member posted the following:

> Thought yoh might be interested in some disturbing things one of your employees posted earlier. I am attaching screen shots of what she said. Had she just been ranting about general frustrations, thus wouldn't be an issue, but the things she said about children riding on busses, and then to continue on to place blame on parents who let their children ride busses is unacceptable. I hope there are consequences for for words.

(R.R. 17a). Another member of the "Creeps Of Peeps" Group posted the following statement: "One of your employees by the name of Rachael Caar or Carr ranted

about school bus then threaten to ram school bus. You need to take care of this." (R.R. 18a). Another member of the "Creeps Of Peeps" Group posted a screen shot of Carr's rants and made the following statement: "Thought you might like to know how one of your employees feels about children on a bus. Rachael Carr should be fired for this." (R.R. 19a).

Chiappelli was informed of the three complaints by the Department's Central Press Office in Harrisburg. (R.R. 89a–90a). The individuals who complained to the Department were concerned about a Department employee ranting on Facebook about smashing into school buses. (R.R. 89a). At the Pre-Disciplinary Conference ("PDC") held on May 27, 2016, Carr acknowledged that she made those statements and that her Facebook profile indicated that she worked for the Department. (R.R. 25a-28a, 89a–95a). Furthermore, Carr acknowledged at the PDC that the Department is responsible for regulating and drafting motor vehicle and driver licensing laws throughout the Commonwealth of Pennsylvania. (R.R. 25a–28a, 136a–37a). Carr further acknowledged that part of her job responsibilities include traveling to different Department stockpiles to check inventory. (R.R. 52a, 125a).

The Department's essential mission, as a public agency, is all about safety. (R.R. 63a, 100a–01a). In furthering that mission, the Department provides and oversees general driver and school bus driver training, effectuates the laws of the traveling public, and performs valuable highway projects that are all based on a

fundamental goal of safety. (R.R. 63a, 100a–01a). The Department determined that Carr's Facebook comments constituted inappropriate behavior and directly contradicted the Department's foremost mission to promote highway safety in the Commonwealth (R.R. 100a–01a).

Anthony Reda ("Reda"), a labor relations analyst supervisor with the Department, testified that Carr was removed from her position because her Facebook comments constituted inappropriate behavior, created a nexus to her employment, and reflected poorly on the Department and its core mission. (R.R. 155a–57a). Reda also stated that the Department's mission is directly tied to traffic safety and ensuring the safety of highways and the public. (R.R. 155a). The Department, as a public agency, is always in the public eye. (R.R. 156a). Furthermore, Chiappelli testified that he believed that Carr had an intention to act out on her threat to ram into a school bus full of children. (R.R. 64a–65a, 105a–06a). The Commission's Adjudication and Order held that her Facebook comments indicated that she was "capable of violent behavior." (Commission Adjudication and Order, page 18, a copy of the Commission's Adjudication and Order is attached to Carr's Brief as Appendix A).

On August 1, 2017, the Commission issued its Adjudication and Order dismissing Carr's appeal and sustaining the Department's action in removing her from probationary Roadway Program Technician 1 employment. (Commission Adjudication and Order, page 20–21). The Commission, in concluding that Carr did

not establish her First Amendment discrimination claim, held that her "Facebook remarks brought disrepute to the [Department] and raised issues of trust" and "completely disregards the basic safety mission" of the Department. (Commission Adjudication and Order, page 18, 20). Carr subsequently filed a timely appeal of the Commission's Adjudication and Order.

SUMMARY OF THE ARGUMENT

The Department has "a greater interest in the utterances of its employees than it has in those of its citizenry in general." The basis of Carr's claim is that her Facebook comments are protected by the First Amendment's free speech provisions. However, the Department may remove a public employee from their position when the employee's speech does not touch upon a matter of public concern. Carr's Facebook comments, when taking content, form, and context into consideration, do not address any subject that is of legitimate news interest or on a subject of general interest of value and concern to the public. Her comments or "rants," as she describes them, merely addressed her personal dispute with a specific bus driver and do not address any matters of public concern.

In the alternative, if Carr's Facebook comments do constitute speech on a public concern, then the Court must engage in the *Pickering* balancing test. This examination requires a balance of Carr's free speech rights with the Department's interest, as an employer, in promoting the efficiency of the public services it performs. Carr's Facebook comments directly conflict with the basic core service that the Department strives to deliver to the public—highway safety. Furthermore, the medium of Carr's speech—social media—amplified her message and resulted in a significant potential to erode the public's trust in the Department, as Carr's comments and Facebook page directly referenced her employment.

ARGUMENT

On appeal, Carr argues that the Commission's adjudication is in error and that the Department violated her free speech rights as guaranteed by the United States[3] and Pennsylvania Constitutions.[4] The Department disagrees. Here, Carr did not engage in protected speech, but rather made disparaging remarks regarding her personal experiences with a specific school bus driver that brought disrepute to the Department and its core mission of promoting highway safety. In addition to Carr's free speech claim, she also raises a separate issue under Article I, Section 11 of the

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[3] The First Amendment to the U.S. Constitution, as contained in the Bill of Rights states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

[4] Article I, Section 7 of the Pennsylvania Constitution states:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Pa. Const. art. I, § 7.

Pennsylvania Constitution, Pa. Const. art. I, § 11, and Section 952(a) of the Civil Service Act.[5] 71 P.S. § 741.952(a).

I. THE COMMISSION PROPERLY DISMISSED CARR'S APPEAL ON THE BASIS THAT SHE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT HER CLAIMS OF TRADITIONAL DISCRIMINATION OR DISPARATE TREATMENT.

Carr's Petition for Appeal to the Commission "alleged that she was discriminated against based upon her ethnic background (Mexican American) and because her behavior occurred off state property, during her off-duty hours, and did not include any other appointing authority employee." (Commission Adjudication and Order, page 10). The Commission concluded that she failed to present "sufficient evidence to support her claim of discrimination or a violation of her First Amendment free speech [rights]." (Commission Adjudication and Order, page 20).

In claims of "traditional discrimination," the employee carries the burden of showing that the appointing authority's personnel action was tainted by discrimination. *See Dep't of Health v. Nwogwugwu*, 594 A.2d 847 (Pa. Cmwlth. 1991); *Henderson v. Office of the Budget*, 560 A.2d 859 (Pa. Cmwlth. 1989). As to Carr's discrimination claim, no evidence regarding this claim was presented to the Commission. In fact, the record is entirely devoid of any evidence or argument that

[5] The basis of this claim is that the Commission violated Carr's due process rights by issuing its adjudication 257 days after the conclusion of the hearing. These issues of law are directed towards the Commission and, as such, the Department respectfully defers all legal arguments on said issues to the Commission, as addressed in their Application for Summary Relief and Main Brief.

the Department discriminated against her because of her ethnic background. Additionally, this issue was not raised in Carr's Petition for Review or Brief—as such, the issue is waived. Pa.R.A.P. 2116. *See G.M. v. Dep't of Pub. Welfare*, 954 A.2d 91 (Pa. Cmwlth. 2008) (issues not raised in a Petition for Review or in a petitioner's brief are waived).

Furthermore, Carr claims disparate treatment on the basis that she was treated differently than other probationary employees similarly situated. (Commission Adjudication and Order, page 19). The Commission held that Carr failed to meet her burden as to this claim. The Department's witnesses testified as to similar adverse employment actions taken against probationary employees for inappropriate comments made during their probationary period. (R.R. 160a–62a). As with the prior claim, Carr did not raise this issue in her Petition for Review or Brief—as such, the issue is waived. Pa.R.A.P. 2116. *See G.M.*, 954 A.2d at 93.

II. THE COMMISSION PROPERLY DISMISSED CARR'S APPEAL ON THE BASIS THAT HER VIOLENT AND INAPPROPRIATE FACEBOOK COMMENTS DID NOT ADDRESS A MATTER OF PUBLIC CONCERN AND, AS SUCH, WERE NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

It is well-settled that government employees have limited First Amendment rights. While "[p]ublic employees are not, by virtue of becoming public employees, shorn of First Amendment protection," *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987), "[w]hen a citizen enters government service, the citizen by necessity

must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).[6] The First Amendment allows a public employer, such as the Department, to regulate its employees' speech in ways it could never regulate the general public's. It is beyond question, under both the U.S. and Pennsylvania Constitutions, that the Department has "a greater interest in the utterances of its employees than it has in those of its citizenry in general." *Chalk Appeal*, 272 A.2d at 460. The U.S. Supreme Court has held that government employers may not punish a public employee when they speak as a private citizen regarding a matter of public concern, *unless* the needs of the government, as an employer, outweigh the Constitutional rights of the employee.

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[6] The basis of Carr's appeal is that the Department allegedly violated her free speech right when she was removed from her position after posting violent comments from her personal Facebook account. While both federal and state constitutional provisions protect free speech rights, to the extent that a state's constitutional provisions provide greater protections to individual rights than the U.S. Constitution, then the applicable standard is the state constitution. *See Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (Pennsylvania's free speech provision was the standard for the issue at hand). *See also Michigan v. Long*, 463 U.S. 1032 (1983) (states may provide greater constitutional protections under state law than the federal constitution).

In prior free speech cases, the Pennsylvania Supreme Court has stated that "the Pennsylvania Constitution recognizes broader free expression rights than does the federal constitution." *Day v. Civil Serv. Comm'n*, 948 A.2d 900, 905 (Pa. Cmwlth. 2008) (*citing Pap's A.M.*, 812 A.2d at 603). However, even though the Pennsylvania Constitution may provide broader protection than the First Amendment, in the context of free speech protections for public employees, Pennsylvania courts have adopted the various tests set forth by the U.S. Supreme Court under the First Amendment to the U.S. Constitution. *See Chalk Appeal*, 272 A.2d 457 (Pa. 1969) (Pennsylvania Supreme Court adopted the Pickering balancing test); *Campbell v. Unemployment Comp. Bd. Of Review*, 694 A.2d 1167 (Pa. Cmwlth. 1997) (same); *Wright v. Unemployment Comp. Bd. Of Review*, 404 A.2d 792 (Pa. Cmwlth. 1979) (same). As such, the Department looks towards the First Amendment of the U.S. Constitution to answer the relevant inquiry.

The seminal case that set forth this Constitutional test is *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, a school teacher was dismissed from his position after he sent a letter to a local newspaper that was critical of the local school officials and their effort to raise revenue by a proposed tax increase. The school board terminated Pickering's employment as in the interest of the school because his letter was deemed to be "detrimental to the efficient operation and administration of the schools of the district." *Id.* at 564–65. On appeal to the Supreme Court, it was held that the termination violated the teacher's First Amendment rights. In its holding, the Court developed a balancing test to weigh the interest of the government's need for efficient operation, as an employer, versus the free speech rights of public employees. The Court specifically held:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568. After balancing the various interests, the Court concluded that the record was devoid of any indication that the teacher's statements did or *could have* interfered with his ability to perform his duties or the operation of the government, as an employer. *Id.* at 573–74. As such, the Court held that the interest of the school administration in limiting the teacher's speech was "not significantly greater than its

interest in limiting a similar contribution by any member of the general public." *Id.* at 573. In this sense, given that the teacher's speech raised a matter of public importance, the Court concluded that it was necessary to consider the public employee as a "member of the general public" when he spoke. *Id.*

Years after its decision in *Pickering*, the Supreme Court again addressed the issue in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, an assistant district attorney was removed from her position after she circulated an internal "questionnaire" seeking opinions from other attorneys in her office concerning various aspects of office policy. *Id.* at 140–41. In ruling against the public employee, the Court expanded its prior decision in *Pickering* to inquire whether the speech in question is on "matters of public concern." *Id.* at 145. The Court added the following element to its prior *Pickering* test:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Id. at 146. The question of whether speech touches on a matter of public concern is determined by analysis of "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147–48. In *Connick*, the Court determined that all but one of the questions posed by the public employee did not address any matters of public concern. A majority of the "questionnaire" was characterized, in general,

as an internal grievance concerning office policy. *Id.* at 154. In applying the *Pickering* balancing test to the remaining portion of the attorney's "questionnaire," the Court held that the balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. Furthermore, "[t]his includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Id.* at 151. The Court ultimately concluded that the speech in question hindered the District Attorney's office and the close working relationship between attorneys and their superiors. *Id.*

In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court examined and applied the *Pickering-Connick* tests to find that a public employee, employed by the Harris County (Texas) Sheriff's office, was protected by the First Amendment. The public employee, after learning of the attempted assassination of President Ronald Regan, said "if they go for him again, I hope they get him." *Id.* at 381. However, the speech occurred between two co-workers and was overheard by a third public employee within the confines of the office. *Id.* In reviewing the context of the speech, the Court held that it addressed a matter of public concern—the statement was made during the course of discussing the policy of the President's administration. *Id.* at 386. "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public

concern." *Id.* at 387. Then in applying the *Pickering* balancing test, the Court determined that the test weighed towards the public employee because there was no danger that the employee's speech could discredit her employer. *Id.* at 389. The statement was made in the workplace and there was no evidence that anyone heard her comments other than two co-workers, nor was she in an area which the public could access when she made her comments.[7] *Id.*

Although "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment," *City of Dan Diego v. Roe*, 543 U.S. 77, 80 (2004), the government, as an employer, may impose some restraints on the speech of its employees, even if those restraints would be unconstitutional as applied to the general public. *Id.* In *Roe*, a police officer was terminated after his employer, the San Diego Police Department, learned that he was selling sexually explicit videotapes that featured him wearing a police uniform. *Id.* at 78. While the police uniform worn in the employee's videos was not the same worn by San Diego Police Departments, it was nevertheless concluded that his speech was injurious to his employer. *Id.* at 81. The *Roe* Court did not engage in the *Pickering* balancing test because it was determined that the employee failed to demonstrate that his speech touched on a matter of public concern. *Id.* at 84.

[7] Furthermore, the *Rankin* Court held that the fact that she was a probationary employee did not impact her ability to exercise her First Amendment rights. 483 U.S. at 383–84.

Applying the *Connick* test, the Supreme Court expanded its initial definition of "matters of public concern" to include matters that are "subject of legitimate news interest" or "subject of general interest and of value and concern to the public at the time of publication." *Id.* at 83–84.

However, as discussed above, the *Pickering* balancing test does not apply to every case involving speech by a public employee. To hold otherwise "could compromise the proper functioning of government offices." *Id.* at 82. Before applying *Pickering* to the case at hand, the initial determination is whether Carr's Facebook posts may be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147–48. Furthermore, in determining whether speech meets this element, "courts should take into account the employee's motivation as well as whether it is important to our system of self-government that the expression take place." *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 467 (3d Cir. 2015) (*citing Azzaro v. Cnty. Of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997)). *See Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1364–65 (3d Cir. 1993) (the speaker's motivation is relevant to the extent that it indicates whether the speaker is speaking as a citizen upon matters of public concern or as a volunteer upon matters only of personal interest).

Carr's Facebook comments do not enjoy the protections of the First Amendment because they do not touch upon matters of public concern. The Commission below held that Carr's remarks did not meet the initial element established in *Connick*. (Commission Adjudication and Order, page 18). The Commission held that it was "at a complete loss to find any reasonable public interest in a rant about harming children or a bus driver." (Commission Adjudication and Order, page 18). Additionally, it was noted that "[Carr's] remarks do not provide any educational information to the public or serve to inform them about any public matter." (Commission Adjudication and Order, page 18).

Carr's Facebook comments do not rise to the level of requiring First Amendment Protections under *Pickering* and its progeny. Over a period of five hours, Carr posted various comments and replies to other comments on a Facebook page called "Creeps Of Peeps," which contained 1,359 members. (R.R. 15a, 132a–33a). Carr's initial comments was:

> Rant: can we acknowledge the horrible school bus drivers? I'm in PA almost on the NY boarder bear Erie and they are hella scary. Daily I get ran off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don't give a flying shit about those babies and I will gladly smash into a school bus.

(R.R. 16a). While Carr's comments are certainly inappropriate, that fact is irrelevant solely for purposes of the initial analysis set forth in *Connick*. The remaining Facebook comments posted by Carr were in response to her initial comment and in

an attempt to defend her original "rant." (R.R. 18a, 21a–23a, 26a, 130a–31a). It is clear that Carr is merely "ranting" or "venting" her personal complaints regarding a specific school bus driver in her community. (R.R. 25a–28a, 122a). *See Button v. Kirby-Brown*, 146 F.3d 526, 529–30 (7th Cir. 1998) ("speech lacks the public concern element if it 'concerns a subject of public interest but the expression addresses only the personal effect upon the employee'").

The Department does not dispute that dangerous school bus drivers *may* potentially be a subject of legitimate news interest or a concern to the community. However, when considering the *Connick* public concern test, it is important to take the content, form, and context of the speech into consideration. The "public-concern inquiry centers on whether 'the public or the community is likely to be truly concerned with or interested in the particular expression.'" *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 343 (4th Cir. 2017) (*citing Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004), *cert. denied* 547 U.S. 1187 (2006)). Taking the content, form, and context of Carr's Facebook comments into consideration, it is evident that her comments do not touch upon a matter of public concern.

Unlike the speech in *Connick* or *Rankin*, Carr's Facebook comments expressed her personal frustrations with a specific bus driver and his or her driving as opposed to issues of a greater public concern. (R.R. 25a–28a, 122a). *Compare Harris v. City of Va. Beach*, 1995 U.S. App. LEXIS 30912 (4th Cir. 1995)

(employee's speech in making a criminal complaint was not a matter of public concern because the issue was a personal personnel dispute), *cert. denied* 517 U.S. 1167 (1996) and *Harper v. Crockett*, 868 F. Supp. 1557 (E.D. Ark. 1994) (employee's comments regarding a bank policy was not a matter of public concern but a personal complaint about the bank) *with Grutzmacher*, 851 F.3d at 343 (public employee's inappropriate Facebook comments were of public concern given the context that his comments were understood as discussing gun control legislation).

At the Department's PDC, Carr stated that her comments were taken out of context and she was upset because "a certain bus driver often runs we [sic] off the road or causes me to have to stop suddenly [because] he does not obey traffic rules." (R.R. 26a). Carr's initial comment—the "rant"—was motivated by her personal dispute with that specific bus driver. Nowhere in her Facebook comments does Carr express an interest in or intent to contribute anything to the marketplace of ideas. To the contrary, Carr's comments merely addressed her personal experiences with a specific bus driver and the fact that she does not personally care about the students on the bus and that she herself would gladly smash into a school bus. (R.R. 26a–27a). Her speech did not add anything to the greater discussion of highway safety—it is simply about the *personal effect* that the school bus driver had on *her*. Additionally, the remainder of her Facebook dialogue was in an apparent effort to explain or defend her initial comment. (R.R. 25a–28a). As such, the latter comments

are also not of public concern but are merely personal disputes between Carr and other Facebook users.

Carr argues that her speech touched on a matter of public concern because it addressed an issue involving local school buses and the quality of the bus driver. However, Carr's argument only focuses on the language of the initial comment (rant) itself. It ignores Carr's own explanation of her comments in the record and further ignores the many additional comments she made on the group's page.[8] In short, her argument entirely ignores the context and forum of her initial and later comments. In context, the Facebook comments were posted to a page titled "Creeps Of Peeps" as opposed to a page dedicated to purely local issues in the area where Carr lived. (R.R. 27a, 133a). In fact, she admitted that the page has members all over the world. (R.R. 27a, 133a). Furthermore, as demonstrated by Carr's testimony, her comments and frustrations were exclusively directed at a specific school bus driver rather than a comment on the quality of school bus drivers generally. (R.R. 25a–28a).

When examined, based on the record as a whole, it is apparent that Carr's "rant" was merely her expression of a personal grievance of her frustrations with this

[8] The Department does not concede that Carr's original Facebook comment, without more, would constitute protected speech. In fact, after examining the record as a whole, Carr's initial Facebook comment solely addressed her personal experiences and complaints regarding one specific school bus driver.

driver. As such, Carr's Facebook comments are not entitled to First Amendment protections.

III. EVEN IF CARR'S FACEBOOK COMMENTS CONSTITUTE PROTECTED SPEECH, THE COMMISSION PROPERLY DISMISSED HER APPEAL BECAUSE THE *PICKERING* BALANCING TEST WEIGHS IN FAVOR OF THE DEPARTMENT'S INTERESTS AS AN EMPLOYER.

In the event that this Honorable Court concludes that Carr's Facebook comments are matters of public concern, the *Pickering-Connick* test next requires the Court to balance her free speech rights with the Department's interest, as an employer, in promoting the efficiency of the public services it performs. At the outset, when engaging in the *Pickering* balancing test, courts should "place a premium on the government's interest." *Mills v. Steger*, 64 Fed. Appx. 864, 872 (4th Cir. 2003) (per curiam) (*citing Goldstein v. Chestnut Ridge Vol. Fire Dep't*, 218 F.3d 337, 354–55 (4th Cir. 2000), *cert. denied* 531 U.S. 1126 (2001)). In applying the Supreme Court's analysis in *Pickering* and its progeny, along with persuasive authority from various federal circuit courts, it is clear that the Commission correctly determined that the Department's action, in terminating Carr, did not run afoul of the First Amendment.

In *Munroe v. Central Bucks School District*, the court applied the *Pickering-Connick* test to an online blog. 805 F.3d at 457. Munroe was an English teacher, and she began a personal blog entitled "Where are we going and why are we in this

handbasket." *Id.* at 458. In her personal blog, there was no mention of where she taught or the names of her students, and the content was only for subscribers of which there were nine. However, one day while she was at work, she entered on her blog her dissatisfaction with students, co-workers, and posted various other negative and offensive comments. A local newspaper found the blog and began to question the school district about her comments. Eventually, the comments on the blog were discovered by the students' parents. The parents expressed concern over their students being taught by Munroe and requested that they be transferred from her class. Munroe was suspended pending an investigation and then ultimately terminated.

The focus of the *Pickering* balancing test in *Munroe* was on both the actual disruption caused by the speech and the erosion that it caused to the school board's function to promote education and trust between teachers and their students. The Court held that there was no violation of protected speech. *Id.* at 480. The employee's speech satisfied the public concern test because there were occasional posts that touched on broader issues of academic integrity, honor and importance of hard work. However, once the blog posts became the subject of the media attention, and were discovered by the students' parents, the employee's speech was sufficiently disruptive to her workplace and further disrupted the functioning of the school

district in its essential mission. *Id.* at 476. This diminished any legitimate interest in her expression and thus was not protected.

In *Grutzmacher*, a public employee, Patrick Buker, was removed from his position after posting comments on Facebook in which he discussed gun control, with another public employee, on his personal Facebook page.[9] 851 F.3d at 336. The employees' comments discussed "killing someone with a liberal" and glorified "beating a liberal to death with another liberal." *Id.* at 338. After learning of these various comments, publicly posted on Facebook, Howard County (Maryland) Department of Fire and Rescue Services acted to terminate Buker's employment. After concluding that the Facebook comments addressed a matter of public concern—gun control legislation—the Court moved on to the *Pickering* balancing test. In determining the interests between the employee's speech and the government's interest as an employer, the *Grutzmacher* Court listed the following potential factors:

> Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities

[9] The Facebook comments involved in *Grutzmacher* included comments posted on Buker's personal Facebook page. The named Plaintiff, Mark Grutzmacher, then send a reply comment which included racist language. *Id.* at 338. However, it is unclear from the Court's decision if any adverse employment action was taken against Grutzmacher.

> of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

Id. at 345 (*quoting Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317 (4th Cir. 2006)). The Court noted that the government does not need to prove that the employee's speech actually caused a disruption to the efficiency of the government's office or services to the public—it only needs to be demonstrated that an adverse effect could be reasonably foreseen. *Id. See Garcetti*, 547 U.S. at 418 (Actual disruption is not necessary provided that the speech "has some potential to affect the entity's operations."). *See also Hara v. Pa. Dep't of Educ.*, 492 Fed. Appx. 266, 268 (3d Cir. 2012) (same); *Jurgensen v. Fairfax Cnty.*, 745 F.2d 868, 879 (4th Cir. 1984) ("If the perception of potential harm or damage is present, that fact may outweigh any First Amendment rights involved."). Furthermore, the *Grutzmacher* Court recognized the effect that social media platforms have on a speaker's ability to broadcast their speech and how that impacts the *Pickering* balancing test:

> [A] social media platform amplifies the distribution of the speaker's message — which favors the employee's free speech interests — but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency.

851 F.3d at 345 (*quoting Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016)).

After weighing all relevant factors, the Court held that the government's interest prevails because, *inter alia*, the employee's Facebook activity conflicted

with his duties as a public employee and his speech frustrated the government's public safety mission.[10] *Id.* at 346. His Facebook comments also threatened to erode the community's trust in the Howard County Department of Fire and Rescue Services which is critical to its function to service the public. *Id.* The comments advocated violence towards certain people based on their political ideology and regardless of whether the threats were to be taken seriously or were mere figures of speech, the negative impacts of the government, as an employer, were overt.

In the present matter, similar to the online comments in *Munroe* and *Grutzmacher*, the *Pickering* balancing test tips to the government's interest "in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Carr's Facebook comments indicated that she is capable of violent behavior when she claimed that she would "t-bone" and "gladly smash into a school bus" with children on board without "giv[ing] a flying shit about those babies." (R.R. 16a) (Commission Adjudication and Order, page 18). One of the Department's witnesses testified that he believed that Carr had an intention to act out on her threat to ram into a school bus full of children. (R.R. 64a–65a, 105a–06a). The Commission affirmed the Department's reasonable belief and held that her Facebook comments indicated that she was "capable of violent behavior." (Commission Adjudication and

[10] The *Grutzmacher* Court also weighed the fact that the Facebook comments resulted in an internal disruption and disharmony within the employer's office and some of the employee's subsequent posts were perceived as being disrespectful to his superiors.

Order, page 18). While Carr testified that she had no intent to harm children—her intent is irrelevant. The relevant inquiry is whether the Department had a reasonable belief that Carr's speech could adversely affect the Department as an employer. *See Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (U.S. Supreme Court gave "substantial weight to government employers' reasonable predictions of disruption"); *Grutzmacher*, 851 F.3d at 345 (is it reasonable to believe that the online speech will adversely affect the government as an employer); *Melzer v. Bd. of Educ.*, 336 F.3d 185, 197 (2d Cir. 2003) ("showing of probable future disruption may satisfy the balancing test, so long as such a prediction is reasonable"), *cert. denied* 540 U.S. 1183 (2004); *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) (holding "government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities" in a manner outweighing employee's interests). Carr's comments have the potential to cause significant harm to the Department's chief mission of promoting highway safety and to further cause workplace disruption. (R.R. 62a–63a, 156a–60a). Here, as testified by the Department's witnesses, Carr's violent comments "gave the Department a black eye" by bringing the Department into her "rant." (R.R. 156a–57a). These comments also, if acted upon while on duty, would subject the Department to legal liability. (R.R. 158a). Most importantly, Carr's comments directly contradicted the Department's mission of ensuring safety on public highways. (R.R. 97a–98a).

Additionally, the harm to the Department is magnified by Carr's use of social media to broadcast her "rant." Had Carr's comments been merely uttered to a co-worker, as in *Rankin*, then the scales would tip towards the employee because the likelihood of causing harm to the government's interest as an employer would be nominal.[11] However, by using Facebook, Carr's inappropriate and violent comments were posted for any and all members of the "Creeps Of Peeps" page to view. (R.R. 14a–23a). At the time of her posting, the page had 1,359 members who could view or respond to Carr's comments.[12] (R.R. 15a, 132a–33a). In fact, many members of the group did view Carr's initial comment and posted various replies that resulted in a heated dialogue regarding the inappropriateness of Carr's violent comments. (R.R. 14a–23a, 26a–27a). In addition to responsive comments online, three people responded by notifying the Department of Carr's violent comments. (R.R. 17a–19a).

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[11] The speech involved in *Rankin* stands in sharp contrast with Carr's Facebook comments. *See Duke v. Hamil*, 997 F. Supp. 2d 1291, 1303 (N.D. Ga. 2014) (public employee's "choice to place [their speech] on a social media platform risked sharing it with a much broader audience."). Furthermore, *Duke* stands for the proposition that an employer does not need to wait for an actual controversy to arise from an employee's speech. *Id.* at 1301. The Department does not need to sit idle and wait for the harm to arise, *Pickering* and its progeny allows the Department to take proactive steps to prevent reasonable harm that may arise from an employee's speech.

[12] Furthermore, another factor that may appear in social media related cases, is whether the speaker's profile was "public" or "private." *See Gresham v. City of Atlanta*, 542 Fed. Appx. 817 (11th Cir. 2013) (speaker's Facebook profile was set to "private" and as such only "friends" of the speaker could view her comments; *Pickering* test tipped towards the employer). In the present matter, Carr's comments were on a separate "page" opposed to her personal page; however, Carr's comments were able to be viewed by a large number of other Facebook users. (R.R. 15a, 132a–33a).

The speech of a public employee cannot impair the proper performance of governmental functions or corrupt the employer's fundamental mission. Carr's comments did just that by completely disregarding the core safety mission that the Department strives to achieve—to provide safe highways to the traveling public. (R.R. 63a, 97a–98a, 100a–01a). The Department is also involved in safety training of drivers and, specifically, school bus drivers. (R.R. 63a, 100a–01a). Department employees must be in the position of advancing the Department's best interest by following the rules that the Department drafts. (R.R. 78a, 108a). Carr's comments directly conflict with that basic core mission that the Department strives to deliver to the public. (R.R. 97a–98a).

Of critical importance here is that Carr's personal Facebook page lists both her employer, the Department, and position, Roadway Programs Technician. (R.R. 14a, 23a, 129a). The mere fact that she cites her employment on her Facebook page is not dispositive of the issue; however, such a factor leans strongly towards the government's interest under the *Pickering* balancing test. By linking her employment with the Department to her personal Facebook page, Carr's comments created a direct nexus to her employment. As such, it is reasonable to believe that Carr's violent comments could have the effect of eroding the public's trust in the Department.

Carr's position with the Department required her to travel as part of duties. (R.R. 52a, 125a, 158a). The Department's reasonable belief that Carr would "t-bone" a school bus is indisputably an event that the Department has an interest in preventing, given the potential legal liability and because of the Department's effort in preserving its essential mission to promote safety. (R.R. 158a). At the end of the day, the Department and its employees should strive for safety and promote safe highways. Carr's comments are diametrically opposed to the Department's core mission.

An additional factor to consider in the present matter is that Carr is a probationary employee. While a public employer may not infringe upon the free speech rights of a public employee merely because they are on probationary status, such a fact is relevant when performing the *Pickering* balancing test. *Rankin*, 483 U.S. at 383–84. During an employee's probationary period, the Department examines the performance, conduct, and character of the employee. (R.R. 75a, 77a, 96a, 153a). It is beyond question that the Department has an interest in ensuring that its employees strive to promote safety at all times and prevent any inappropriate behavior which may have the effect of eroding the public's trust in the Department. Carr's inappropriate behavior, demonstrated by her violent Facebook comments, reflect poorly on her conduct and character and hence on her ability to competently perform her position with the Department. As such, the Department, in an effort to

preserve the public trust and prevent any negative impact from Carr's comments, took the necessary steps to terminate her employment during this probationary period. This is exactly what the probationary status period attempts to achieve.

The *Pickering* balancing test is a sliding scale. At one end there are cases such as *Rankin*, in which the speech had no potential effect on the government's mission as an employer, and at the other end is *Munroe*, in which the facts demonstrated a substantial disruption to the workplace and an erosion of the fundamental public trust sought by the government. In the present matter, as demonstrated by the Department, the scales are tipped in favor of the Department's interest in promoting highway safety and avoiding any potential disruptions caused by Carr's Facebook comments. Furthermore, Carr's comments touched on the very issue that is core to the Department's mission and services it provides to the public.

Carr argues that the Department violated her First Amendment rights because there was no actual disruption to the Department's mission.[13] Carr claims that the

[13] Carr's Brief cites to *Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2003), to support its understanding of the appropriate inquiry for the Court in the present Matter. While *Mandell* discusses *Pickering* and its progeny, Carr ignores the fact that the basis of the action in that proceeding was a First Amendment *retaliation* claim under Section 1983 of the Civil Rights Act of 1964. 42 U.S.C. § 1983. The Department has no burden to show that it would have taken the personnel action even without reference to the employee's speech. Carr's claim is that the Department violated her First Amendment rights, not that she was retaliated against for exercising said rights—while the claims are similar, they are not exact. As such, the appropriate inquiry here is whether the speech touched on a matter of public concern (the *Connick* test) and, if so, then the Court must balance the interest of the speaker against that of the government as an employer (*Pickering* balancing test).

factors in the present matter weigh towards the speaker. She claims that her Facebook comments: (1) did not impact close working relationships; (2) did not impair her ability to perform her job; and (3) did not hinder the Department's ability to provide public service. (Petitioner's Brief, pg. 35). However, Carr ignores the remaining factors that courts have examined when conducting the *Pickering* balancing test. The Supreme Court has stated that the government, as an employer, "must have wide discretion and control over the management of its personnel." *Connick*, 461 U.S. at 151. Carr also ignores that a government employer does not need to specifically demonstrate that the speech *actually* impaired efficiency, but merely that it would be *reasonable* for the government to reach that conclusion. *Grutzmacher*, 851 F.3d at 345. Here, based upon the Department's core mission relative to highway safety, it is reasonable for the Department, as affirmed by the Commission, to conclude that Carr's comments were in direct conflict with that mission and could, reasonably, erode the public's trust. (R.R. 62a–65a, 156a–58a). As to the potential effect on the Department's goals of workplace efficiency, prevention of disruption, delivery of a public service, and earning the trust of the public, Carr's Facebook comments are very similar to those in *Grutzmacher*, which found that the employee's speech "frustrated the Department's public safety mission and threatened 'community trust' in the Department, which is 'vitally important' to its function." 851 F.3d at 346.

While social media, such as Facebook and Twitter, have become the modern-day *agora* in the marketplace of ideas, online speech, just like speech in other mediums, is not absolute. *Pickering* and its progeny recognize the "government employer's right to protect its own legitimate interests in performing its mission." *Roe*, 543 U.S. at 82. This may include regulating speech that would be otherwise protected outside of the confines of government employment. *Id.* at 80. However, in the event that a public employee is speaking on a matter of public concern, the *Pickering* balancing test is used to ensure that both the speaker's free speech rights and the government's interest in maintaining efficient operations and public trust are protected. Those interests were properly balanced by the Commission in the present matter and the scales weigh in the favor of the Department's preservation of its core mission over Carr's violent Facebook "rant."

As such, the Department respectfully requests that this Honorable Court affirm the adjudication below by the Commission because Carr's Facebook comments were not a matter of public concern or, in the alternative, that her free speech rights are outweighed by the Department's interest, as an employer, in promoting highway safety throughout the Commonwealth of Pennsylvania.

CONCLUSION

Wherefore, the Commonwealth of Pennsylvania, Department of Transportation, respectfully requests that this Honorable Court affirm the decision of the Pennsylvania State Civil Service Commission, dated August 1, 2017, in sustaining the Department of Transportation's action removing the Petitioner, Rachel L. Carr, from her position as a Roadway Program Technician 1, probationary status, effective June 17, 2016.

Respectfully submitted,

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March 19, 2018

CERTIFICATE OF COMPLIANCE—WORD COUNT

I hereby certify, on this 19th Day of March 2018, that the foregoing Main Brief, submitted by the Department of Transportation, does not exceed the word limit established by Pa.R.A.P 2135. The within brief, including footnotes but excluding the cover page and tables of contents and authorities, contains 8,631 words.

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CERTIFICATE OF COMPLIANCE—PUBLIC ACCESS POLICY

I hereby certify, on this 19th Day of March 2018, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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