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Constitutional Law - Freedom of Speech: Public Employee - Can We Talk - The Wyoming Supreme Court Grants Little Protection to Public-Employee Whistleblowers - Mekss v. Wyoming Girls' School

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CONSTITUTIONAL LAW—Freedom of Speech: Public Employee—Can We Talk? The Wyoming Supreme Court Grants Little Protection to Public-Employee Whistleblowers. *Mekss v. Wyoming Girls' School*, 813 P.2d 185 (Wyo. 1991).

Ms. Regina Mekss (Mekss) was employed for three years as a bookkeeper at the Wyoming Girls' School (School).[1] She was a well-liked employee and received good to excellent job evaluations.[2] Because Mekss felt that certain conditions at the School were detrimental to the residents and the staff, she wrote an anonymous letter to the Board of Charities and Reform (Board) in August 1988.[3] The letter described disharmony at the School and poor employee morale due to harmful management policies and the failure of reporting procedures.[4] Mekss reported favoritism, harassment of employees who complained, improper hiring practices, and use of outdated teaching and therapy techniques.[5] She questioned the lack of female guards and alleged improper use of corporal punishment on the residents.[6] Subsequently, the Board elected to conduct an investigation at the School.[7]

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1. Mekss v. Wyoming Girls' Sch., 813 P.2d 185, 187-88 (Wyo. 1991), *cert. denied*, 112 S. Ct. 872 (1992). The Wyoming Girls' School was created to educate and rehabilitate adolescent girls committed by the state's district courts. *Id.* at 187 (citing WYO. STAT. §§ 25-4-101 to -103 (1977)). The Board of Charities and Reform has general supervisory control over the School and consists of the governor, the secretary of state, the state treasurer, the state auditor and the state superintendent of public instruction. *Id.* (citing WYO. CONST. art. VII, § 18; WYO. STAT. § 25-1-101 (1977)). The Board appoints an executive secretary to evaluate and report the conditions at the School. *Id.* (citing WYO. STAT. § 25-1-103(a) and (b)(ii) (1977)). The Board also appoints a school superintendent to oversee the School's daily operations. *Id.* (citing WYO. STAT. § 25-1-201(b)(i) and (c) (1977)).

2. *Mekss*, 813 P.2d at 187-88, 192.

3. *Id.* at 188.

4. *Id.* Earlier in 1988, Mr. Jack Geisler, Superintendent of the School, wrote a memorandum requesting that staff bring concerns to either him or the assistant superintendent. *Id.* However, Mekss thought Geisler was unapproachable and questioned whether she would be treated fairly when reporting problems. In a later speech to the staff, he warned that anonymous criticism of School policies would be dealt with severely. Brief of Appellant at 9, app. at [6], Mekss v. Wyoming Girls' Sch., 813 P.2d 185 (Wyo. 1991) (No. 89-235), *cert. denied*, 112 S. Ct. 872 (1992).

5. *Mekss*, 813 P.2d at 188-89; Brief of Appellant, *supra* note 4, at 7, app. at [7]. Problems had been escalating for over a year, and several employees had written anonymous letters to the Board during 1988. These letters contained allegations similar to Mekss'. *Mekss*, 813 P.2d at 188.

6. Brief of Appellant, *supra* note 4, at 7, app. at [7].

7. *Mekss*, 813 P.2d at 189. State corrections personnel conducted the investigation. Investigators asked each employee a list of questions in a fifteen-minute interview. Based upon this investigation, Mr. Gary Sherman, Executive Secretary of the Board, wrote to Geisler, "You have the overwhelming support of your staff. . . . No one demonstrated any proof of the anonymous allegations. . . . There were six employees who expressed universal dissatisfaction." *Id.* He concluded that "the allegations were spurious, mean spirited and without substance." *Id.* Following the investigation, Geisler changed a few staff schedules in an attempt to improve morale. *Id.*

After the investigation, problems and distrust continued.[8] Secretary of State Kathy Karpan (Karpan) advised employees who were disappointed with the investigation to take specific concerns directly to Gary Sherman (Sherman), Executive Secretary of the Board.[9] Mekss took Karpan's advice and attempted to call Sherman. However, when Mr. Jack Geisler (Geisler), Superintendent of the School, learned of the attempted call, he arranged to meet with Mekss. Those attending the meeting were Geisler; Mekss; Gary Kopsa, the Assistant Superintendent; and Carol Maxwell, Mekss' immediate supervisor.[10] At the close of the meeting, all four signed a memorandum which stated that Mekss should subsequently bring School problems only to one of these three superiors.[11]

Thereafter, Mekss succeeded in speaking with Sherman. During their conversation, Mekss told Sherman that she had written one of the anonymous letters. Despite his earlier assurances that he welcomed information about the investigation,[12] Sherman told Mekss that she was at risk for violating the School's chain-of-command by bringing her complaints to him and that he would inform Geisler of this.[13]

When informed, Geisler arranged to confront Mekss to discipline her for insubordination. He gave her three options: (1) resign; (2) accept a two-week suspension and write a letter of apology; or (3) be terminated.[14] Mekss chose the second option and was suspended for two weeks. During this time she wrote and submitted a letter of apology to Geisler.[15] Because the letter did not retract her allegations, Geisler refused to accept it, and Mekss was terminated.[16] Geisler indicated that Mekss was terminated for (1) circumventing established lines of authority and (2) refusing to accept disciplinary measures imposed.[17]

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8. Brief of Appellant, *supra* note 4, at 8-9.

9. *Mekss*, 813 P.2d at 189. In November 1988, under a statutory duty, the Board visited the School. *Id.* (citing WYO. STAT. § 25-1-104(b) (1977)). At this time, Karpan met with Mekss and other dissatisfied employees. *Id.* A few weeks later, Karpan, Sherman, and Mekss' co-worker talked by conference call about the investigation. Sherman told the co-worker that he welcomed information about the investigation and that there would be no retaliation against any employee who talked to him. Brief of Appellant, *supra* note 4, at 10.

10. *Mekss*, 813 P.2d at 189-90; Brief of Appellee at 10, Mekss v. Wyoming Girls' Sch., 813 P.2d 185 (Wyo. 1991) (No. 89-235), *cert. denied*, 112 S. Ct. 872 (1992). At this meeting, Mekss told those present that the call to Sherman concerned the investigation generally and did not specifically address School matters. Brief of Appellant, *supra* note 4, at 10-11.

11. *Mekss*, 813 P.2d at 190.

12. *See supra* note 9.

13. *Mekss*, 813 P.2d at 190. The School's chain-of-command procedure was established by two memoranda. *See supra* note 4 and text accompanying note 11.

14. *Mekss*, 813 P.2d at 190.

15. *Id.*

16. *Id.* at 190-91.

17. *Id.* at 191.

Pursuant to Wyoming administrative procedures, Mekss challenged the termination through an appeal to a personnel review board.[18] The board upheld Mekss' termination because she had violated the chain-of-command and had created disharmony at the School.[19] On appeal, the state district court affirmed the personnel review board's decision.[20] In a subsequent appeal to the Wyoming Supreme Court, Mekss claimed that her First Amendment right to freedom of speech as a whistleblower had been violated.[21] Because of the First Amendment claim, the court independently examined the entire record to determine whether the speech should be constitutionally protected.[22]

In its analysis, the Wyoming Supreme Court used a sequential test developed from United States Supreme Court cases concerning this public-employee, freedom of speech issue.[23] The main theme of the sequential test is in recognizing that a court must balance the employee's interest with that of the employer. A public employee has an interest, like that of any citizen, in being able to criticize public institutions. This interest competes with the employer's interest in facili-

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18. *Id.* (citing the Wyoming Administrative Procedure Act, WYO. STAT. §§ 16-3-101 to -115 (1977)).

19. *Id.* at 192. Subsequently, the Wyoming Supreme Court found Mekss had not, in fact, created disharmony at the School. The court, therefore, modified the personnel review board's finding of fact to read, "Ms. Mekss was insubordinate in circumventing established lines of authority." *Id.* at 203.

20. *Id.* at 192.

21. *Id.* at 192, 194. A whistleblower is an employee who reports unlawful or wrongful activities to a superior inside the whistleblower's organization or to someone outside the organization. Sheldon E. Friedman, *Whistleblowing: A Growing Trend*, 19 COLO. LAW. 1313; BLACK'S LAW DICTIONARY 1596 (6th ed. 1990). As of 1990, Friedman states that, "[t]hirty states have enacted legislation to protect whistleblowers." Friedman at 1313 (discussing Colorado's whistleblower statute). *See, e.g.*, CAL. LAB. CODE § 1102.5 (West 1989); CAL. GOV. CODE §§ 10540 to -46 (West 1980 & Supp. 1992); COLO. REV. STAT. ANN. §§ 24-50.5-101 to -107 (West 1990); HAW. REV. STAT. §§ 378-61 to -69 (1988); KAN. STAT. ANN. § 75-2973 (1989 & Supp. 1991). Wyoming has not enacted whistleblower legislation. Some states protect private employee whistleblowers. *See, e.g.*, COLO. REV. STAT. §§ 24-114-101 to -103 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. § 31-51m (West 1987 & Supp. 1991). Congress also promotes whistleblowing and has enacted legislation to protect federal employees. *See, e.g.*, Whistleblower Protection Act of 1989, §4, 5 U.S.C. § 2302(b)(8) (Supp. II 1990). For a general discussion of state statutory action, *see* Carrie Donald and John Remington, *Recent Developments and Trends in Public Sector Employee Relations*, 5 ANN. LAB. & EMP. L. INST. 149, 152-53 (1990). *See generally* Robert D. Boyle, *A Review of Whistle Blower Protections and Suggestions for Change*, 41 LAB. L.J. 821 (1990); John L. Howard, *Current Developments in Whistleblower Protection*, 39 LAB. L.J. 67 (1988) (discussing whistleblower protections and difficulties in proving employer retaliation).

22. *Mekss*, 813 P.2d at 193. The Wyoming Supreme Court followed the directive of the United States Supreme Court in its review. *Id.* at 194 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)).

23. *Id.* at 194. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Connick v. Myers, 461 U.S. 138 (1983). Although the Wyoming Supreme Court could have used the Wyoming Constitution to provide greater freedom of speech, it chose to analyze the facts in *Mekss* under the First Amendment of the United States Constitution, which sets the minimum level of protection. *Mekss*, 813 P.2d at 192-93 (citing WYO. CONST., art 1, § 20).

tating its service to the public through an efficient and harmonious work environment necessitating a balancing process.[24]

In *Mekss*, the Wyoming Supreme Court balanced the competing interests and found that Mekss' anonymous letter was entitled to First Amendment protection.[25] However, notwithstanding this heightened level of protection, the court determined that Mekss' insubordination was a legitimate reason for the termination, separate from the protected speech.[26]

This casenote presents a chronological overview of the applicable United States Supreme Court cases to demonstrate the evolution of the sequential, four-part test used in public-employee, freedom of speech cases. It then outlines the Wyoming Supreme Court majority's and dissent's analysis of the anonymous letter and telephone call using this test. The casenote criticizes the majority's analysis because the majority did not grant Mekss whistleblower status. As a result, the majority's analysis was skewed. The casenote demonstrates that because Mekss was a whistleblower, her speech should have been entitled to the highest constitutional protection. However, the court ultimately granted the speech little protection which resulted in an erroneous decision. The casenote concludes that the court's decision will deter Wyoming public-employee whistleblowers to the detriment of the people of the Wyoming.[27]

BACKGROUND

For the last forty years, the United States Supreme Court has protected a public employee's right to freedom of speech.[28] In *Keyi-*

24. *See Pickering*, 391 U.S. at 568. For a discussion of employee and employer interests relating to the organizational model being considered, *see* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 3, 51-63 (1987). According to Massaro, the employee and employer's interests diverge only within certain organizational models. For example, under a bureaucratic, or rational systems model, the main focus within the organization is on the institutional goals to be achieved rather than on the individuals or relationships which affect efficiency. Because bureaucratic organizations are hierarchical, they grant broad managerial authority and limit employee freedom. Most courts use this model even though it is a poor model on which to base First Amendment protection.

Conversely, under a natural systems model, according to Massaro, the interests of the employee and the employer do not differ and therefore, do not compete. This organizational model focuses on individuals and relationships within the organization and does not equate employee efficiency with employee silence. Workers are not managed like robots and forced to adapt to a rigid, hierarchical system. *Id.*

25. *Mekss*, 813 P.2d at 195, 203.

26. *Id.* at 203.

27. Other jurisdictions grant significant protection to whistleblowers. *See Pickering*, 391 U.S. at 572; Considine v. Board of County Comm'rs, 910 F.2d 695 (10th Cir. 1990); Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985), *cert. denied*, 474 U.S. 803 (1985); Anderson v. Central Point Sch. Dist. No. 6, 746 F.2d 505 (9th Cir. 1984); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984).

28. Prior decisions held that since government employment was a privilege, an

shian v. Board of Regents, decided in 1967, the United States Supreme Court held that the government cannot unreasonably condition public employment upon the surrender of First Amendment rights.[29] One year later, in *Pickering v. Board of Education*, the Court narrowed *Keyishian* and held that public employers may regulate employee speech under certain circumstances.[30]

Balancing the Competing Interests of Employee and Employer

In *Pickering*, the school board terminated a public school teacher because he wrote a letter, critical of the school board's allocation of school funds and the school board's explanation of a bond issue proposal, which was published in a local newspaper.[31] The United States Supreme Court determined that a balance was necessary "between the interests of the [employee], 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 . . . ."[32] This weighing process became known as the *Pickering* balancing test.[33] In *Pickering*, the Court discussed circumstances relevant, though not exclusive, to the balancing process.[34] Factors to be evaluated included: (1) whether the employee's speech impaired discipline by superiors or harmony among co-workers; (2) whether the speech had a harmful impact on working relationships requiring loyalty and confidence; (3) whether the employee's position required confidentiality; and (4) whether the speech hindered the employee's job performance or interfered with the regular operation of the organization.[35] Additionally, although the teacher was not labeled a whistleblower, the speech in *Pickering* arose in that context.[36] As a result, the United States Su-

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employee had no constitutional right to it and could be fired at will. Adler v. Board of Educ., 342 U.S. 485 (1952); McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

29. Keyishian v. Board of Regents, 385 U.S. 589 (1967). *Keyishian* struck down a New York law which permitted governing boards to dismiss teachers for knowingly belonging to a subversive organization. *Id.*

30. *Pickering*, 391 U.S. at 568. The circumstances in which an employer may regulate employee speech were considered by the Court when it balanced the interests. *See infra* text accompanying notes 34 and 35.

31. *Pickering*, 391 U.S. at 566.

32. *Id.* at 568.

33. *See* Schalk v. Gallemore, 906 F.2d 491, 496-97 (10th Cir. 1990); Jurgensen v. Fairfax County, 745 F.2d 868, 880, 888-89 (4th Cir. 1984).

34. *Pickering*, 391 U.S. at 569-73.

35. Donahue v. Staunton, 471 F.2d 475, 481 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (referring to *Pickering*, 391 U.S. at 569-73).

36. *Pickering*, 391 U.S. at 572. In *Pickering*, the Court encouraged public school teachers to comment on school board activities even when the impact would be felt outside the teacher's subject area.

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak freely on such questions without fear of retaliatory dismissal.

Id. See supra note 21 for a discussion of whistleblowing.

preme Court considered whether the teacher had knowingly or recklessly made false statements.[37] Following the *Pickering* decision, courts used these factors, as applicable, when balancing the competing interests in public-employment, First Amendment cases.[38]

Adding Causation: "Substantial Factor" and "Shifting the Burden"

In 1977, the United States Supreme Court addressed the issue of causation in *Mount Healthy City Board of Education v. Doyle*.[39] In *Mount Healthy City*, a non-tenured teacher's contract was not renewed after he gave information from a school memorandum to a local radio station. This information, announcing the adoption of a dress code for teachers, was broadcast as a news item.[40] After balancing the competing interests, the Court found that the teacher's speech was protected under the First Amendment.[41] However, because the school board may have had more than one motive for not renewing the contract,[42] the teacher was required to prove that the memorandum was a substantial factor in the decision.[43] Once the employee met his burden, the burden shifted to the employer to prove that there was a separate, permissible reason which was unrelated to the protected speech.[44] The Court determined that it should not reinstate an employee if there was a legitimate reason for the school board's decision.[45] Otherwise, an employee who spoke out could be protected regardless of his other conduct.[46]

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37. *Pickering*, 391 U.S. at 569. The knowingly or recklessly false standard was used by the United States Supreme Court in determining whether defamation of public officials had occurred in the non-employment context. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). In *Pickering*, the Court refused to adopt this as a general standard to be considered by courts in every public-employee, freedom of speech case. *Pickering*, 391 U.S. at 569.

38. *See generally* Board of Trustees v. Spiegel, 549 P.2d 1161, 1176 (Wyo. 1976). The Wyoming Supreme Court considered whether the speech by a continuing contract teacher was knowingly or recklessly false. The teacher's speech was critical of the school administrator and was made outside the employment context. The court also balanced the applicable competing interests. *Id.* at 1176-77. *See also* Atcherson v. Siebenmann, 605 F.2d 1058, 1062-63 (8th Cir. 1979) (applying the balance).

39. 429 U.S. 274 (1977).

40. *Id.* at 282.

41. *Id.* at 284.

42. *Id.* at 281-82. Prior to the release of the memorandum, the teacher had been involved in several incidents which may have influenced the school board's decision. The teacher had previously been suspended for arguing with another instructor. He also had used profanity with students, had made obscene gestures to female students, and had argued with school-cafeteria employees. *Id.*

43. *Id.* at 287.

44. *Id.* The case was remanded to determine whether the board could have met its burden of showing that it would not have renewed his contract even without the memorandum. *Id.*

45. *Id.* at 285-86.

46. *Id.* at 285.

Adding a Public-Concern-Threshold Inquiry

In *Connick v. Myers*, the United States Supreme Court expanded upon the circumstances which must be present to protect a public employee's freedom of speech right.[47] In *Connick*, the dispute arose when Myers, an assistant district attorney, learned of her impending transfer to a different department within the district attorney's office. Concerns about office policy surfaced when Myers spoke to her supervisor about the transfer and, as a result, she circulated a questionnaire to co-workers. There were fourteen questions on the questionnaire, thirteen of which dealt with office policies and procedures. The remaining question asked whether co-workers felt "pressured to work in political campaigns on behalf of office supported candidates."[48] After distributing the questionnaire, Myers was terminated.[49]

The Court in *Connick* added a public-concern-threshold inquiry which should be considered prior to balancing the competing interests of the employee and employer.[50] The Court found that, initially, the speech in question must involve a matter of public concern.[51] This threshold inquiry was a question of law to be determined from the "content, form, and context" of the speech.[52] If the employee had spoken out of a purely personal motive, such as might occur if there was a transfer, termination, or other employment-dispute, the speech would lack the necessary public concern.[53] However, even in an employment dispute context, speech with an extremely important public-concern content might be able to minimally meet the threshold. The Court in *Connick* determined that since the speech had some important, politi-

47. Connick v. Myers, 461 U.S. 138 (1983).

48. *Id.* at 140-41, app. at 155.

49. *Id.* at 141-42. The district court found that the questionnaire was protected speech and that Myers had been wrongfully terminated because of it. The court of appeals affirmed.

50. *Id.* at 147-49. In *Pickering*, the United States Supreme Court emphasized the public's interest in having free and unhindered debate on matters of public concern, but it did not specifically set up a threshold element. Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

51. *Connick*, 461 U.S. at 149-50. Speech which addresses a matter of public concern relates to any matter of political, social or other community concern. *Id.* at 146. Public-concern issues, for example, are those which promote informed decision-making by the electorate to bring about desired political and social changes, address racial discrimination, or inform taxpayers about how tax revenue is raised and should be spent. *Id.* at 145-46 (citing Roth v. United States, 354 U.S. 476, 484 (1957); Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 410 (1979); *Pickering*, 391 U.S. at 571-72).

52. *Connick*, 461 U.S. at 147-48 & n.7

53. *Id.* at 148. The United States Supreme Court noted that because a transfer was involved, the questionnaire arose from an employment dispute, and the thirteen office policy questions were merely a means to gather ammunition against her employer. Her motive in circulating the questionnaire was suspect because she had circulated it after being informed of the transfer. If Myers had attempted to expose her employer's improper actions, absent personal motivation, the questions concerning office policies would then have met the public-concern threshold. *Id.*

cal content, the minimum public-concern threshold was met.[54]

The Court in *Connick* then balanced the competing interests of the employee and employer.[55] In addition to the *Pickering* factors,[56] the Court added other factors which it considered important to this balancing process.[57] One consideration was whether the speech arose within an employment-dispute context. Personal motive was present in *Connick* because this employee opposed the departmental transfer; therefore, the Court gave less weight to the employee's interests in speaking than to the employer's interests favoring the termination.[58] However, the Court indicated that an employment-dispute context would not automatically weigh in the employer's favor and that the court would consider other circumstances.[59] Under a "time, place, and manner" factor, if the speech occurred on the employee's own time and in non-work areas, the Court need not give more weight to the employer's interests because there would be little work disruption.[60] In contrast, speech in violation of announced office policy could weigh against the employee because of the speech's "time, place, or manner."[61]

Another factor was the closeness of the working relationships which would be disrupted by the speech. Because the Court in *Connick* found that close-working relationships were essential to the efficiency of this office, it gave greater weight to the employer's judgment on how best to control internal office affairs.[62] The Court did not require the employer to show actual office disruption and destruction of working relationships as a result of the speech. In this situation, the employer's fear of disruption was enough to tip the balance.[63] Because the balance had tipped in favor of the employer in *Connick*, the speech was not constitutionally protected and therefore, the Court did not need to address the *Mount Healthy City* elements of causation. The employer was allowed to use the speech as a permissible reason for the termination and no further inquiry was necessary.[64]

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54. *Id.* at 149-51. The Court found that the question concerning political campaigns touched on a matter of public concern. *See supra* note 51. The Court determined that the content of the speech on this one question was extremely important, even though it arose out of an employment dispute. However, it was given less weight because of the Court's emphasis on the thirteen "ammunition" questions. *See supra* note 53; *Connick*, 461 U.S. at 149, 152, 154.

55. *Connick*, 461 U.S. at 147-50, 153.

56. *See supra* text accompanying notes 34 and 35 (describing the *Pickering* factors).

57. *Connick*, 461 U.S. at 150-53.

58. *Id.* at 154.

59. *Id.* at 152-53.

60. *Id.* at 153 n.13.

61. *Id.* at 153 & n.14. The employee in *Connick* had not violated established office policy. *Id.* at 153. *See also* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977).

62. *Connick*, 461 U.S. at 151-52.

63. *Id.*

64. *See supra* text accompanying notes 39-46 (discussion of *Mount Healthy City*

The United States Supreme Court followed *Connick* in *Rankin v. McPherson*.[65] In *Rankin*, the employee was a probationary clerical worker in a constable's office.[66] Upon hearing of the assassination attempt on President Reagan, the employee said, privately, to a coworker, "[I]f they go for him again, I hope they get him." After the remark was reported to the constable, the employee was fired.[67] Initially, the Court evaluated whether the speech touched on a matter of public concern.[68] In *Rankin*, the Court found that the content of the employee's speech, although inappropriate, did involve a matter of public concern.[69]

Because the speech arose in the context of a private conversation, the Court in *Rankin* gave less weight to the employer's interests.[70] The employer's apprehension about future interference with its law-enforcement goals was inadequate to tip the balance.[71] The Court considered the fact that this employee had no confidential, policy-making, or public-contact responsibilities; therefore, the employee's private conversation presented little danger to the constable's office.[72] Because the employer's only reason for this termination was the employee's constitutionally protected speech, the termination was reversed and the Court did not address the *Mount Healthy City* elements of causation.[73]

The Sequential, Four-Part Test

Based on the United States Supreme Court's analyses in these cases, many state and federal courts have developed a sequential, four-part test to assist the determination of whether a public employer has violated an employee's right to freedom of speech.[74] First, a court must decide whether an employee's speech touches on a matter of public concern.[75] Second, if the speech touches on a matter of pub-

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causation elements).

65. 483 U.S. 378 (1987).

66. *Id.* at 380.

67. *Id.* at 381-82.

68. *Id.* at 384-86.

69. *Id.* at 385-87. The United States Supreme Court agreed with the district court that the speech did not amount to a punishable threat to kill the President. *Id.* (citing 18 U.S.C. § 871(a) and 18 U.S.C. § 2385).

70. *Rankin*, 483 U.S. at 388-89.

71. *Id.* at 389-90, 391 & n.17.

72. *Id.* at 390-92.

73. *See supra* text accompanying notes 42-44 (describing the causation elements of "substantial factor" and "shifting the burden").

74. Schalk v. Gallemore, 906 F.2d 491, 494-95 (10th Cir. 1990) (calling this a multi-tier test). *See* Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (describing burdens of proof); Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 672-76 (8th Cir. 1986). For a more detailed discussion of the United States Supreme Court cases which make up this sequential test, *see* Massaro, *supra* note 24; Dennis H. Mibrath, *The Free Speech Rights of Public Employees: Balancing With the Home Field Advantage*, 20 IDAHO L. REV. 703 (1984).

75. Connick v. Myers, 461 U.S. 137, 146 (1983).

lic concern, the court will then balance the interest of the employee in making the statement against the employer's interest in minimal disruption of the workplace.[76] Third, if the balance weighs in favor of the employee, the court will protect the speech and reverse the termination, provided the employee proves that the protected speech was a substantial factor in the employer's decision.[77] Fourth, the burden shifts to the employer to prove that there was another, permissible reason for the termination which was unrelated to the protected speech.[78]

THE PRINCIPAL CASE

Mekss argued that both her anonymous letter and telephone call to Sherman were constitutionally-protected free speech. Justice Thomas, writing for the Wyoming Supreme Court majority, chose to analyze each incident separately using the four-part test.[79]

Majority's Analysis of the Anonymous Letter

The majority initially considered whether the anonymous letter addressed a matter of public concern.[80] Mekss argued that she was acting as a whistleblower because "she was attempting to draw attention to 'improper operations' at the School."[81] The majority agreed that because the management of the School was a matter of public concern, her interests should be given the increased weight of a whistleblower under the balancing step.[82] However, although "conclud[ing] that the anonymous letter should be afforded the highest level of constitutional protection," the majority simply assumed that Mekss had met part one of the sequential test, the public-concern threshold and part two, balancing the competing interests.[83]

The majority then addressed parts three and four by considering whether the letter was the cause of the termination. Under part three, Mekss had the burden of proving that the anonymous letter was a substantial factor in the termination.[84] Since Geisler had testified that Mekss was terminated for circumventing established lines of authority and for refusing to comply with disciplinary measures, the majority could not infer that the letter was a substantial factor.[85] According to

76. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).
77. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
78. *Id.*
79. Mekss v. Wyoming Girls' Sch., 813 P.2d 185, 194 (Wyo. 1991), *cert. denied*, 112 S. Ct. 872 (1992). Justices Thomas, Cardine, and Macy comprised the majority.
80. *Id.* at 194-95.
81. *Id.* at 195.
82. *Id.* at 194-95 (citing Foster v. Ripley, 645 F.2d 1142, 1149 (D.C. Cir. 1981); Conaway v. Smith, 853 F.2d 789, 797 (10th Cir. 1988)).
83. *Id.* at 195.
84. *Id.*
85. *Id.*

the majority, assuming arguendo that the letter was a substantial factor, the School would have met its burden under part four of the test. The court determined that Mekss' insubordination was a separate, permissible cause, unrelated to the constitutionally-protected letter.[86]

The majority in *Mekss* described insubordination at the School by analogy to a police department.[87] The School, like a law-enforcement agency, required a high degree of discipline, harmony, and loyalty from employees to accomplish its mission. According to the majority, the School justifiably expected its employees to use appropriate means and channels for grievances. An employee who chose not to follow the reporting rules was insubordinate and could be punished.[88]

Majority's Analysis of the Telephone Call

In considering the public-concern threshold, the majority held that the telephone call to Sherman, unlike the anonymous letter, did not reach whistleblower status because Mekss was not acting out of pure public concern.[89] Mekss argued that she was attempting to expose the inadequacy of the investigation; however, the majority found that Mekss lacked sufficient personal knowledge to question its adequacy.[90] According to the majority, since the investigators interviewed each employee thoroughly, the results were reliable and Mekss must have had a personal motive for making the call.[91] Even though the call did not reach whistleblower status, the majority assumed that the public-concern threshold was met because of the telephone call's content.[92]

Upon balancing the competing interests of the employee and em-

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86. *Id.* at 195-96.

87. *Id.* (citing Warner v. Town of Ocean City, 567 A.2d 160 (Md. Ct. Spec. App. 1989)). In *Warner*, a police officer wrote an anonymous letter to the mayor and city council alleging unethical and illegal activities by a newly-appointed police captain. The court found, when considering the time, place, and manner of the speech, that the officer had failed to follow the implemented grievance procedures. It was the use of an anonymous letter, not the content, which violated the police department's regulations and resulted in the officer's demotion. The officer's actions constituted insubordination which undermined the important interests of discipline, harmony, and loyalty required by a law enforcement agency. Insubordination, by itself, was a justifiable reason for demoting the officer, separate from the First Amendment issue. *Warner*, 567 A.2d at 162, 166-68.

88. *Mekss*, 813 P.2d at 196.

89. *Id.* Whistleblower speech would automatically meet the public-concern threshold and would be given increased weight when the competing interests were balanced. *Id.* at 194-95. *See supra* text accompanying notes 81-82.

90. *Mekss*, 813 P.2d at 196 (citing Hughes v. Whitmer, 714 F.2d 1407, 1423 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984)).

91. *Id.* at 198. Speech was not entitled to protection if the point was simply to air grievances of a purely personal nature. Connick v. Myers, 461 U.S. 138, 148 (1983).

92. *Mekss*, 813 P.2d at 198. If the content of an employee's speech focused on disclosing public officials' wrongdoing, it was more likely to be considered a matter of public concern. Koch v. City of Hutchinson, 847 F.2d 1436, 1445 (10th Cir. 1988)(en banc), *cert. denied*, 488 U.S. 909 (1988).

ployer under the second element of the sequential test, the majority concluded that the scales tipped in the School's favor.[93] The majority indicated that the education and rehabilitation goals of the School, which involved teaching the residents to solve problems in a direct and honest manner, could be undermined by Mekss' telephone call.[94] The majority, again by analysis to a police department, found that the School had a strong interest in maintaining discipline and *esprit de corps* through the chain-of-command rule.[95] Mekss' violation of this rule could undermine confidence and trust among co-workers.[96] Even though the call may not have affected Mekss' ability to perform her own duties, it could have potentially interfered with School operations, subverted Geisler's authority, and destroyed close-working relationships.[97] Mekss' telephone call did not survive the balancing test and therefore did not reach the level of protected speech.[98] As a result, the majority did not proceed to analyze parts three and four of the sequential test. The majority found that Mekss was justifiably terminated for violating the School's chain-of-command rule.[99]

The Dissent's Analysis

A well-reasoned dissent, written by Justice Urbigkit and joined by Justice Golden, approved the majority's adoption of the four-part test but rejected the majority's analysis.[100] Because the majority found that Mekss was justifiably terminated for violating the chain-of-command rule by making the telephone call, the dissent focused its analysis on that incident. The dissent maintained that the telephone call should have been protected speech and Mekss should not have been terminated for it. According to the dissent,

> [b]y demonstrating that it is again the messenger who is at risk, this whistleblower case does not suit my sense of either justice or justification to approve Mekss' termination from public employment. . . . Public employees who speak out should now fear that they will lose their jobs, forfeit salary increases, or be denied promotions. When faced with such consequences, self-imposed censorship is often the most prudent choice. This self-imposed cen-

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di fr /93. *Mekss*, 813 P.2d at 199.

94. *Id.*

95. *Id.* (citing Crain v. Board of Police Comm'rs, 920 F.2d 1402 (8th Cir. 1990); *Hughes*, 714 F.2d 1407).

96. *Id.*

97. *Id.* at 199-200. *See generally* Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), *on reh'g vacated and remanded on other grounds*, 928 F.2d 920 (10th Cir. 1991).

98. *Mekss*, 813 P.2d at 200. *See, e.g.*, Huber v. Leis, 704 F. Supp. 131 (S.D. Ohio 1989), *cert. denied*, 493 U.S. 1020 (1990) (speech did not survive the balance).

99. *Mekss*, 813 P.2d at 199-200. "The discipline administered to Mekss was not directed 'at speech as such, but at employee behavior, including speech, which [was] detrimental to the efficiency of the employing agency.' " *Id.* (quoting Arnett v. Kennedy, 416 U.S. 134, 162 (1974)).

100. *Id.* at 208 (Urbigkit, C.J., dissenting).

> sorship is of profound consequence not only to the millions who work for the government, but also to the public who may have an interest in hearing their unexpressed views.[101]

When addressing the sequential, four-part test, the dissent's analysis paralleled the majority's. Initially, the dissent addressed the public-concern threshold. According to the dissent, however, the purpose of the public-concern threshold was to exclude those cases arising out of a purely personal dispute.[102] The dissent argued that Mekss had nothing personal to gain when she made the telephone call and, based on the continuing distrust and poor morale at the School, she perceived that the investigation was inadequate.[103] Mekss' statements during the telephone call, if true, suggested that Geisler and the Board had not been properly discharging their duties. Therefore, argued the dissent, the telephone call was clearly made out of public concern and should have been granted whistleblower status.[104] In this context, termination based on criticism of the employer should be lawful only if the employee had knowingly or recklessly made false statements.[105]

In balancing the competing interests of the employee and employer, the second element of the sequential test, the dissent addressed the following applicable factors: (1) possible disruption in the workplace, (2) the employee's responsibilities, and (3) the chain-of command rule.[106] According to the dissent, minor disruptions and general disharmony in an office are always foreseeable consequences when the improper activities of a supervisor are reported. If courts gave this factor much weight, a whistleblower could always be terminated for exposing a supervisor.[107] The dissent also considered Mekss' job responsibilities. Because she had no confidential, policy-making, or public-contact role, there was minimal danger to the School's successful and smooth function.[108] Addressing the chain-of-command rule, the dissent concluded that if the rule were enforced against an employee who criticized a supervisor, the employee's First Amendment freedom

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101. *Id.* at 207.

102. *Id* at 209 (citing Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986)).

103. *Id.*

104. " 'Speech that seeks to expose improper operation of the government or questions the integrity of governmental officials clearly concerns vital public interests.' " *Id.* (quoting Conaway v. Smith, 853 F.2d 789, 797 (10th Cir. 1988)).

105. *Id.* (citing Board of Trustees v. Spiegel, 549 P.2d 1161, 1176 (Wyo. 1976)). *See supra* notes 36-38 and accompanying text.

106. *Mekss*, 813 P.2d at 211-12 (Urbigkit, C.J., dissenting).

107. *Id.* at 211. " 'It would be anomalous to hold that because the employee's whistle blowing might jeopardize the harmony of the office or tarnish the integrity of the department, the law will not allow him to speak out on his perception of potential improprieties or department corruption.' " *Id.* (quoting *Conaway*, 853 F.2d at 797-98)

108. *Id.* at 211-12 (citing Rankin v. McPherson, 483 U.S. 378, 390-92 (1987)). *See supra* text accompanying note 72.

of speech would be impermissibly chilled.[109] Significantly, this rule "would deter 'whistle blowing' by public employees on matters of public concern. It would deprive the public in general and its elected officials in particular of important information about the functioning of government departments."[110] The dissent concluded that Mekss' interests outweighed those of the School in preventing possible disruption, and she therefore met her burden of proving the telephone call was constitutionally protected speech.[111]

The dissent proceeded to analyze the facts under the causation elements, "substantial factor" and "shifting the burden." The dissent maintained that Mekss would have prevailed on the "substantial factor" element because the telephone call was the specific act constituting grounds for the termination.[112] Under the dissent's analysis, Mekss proved the first three elements and therefore, "[t]he government's violent reaction to employee dissent [was] clearly not justified in this case."[113] Upon shifting the burden, the School would have been unable to prove that it had a separate, permissible reason for the termination because Geisler stated that he terminated Mekss for the telephone call.

ANALYSIS

Mekss was erroneously decided. Because the majority did not take Mekss seriously as a whistleblower, its analysis of both the anonymous letter and the telephone call was skewed. The majority gave the School's interest in preventing possible disruption startling weight. As a consequence, few Wyoming public employees will feel safe in disclosing much-needed information about public institutions because retaliation has now been legitimized.

The Anonymous Letter

The majority in *Mekss* did not ultimately base its decision on the anonymous letter. However, because the majority's analysis of the letter set the stage for the decision, this casenote will address it. Even though many of the same factors were applicable to both the letter and the telephone call, the majority reached different results in each instance. As a result, the majority's two analyses are difficult to reconcile.

The majority initially emphasized that Mekss was a whistleblower when she wrote the anonymous letter and therefore, the letter would

109. *Mekss*, 813 P.2d at 212 (Urbigkit, C.J., dissenting) (citing Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984)).
110. *Id.* (quoting Czurlanis v. Albanese, 721 F.2d 98, 106 (3d Cir. 1983)).
111. *Id.* at 207.
112. *Id.* at 212-13.
113. *Id.* at 213.

be granted the highest level of constitutional protection.[114] Based on the United States Supreme Court's analysis in *Pickering* and the Wyoming Supreme Court's analysis in *Board of Trustees v. Spiegel*, whistleblowing speech should be judged as if made by a member of the public.[115] The anonymous letter would then be protected unless it was knowingly or recklessly false and there had been actual, significant disruption at the School.[116] However, even though the majority initially stated that Mekss was a whistleblower, it then cavalierly assumed that the letter had minimally met the public-concern threshold. As a result, the majority did not grant the letter the stated "highest level of constitutional protection" available.[117] The anonymous letter was actually given very little weight which resulted in a skewed analysis of the remaining elements.

Because the majority had not actually considered Mekss to be a whistleblower under step one, it gave her interests little examination or credibility under the second element. As a result, the majority again merely assumed, without discussion, that Mekss' interests prevailed.[118] The majority did not examine Mekss' allegations closely and treated this as a mere disciplinary matter better handled by the School.

Under the causation elements of "substantial factor" and "shifting the burden,"[119] the majority found that the letter was not a substantial factor in Mekss' termination.[120] However, the majority did not carefully examine the School's motive for the termination. Because the letter had been given little public concern or weight, the majority did not fully consider the disciplinary measures imposed. Mekss had three extremely limited alternatives for discipline after she revealed that she had authored the anonymous letter. In essence, she was required to apologize for writing the letter or lose her job.[121] If the majority had actually granted Mekss whistleblower status and the letter First Amendment protection, as it should have, she would not have been required to retract the allegations in the letter. Because the majority determined that the letter was not a substantial factor in the termination, the burden did not shift to the School to show a separate, permissible reason unrelated to the speech.

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114. Mekss v. Wyoming Girls' Sch., 813 P.2d 185, 194-95 (Wyo. 1991), *cert. denied*, 112 S. Ct. 872 (1992). *See supra* text accompanying notes 81-83.

115. Pickering v. Board of Educ., 391 U.S. 563, 569 (1968); Board of Trustees v. Spiegel, 549 P.2d 1161, 1176 (Wyo. 1976).

116. *See supra* notes 36-38 and accompanying text.

117. *Mekss*, 813 P.2d at 194-95.

118. *Id.* at 195.

119. *See supra* text accompanying notes 42-44.

120. *Mekss*, 813 P.2d at 195.

121. *Id.* at 190. *See supra* text accompanying note 14.

The Telephone Call

When it addressed the public-concern threshold, the majority erroneously dismissed Mekss' argument that she had been acting as a whistleblower when she made the telephone call.[122] The majority should have granted Mekss whistleblower status because she was again attempting to expose problems at the School and with the investigation.[123] The majority should have granted protection to Mekss' telephone call, provided the statements made were not knowingly or recklessly false.[124] Mekss' statements were not false because the School had continuing problems after the investigation, therefore, it was reasonable for her to report those problems and to question the adequacy of the investigation.[125]

The majority gave the telephone call a minimum of public concern when it simply assumed that the public-concern threshold was met. Because of a suspicion that Mekss had a personal motive when she made the call, the majority gave it less public concern than it gave to the anonymous letter.[126] According to the majority, since a typical public citizen would not have questioned the results of the investigation, it could be inferred that Mekss' motivation was purely personal.[127] However, in *Mekss*, there was absolutely no evidence of personal motive.[128]

Because the majority determined that the telephone call only minimally addressed a matter of public concern, it gave less weight to Mekss' interests. As a result, the School's expectation of employee discipline, harmony, and loyalty, promoted through the chain-of-command rule, prevailed.[129] The majority gave no weight to either the fact that Mekss had been advised to take her concerns to Sherman or that Sherman had assured Mekss' co-worker that there would be no retaliation.[130] In general, an employee who reports problems with superiors should not be required to follow the chain-of-command rule. This would impermissibly chill First Amendment rights and deter whistleblowing.[131] Because the majority did not grant Mekss whistleblower status for the telephone call, it did not address any of

122. *Mekss*, 813 P.2d at 196.
123. *Id.* at 189-90.
124. *See supra* notes 36-38 and accompanying text.
125. *Mekss*, 813 P.2d at 189.
126. *Id.*
127. *Id.* at 197-98. *See supra* note 91 and accompanying text (majority's discussion of personal motive).
128. Some courts address the motivation or "point" of the speech. Is the employee attempting to bring wrongdoing to light or further a purely private interest? *See* Kemp v. State Bd. of Agric., 803 P.2d 498, 503 (Colo. 1990), *cert. denied*, 111 S. Ct. 2798 (1991). *See also* Connick v. Myers, 461 U.S. 139, 148 (1983).
129. *Mekss*, 813 P.2d at 195-96.
130. *Id.* at 192; Brief of Appellant, *supra* note 4, at 10. *See supra* note 9 and accompanying text.
131. *See supra* text accompanying notes 109-10.

the important public-policy issues which favor whistleblowing.

The majority also gave more weight to the School's claim that the telephone call could undermine the School's goals.[132] The School was not required to show that actual disruption occurred,[133] and furthermore, since Mekss' telephone call occurred on her own time, there would be minimal work disruption.[134] Mekss had no confidential, policy-making, or public-contact responsibilities, and therefore, there was little danger of disrupting the School's function.[135] Minimal disruption and disharmony are foreseeable consequences when an employee reports the improper activities of a supervisor.[136] Also, the School had already been experiencing poor morale and disharmony for at least a year prior to Mekss' telephone call.[137] Therefore, not all disruption and disharmony can be attributed to her call.

Comparing Mekss to the United States Supreme Court Cases

The United States Supreme Court protects whistleblowers in First Amendment cases. *Pickering*, from both the context and the content of the speech, was a whistleblower case and not an employment-dispute case.[138] Therefore, the Court did not give significant weight to the employer's interest. In *Connick*, the Court gave meaningful weight to the employer's interest because the employee's speech arose out of a personal-employment dispute and was not a whistleblower case.[139] The Court looked at the reason for the speech, which was to gather ammunition for the employment dispute, and determined that potential for office disruption outweighed the employee's interest. By contrast, the employee speech in *Rankin* arose outside the employment-dispute context and therefore, the employer was required to show actual disruption caused by the employee speech.[140] In the context of a private conversation, the Court gave more protection to speech which only minimally touched on a matter of public concern.

These cases show that, though significant, context of the speech will not always determine the outcome. Outside the employment-dispute context, if the speech touches on a matter of public concern, the Court will grant the employee's speech significant weight when per-

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132. *Mekss*, 813 P.2d at 199.

133. *Id.*

134. *Id.* at 210-11 (Urbigkit, C.J., dissenting). *See supra* text accompanying note 60 (speech occurring on employee's own time would cause little disruption).

135. *See supra* text accompanying note 72.

136. *See supra* note 107 and accompanying text.

137. *Mekss*, 813 P.2d at 188.

138. Pickering v. Board of Educ., 391 U.S. 563 (1968). *See supra* notes 31-38 and accompanying text (*Pickering* discussed in BACKGROUND section).

139. Connick v. Myers, 461 U.S. 138 (1983). *See supra* text accompanying notes 47-63 (*Connick* discussed in BACKGROUND section).

140. Rankin v. McPherson, 483 U.S. 378 (1987). *See supra* text accompanying notes 65-73 (*Rankin* discussed in BACKGROUND section).

forming the balance. The employer will have to show substantial disruption in the workplace in order for the scales to tip in its favor. Also, if the employee is exposing government mismanagement as a whistleblower, the employer should be required to show the speech was knowingly or recklessly false.

Mekss was a valued employee,[141] having no personal employment dispute with her employer. Nevertheless, the Wyoming Supreme Court inferred that Mekss had a personal motive against either Geisler or the School.[142] Because of this unknown, hidden motive, the court only required that the School show the telephone call had the *potential* to interfere with the School's function.[143] The court gave excessive weight to the School's interests and erroneously upheld the retaliatory termination.

The majority compared the School to a police department to demonstrate how the important goals of discipline and *esprit de corps* could be furthered by a chain-of-command rule.[144] The law-enforcement cases cited by the majority each contained an employment dispute or obvious personal motive.[145] To support its position, the majority also cited non-police department cases. These disputes also arose because of some personal motive.[146] No personal motive was present in *Mekss*.

In *Mekss*, if the Wyoming Supreme Court had recognized the whistleblowing context of the speech, its attention would have been properly focused on the content of the speech. Because there is a high degree of public concern over management of state institutions, focusing on the content in this case would have benefitted both the public and the School. As explained by the dissent, repressing public-employee freedom of speech will only result in improper operation of government institutions in the future because employees will be afraid to speak out.[147] If the court curbs an employee's freedom of speech in

141. Mekss v. Wyoming Girls' Sch., 813 P.2d 185, 187-88 (Wyo. 1991), *cert. denied*, 112 S. Ct. 872 (1992).

142. *Id.* at 198.

143. *Id.* at 199.

144. *Id.* at 195-96, 199.

145. Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405 (8th Cir. 1990) (officer discharged for violating sick leave regulations); Hughes v. Whitmer, 714 F.2d 1407, 1411 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (inter-departmental transfer of two officers because of personal conflicts between them); Huber v. Leis, 704 F. Supp. 131, 133 (S.D. Ohio 1989), *cert. denied*, 493 U.S. 1020 (1990) (written reprimand arose out of a dispute involving the arrest of the employee's son); Perry v. City of Kinlock, 680 F. Supp. 1339, 1340-41 (E. D. Mo. 1988) (officer discharged because of a disputed automobile accident report which arose during normal course of his employment); Warner v. Town of Ocean City, 567 A.2d 160, 166 (Md. Ct. Spec. App. 1989) (officer demoted because of speech which arose when he was passed over for promotion).

146. Hesse v. Board of Educ., 848 F.2d 748, 750 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) (evidence of prior negative employee evaluations was present); Leiphart v. North Carolina Sch. of the Arts, 342 S.E. 2d 914, 917 (N.C. Ct. App. 1986) (employee held a departmental meeting while dean was out of town).

147. *Mekss*, 813 P.2d at 207 (Urbigkit, C.J., dissenting).

one government institution, it will effectively chill expression in all institutions. Employees will understandably remain quiet to protect their jobs.

CONCLUSION

The Wyoming Supreme Court in *Mekss* erroneously applied the sequential, four-part test based upon the United States Supreme Court cases in this area. The Wyoming Supreme Court erred when it did not emphasize Mekss' whistleblower status under the public-concern-threshold element. As a result, the court did not give the letter the highest protection possible under the First Amendment and did not give the letter significant weight when it balanced Mekss' interests in speaking out against those of the School in maintaining an efficient and harmonious workplace. The letter was protected speech and Mekss was impermissibly fired because of it.

Under the court's separate analysis of the telephone call, it erroneously refused to grant Mekss whistleblower status when she made the call questioning the investigation. Mekss had no personal motive in speaking and was merely attempting to expose improper governmental activities. Mekss' interests in speaking deserved maximum protection under the First Amendment. The School, deferentially, was not required to show actual, significant disruption in its operation as a result of the telephone call or that the information relayed to Sherman was knowingly and recklessly false. Because the School listed the call as a specific reason for its decision, Mekss met her burden in proving that the telephone call was a substantial factor in her termination.

After *Mekss*, public employees will not risk exposing the mismanagement of state institutions out of fear of employer retaliation. Because Wyoming courts have been slow to recognize whistleblower status and to protect freedom of speech in these situations, fewer employees will come forward. Ultimately, it is the people of Wyoming who suffer because of the loss of this informed, collective voice.

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