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Refining the Tenth Circuit's Stance on Employee Rights: The ADA, Free Speech in the Workplace, and the Fair Labor Standards Act

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REFINING THE TENTH CIRCUIT'S STANCE ON EMPLOYEE RIGHTS: THE ADA, FREE SPEECH IN THE WORKPLACE, AND THE FAIR LABOR STANDARDS ACT

INTRODUCTION

Employment law is an area in which many lawyers and non-lawyers alike have experience. After all, most adults have either been employed or employ others. The issue underlying many employment cases seems to be the struggle to balance the employee's right to be treated fairly and with dignity in the workplace, and the employer's need to maintain an efficient, profitable business. This tension has formed a large and diverse body of caselaw ranging from topics such as wages to sexual harassment.

This article focuses on United States Court of Appeals for the Tenth Circuit decisions in employment law from September, 2000 through August, 2001. Employment law encompasses many different topics, and it is not possible to discuss all the cases decided in the Tenth Circuit in this writing. Therefore, this paper examines some of the more significant cases decided in three common areas of employment law. Part I discusses the American Disabilities Act's requirement for reasonable accommodation. Part II discusses free speech rights in the workplace, and Part III examines the Fair Labor Standards Act.

I. ADA- REASONABLE ACCOMMODATION

A. *Background*

The Americans with Disabilities Act of 1990[1] ("Act" or "ADA") provides that private employers may not discriminate against qualified individuals with disabilities and must accommodate workers who qualify for accommodation.[2] As part of this mandate, some courts, including the Tenth Circuit, have held that the Act requires employers to consider reassignment into other available positions when a disabled employee cannot perform the functions of his position.[3] Until now, however, neither the Act nor the Tenth Circuit have provided guidance as to the time frame during which the employer must consider reassignment.[4]

The "EEOC [Equal Employment Opportunity Commission] guidelines and previous case law show that a 'reasonable accommodation' may include reassigning the disabled employee to a different, vacant

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1. 42 U.S.C. §§ 12101, *et seq.* (2001).

2. *See* Christopher J. Murray & John E. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQUETTE L. REV. 721, 722 (2000).

3. *See* Murray & Murray, *supra* note 2, at 722 (citing 42 U.S.C. § 12111(9)(B) (2001)).

4. *See* Murray & Murray, *supra* note 2, at 731.

position for which he is qualified."[5] The Tenth Circuit in *Smith v. Midland Brake, Inc.*,[6] set forth the criteria for determining an employer's accommodation requirements if the employee has requested reassignment to a vacant position.[7] In *Smith*, the court held that "[i]f no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require assignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer."[8] In order to withstand a motion for summary judgment by the employer, the employee must be able to show the following:

> (1) The employee is disabled within the meaning of the ADA and has made any resulting limitations from his or her disability known to the employer;
>
> (2) The preferred option of accommodation within the employee's existing job cannot reasonably be accomplished;
>
> (3) The employee requested the employer reasonably to accommodate his or her disability by reassignment to a vacant position, which the employee may identify at the outset or which the employee may request the employer identify through an interactive process, in which the employee in good faith was willing to, or did, cooperate;
>
> (4) The employee was qualified, with or without reasonable accommodation, to perform one or more appropriate vacant jobs within the company that the employee must, at the time of summary judgment proceeding, specifically identify and show were available within the company at or about the time the request for reassignment was made; and
>
> (5) The employee suffered injury because the employer did not offer to reassign the employee to any appropriate vacant position.[9]

Some critics have argued that this rule is unclear because it does not tell an employer how long he or she must seek a position for which the

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5. *Tenth Circuit Opines on ADA 'Reasonable Accommodations,'* UTAH EMP. L. LETTER (Wood Crapo, L.L.C.), June 2001, at 4.

6. 180 F.3d 1154 (10th Cir. 1999).

7. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

8. *Smith*, 180 F.3d at 1169.

9. *Id.* at 1179.

employee is qualified as a reasonable accommodation.[10] Note that the fourth factor only states the employee must show a position was available "at or about the time" of the request for reassignment.[11] The *Smith* court specified only that the term "vacant position . . . includes positions that the employer reasonably anticipates will become vacant in the fairly immediate future."[12] In *Boykin v. ATC/VanCom,*[13] the Tenth Circuit attempted to narrow the timeframe within which employers must reassign an employee to a vacant position.[14]

B. *Boykin v. ATC/VanCom*[15],

Fred L. Boykin ("Boykin") brought suit in Denver County District Court against his former employer, ATC/VanCom of Colorado, L.P. ("VanCom"), claiming that VanCom violated certain sections of the Americans with Disabilities Act ("ADA").[16] After VanCom removed the case to federal court, Boykin appealed the ruling of the federal court granting VanCom summary judgment.[17] The Tenth Circuit affirmed the ruling of the district court.[18]

1. Facts

VanCom hired Boykin as a part-time bus driver in 1997.[19] Boykin suffered from transient ischemic attacks ("TIA"), also known as mini-strokes.[20] While working for VanCom, Boykin suffered three TIAs, one occurring while Boykin was driving a VanCom bus.[21] As a result of Boykin's attack while driving the bus, VanCom required Boykin to undergo an examination by a doctor hired by VanCom.[22] The physician revoked the medical certification Boykin needed for commercial driving for one year, which would be reinstated if Boykin did not suffer any TIAs during that year and was then cleared by a neurologist at the end of the year.[23]

Boykin asked VanCom to accommodate his disability by reassigning him to a dispatch operator or data-entry position.[24] VanCom responded that neither position was available and offered Boykin a bus

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10. *See, e.g., Reassignment Obligation Doesn't Last Forever*, WYO. EMP. L. LETTER (Holland & Hart), May 2001, at 7.
11. *Smith*, 180 F.3d at 1179.
12. *Id.* at 1175.
13. 247 F.3d 1061 (10th Cir. 2001).
14. *See Boykin*, 247 F.3d at 1063.
15. *Id.*
16. *See id.*
17. *See id.*
18. *Id.* at 1066.
19. *See id.* at 1062.
20. *See Boykin*, 247 F.3d at 1062.
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*

cleaner position.[25] Boykin could not accept the position VanCom offered because it conflicted with his schedule as a full-time college student.[26] Boykin was subsequently terminated.[27]

Six months later, new positions became available at VanCom because of a contract into which VanCom had entered with the Regional Transportation District (RTD).[28] The positions included an opening for a dispatch operator.[29] VanCom notified Boykin of the available positions but added that Boykin would need to apply for the position.[30] Boykin did apply and was interviewed, but was not hired.[31]

Boykin sued VanCom for failing to comply with the ADA, contending that VanCom should have assigned him to the dispatch operator position when it became available instead of requiring him to apply for the position along with other candidates.[32] Boykin also alleged that under the ADA, VanCom was required to place him in the position as a reasonable accommodation of Boykin's disability even though he was terminated six months before the position became available.[33] Further, Boykin asserted that VanCom did not comply with the ADA when it offered the bus cleaner position to Boykin because VanCom knew that the position posed a schedule conflict with his school schedule.[34] Finally, Boykin claimed that VanCom violated the ADA by failing to "enter into the good-faith interactive process required by the ADA."[35]

The district court granted VanCom's motion for summary judgment on the basis that VanCom did comply with the ADA in offering Boykin the bus cleaner position.[36] In addition, the court ruled that VanCom was not required to offer Boykin the dispatch operator "position six months after Boykin's termination."[37]

2. Decision

The Tenth Circuit addressed Boykin's claim that VanCom violated the ADA by failing "to offer Mr. Boykin a reasonable accommodation for the period during which he was disabled from driving a passenger

25. *See id.*
26. *See Boykin*, 247 F.3d at 1062
27. *See id.*
28. *See id.* at *1063.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See Boykin*, 247 F.3d at 1063.
33. *See id.*
34. *See id.*
35. *Id.*
36. *See id.*
37. *Id.*

bus."[38] Boykin argued that VanCom should have placed him on indefinite leave until a suitable position became available, because VanCom had knowledge that positions would become available due to the pending contract with RTD.[39] The court did not accept this argument because: (1) six months is not a reasonable amount of time within which an employer must reassign an employee; and (2) VanCom was not required to accommodate Boykin's personal schedule conflict with the bus cleaner position, as the failure to accommodate constituted "discrimination on other bases" not covered by the ADA.[40]

The court first discussed Boykin's contention that VanCom should have placed him in a position after six months.[41] The court found that, under the ADA, a reasonable accommodation by an employer "may include reassignment to a vacant position for which the employee is qualified."[42] This reassignment might also include positions that are not vacant at the present time, but "also includes positions that the employer reasonably anticipates will become vacant in the fairly immediate future."[43]

The court held that "[e]mployers should reassign an employee to a position if it becomes 'vacant within a reasonable amount of time.'"[44] To determine a reasonable amount of time, the court must decide on a "case-by-case basis and [it] is to be determined in light of the totality of the circumstances."[45] Here, the court held that VanCom did not violate the ADA by failing to reassign Boykin six months after he was terminated, nor was VanCom required to place Boykin on indefinite leave for an "excessive amount of time" until a position became available.[46] However, the court wrote that an employer is obligated to reassign an employee at 37 days.[47]

Second, the court discussed Boykin's argument that when VanCom offered him the bus cleaner position, it violated the ADA because VanCom knew that the job conflicted with his school schedule.[48] The court wrote that "the ADA forbids discrimination against a qualified individual because of the disability, not 'discrimination on other bases.'"[49] Further, the court held that "the ADA 'does not require an employer to make accommodation for an impairment that is not a disability within the mean-

38. *Boykin*, 247 F.3d at 1064.
39. *Id.*
40. *Id* at 1065 (quoting Buckley v. Consol Edison Co., 155 F.3d 150, 156 (2d Cir. 1998)).
41. *Id.* at 1064.
42. *Id.*
43. *Id.* (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999)).
44. *Boykin*, 247 F.3d. at 1065 (quoting Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2d Cir. 1998)).
45. *Id.*at 1064 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(o) (2000)).
46. *Id.* at 1065.
47. *See id.* (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996)).
48. *Id.* at 1065.
49. *Id.* (quoting Buckley v. Consol. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2d Cir. 1998).

ing of the Act or that does not result from such a disability.'"[50] In sum, even though Boykin's TIA fell within the meaning of the ADA, VanCom did not have to accommodate his schedule when considering possible reassignment.

C. *Other Circuits*

1. Sixth Circuit

In *Monette v. Elec. Data Sys. Corp.*[51] the Sixth Circuit established that an employer must reassign a disabled employee to a vacant position that will become available in a short amount of time.[52]

Monette was a customer service representative for the defendant, Electronic Data Systems Corporation.[53] He was injured at work when some heavy equipment fell on him.[54] After returning to work from medical leave related to his disability, Monette was placed on unpaid medical leave for thirty-seven days until a position could be located.[55] After that time, the defendant terminated Monette, concluding that it could not reassign Monette to any other positions within the company.[56] Monette sued the defendant pursuant to the ADA and provisions of the Michigan Handicappers' Civil Rights Act.[57] Monette proposed that he be placed on indefinite unpaid medical leave until a position became available.[58]

The Sixth Circuit held that the defendant was not required to place a disabled employee on indefinite unpaid medical leave until a vacant position arose.[59] However, the Court stated in dicta that "[i]f, perhaps, an employer knows that a position for which the disabled applicant is qualified will become vacant in a short period of time, the employer may be required to offer the position to the employee."[60]

The Sixth Circuit further found in *Hoskins v. Oakland County Sheriff's Dept*[61] that an employer was required to reassign an employee if a position became available "within a reasonable amount of time," but the

50. *Id.* at 1066 (quoting Buckley v. Consol. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2d Cir. 1998); *cf.* 29 C.F.R. pt. 1630, App. § 1630.9 (2000)).
51. 90 F.3d 1173 (6th Cir. 1996).
52. *See Monette*, 90 F.3d at 1173.
53. *See id.* at 1176.
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See Monette*, 90 F.3d at 1187.
59. *Id.*
60. *Id.*
61. Hoskins v. Oakland County Sheriff's Dept., 227 F.3d 719 (6th Cir. 2000).

particular employer in that case was not required to assign an employee to a position one year after the employee's disability was disclosed.[62]

2. Eighth Circuit

In *Cravens v. Blue Cross and Blue Shield of Kansas City,*[63] the Eighth Circuit followed the rule articulated in *Monette* by stating that a reasonable accommodation can include reassigning the disabled employee to a vacant position.[64] This vacant position may include not only vacant positions at the time of the reassignment request, but also those that will become available "in a short period of time."[65]

D. *Analysis*

The importance of *Boykin* comes from its narrowing of the timeframe during which employers must consider reassigning a disabled employee to a vacant position if a suitable position is not available at the time of the request.[66] Even though the Tenth Circuit did not provide a bright-line rule and instead opted for a "case-by-case" approach, employees seeking accommodation and employers attempting to accommodate have a clearer picture of what vacant positions must be included in the accommodation search.[67] Now, in the Tenth Circuit, six months is generally too long to require an employer to reassign an employee to a position that has become available.[68] In addition, an employer is not required to place an employee on unpaid medical leave until a vacant position becomes available.[69]

However, *Boykin* illustrates the idea that an employer must also widen the scope of the meaning of "vacant" to include positions that an employer believes may become available in the next few months.[70] If the employer fails to consider a position that may become available in the next six months, the employer may be liable under the ADA for failure to accommodate.[71]

Another important aspect of *Boykin* is that it parallels with the holdings of the Second Circuit when it states that "[t]he ADA does not require an employer to make accommodation for an impairment that is

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62. *Hoskins*, 227 F.3d at 729.

63. 214 F.3d 1011 (8th Cir. 2000).

64. *Cravens*, 214 F.3d at 1019 (discussing the decision in Monette v. Elec. Data Sys. Corp. 90 F.3d 1173, 1187 (6th Cir. 1996)).

65. *Id.*

66. *See Boykin v. ATC/VanCom*, 247 F.3d 1061 (10th Cir. 2001).

67. *See Boykin*, 247 F.3d at 1065.

68. *See id.*

69. *Id.*

70. *See Indefinite Leave not Required as ADA Accommodation*, N. M. EMP. L. LETTER (Hinkle, Hensley, Shanor & Martin, LLP), Aug. 2001, at 1.

71. *See* Christopher M. Leh, *Reassignment Six Months After Termination not Required Under ADA*, COLO. EMP. L. LETTER, June 2001, at 1.

not a disability within the meaning of the Act or does not result from such a disability."[72] This principle will defeat an argument, such as that made by Boykin, that an accommodation offered by a company might be unreasonable if it conflicts with the plaintiff's schedule.[73]

II. FREE SPEECH RETALIATION CLAIMS

A. *Background*

Public employees have a limited right to free speech in the workplace.[74] Freedom of speech for public employees has evolved through cases that consider the issue of freedom of public employees to associate, and more specifically, public employees who were required to take loyalty oaths.[75] The Supreme Court wrote that "the right to speak on matters of public concern must be wholly free or eventually be wholly lost."[76] While the loyalty oath cases protected a public employee's right to free association and speech, little guidance was offered by the Supreme Court to employers as to the extent of the employee's freedom of speech.[77]

1. The *Pickering* Balancing Test

It was not until *Pickering v. Board of Education*[78] that the United States Supreme Court set forth criteria to help determine the scope of a public employee's right to free speech.[79] The Supreme Court devised a test in order to strike a "balance between the first amendment rights of public employees and the proper exercise of managerial authority by state employers."[80] As citizens, public employees should be able to comment on matters of public concern, while still allowing the State to efficiently provide services to the people.[81] Thus, an employee can only win his or her case against an employer if his or her speech is shown to regard a matter of public concern.[82]

In *Pickering*, the first factor in the balancing test was to consider the working relationship between the parties.[83] "[A] close working relation-

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72. Boykin v. ATC/VanCom, 247 F.3d 1061, 1066 (10th Cir. 2001) (quoting Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2nd Cir. 1998)).

73. *See Boykin*, 247 F.3d at 1065-66.

74. Stephen Allred, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429, 429-30 (1984).

75. *See id.* at 433.

76. Wiemann v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring).

77. Allred, *supra* note 74, at 437.

78. 391 U.S. 563 (1968).

79. *See* Allred, *supra* note 74, at 437.

80. *Id.* at 438.

81. *See id.* at 430.

82. *See* Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (And Vice Versa)*, 35 GA. L. REV. 939, 941 (2001).

83. *See* Allred, *supra* note 74, at 438.

ship between the employee and the managers who are the subjects of the employee's criticism could tip the balance in favor of the employer's right to limit free speech."[84] Second, the Court examined whether the speech had a detrimental effect on the employer.[85] Specifically, this factor looked at whether the "public agency could continue to accomplish its mission in light of the employee's statements on a matter of public concern."[86] The third factor was the employee's relationship to the issue and the nature of the issue that was the subject of the employee's speech.[87] If the employee had expertise related to the issue, the speech was more likely to be protected because the employee made a "valuable contribution to public understanding" of the issue.[88]

2. Matters of Public Concern

It then became important to distinguish what exactly was "a matter of public concern."[89] In *Connick v. Myers*,[90] the United States Supreme Court held that if the employee's speech did not constitute a matter of public concern, the speech was not protected, and no balancing test was needed.[91] Also in *Connick*, the Supreme Court held that the expressive activities of an Assistant District Attorney who circulated a questionnaire about office morale and management practices did not touch upon a matter of public concern.[92] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the speech, and that speech must relate to some matter of political, social, or other concern to the community."[93] After *Connick*, "[w]hen the employee's speech is about narrow issues relating to the internal management of the agency, lower courts tend to characterize it as a personal grievance or as part of performing the job itself, rather than as involving a matter of public concern."[94]

The Tenth Circuit uses a modified *Pickering/Connick* test in order to evaluate a party's First Amendment retaliation claim.[95] First, the court examines "whether the employee's speech involves a matter of public concern."[96] If the speech does involve a matter of public concern, then

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84. *Id.* at 439.
85. *See id.*
86. *Id.*
87. *See id.* at 440.
88. *Id.*
89. *See* Allred, *supra* note 74, at 438.
90. 461 U.S. 138 (1983).
91. *See* Allred, *supra* note 74, at 432.
92. *See id.* at 431-32.
93. Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999) (quoting Connick v. Myers, 461 U.S. 138, 146-47 (1983).
94. Wells, *supra* note 82, at 953.
95. *See* Dill v. City of Edmund, 155 F.3d 1193, 1201 (10th Cir. 1998).
96. Finn v. New Mexico, 249 F.3d 1241, 1247 (10th Cir. 2001) (quoting Dill v. City of Edmund, 155 F.3d 1193, 1201 (10th Cir. 1998).

the court must balance "the employee's interest in commenting upon matters of public concern 'against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[97] Third, if the balancing test favors the employee, the employee must then demonstrate "that the speech was a 'substantial factor or a motivating factor in the detrimental employment decision.'"[98] Finally, if the speech is proven to be a factor, then the employer may show that "it would have taken the same action against the employee" despite the occurrence of the protected speech.[99]

The Tenth Circuit used the hybrid *Pickering/Connick* analysis in the following two cases discussed below: *Finn v. New Mexico*,[100] and *Ballard v. Muskogee Regional Medical Center*.[101]

B. *Finn v. New Mexico*[102]

1. Facts

John Finn had been an employee of the New Mexico State Highway and Transportation Department ("Department") beginning in 1974.[103] In 1995, a new administration announced the reorganization of the department, which resulted in Finn's demotion and transfer to a different division.[104] Finn argued this decision was illegal because the Department acted without the approval of the New Mexico State Personnel Office.[105]

Once Finn was officially notified that he would be demoted and transferred to another division within the department, he began sending Intra-Department Correspondence ("IDC") memorandums to the new upper management.[106] The first IDC contained assertions by Finn that the management was abusing its power and "attempting to 'crucify'" Finn.[107] After this first correspondence, Finn left for medical reasons, and upon his return to work he was notified that he was again demoted.[108]

Finn then sent an IDC to the new upper management along with over thirty-five other agencies and individuals, criticizing the reorganization of the Department.[109] This IDC contained statements that the "De-

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97. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1201).
98. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1202).
99. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1202).
100. *Id.*
101. 238 F.3d 1250 (10th Cir. 2001).
102. 249 F.3d 1241 (10th Cir. 2001).
103. *See Finn*, 249 F.3d at 1244.
104. *See id.*
105. *See id.*
106. *See id.* at 1244-45.
107. *Id.* at 1245.
108. *See id.*
109. *See Finn*, 249 F.3d at 1245.

partment's use of the phrase 'Equal Opportunity Employer' was a 'sick joke.'"[110] Finn also claimed that the department reorganization was the result of favoritism, and that Roybal, the new Deputy Secretary, was unqualified for his position.[111] Finn added personal attacks against Roybal as well.[112]

During the next two weeks, Finn sent two more IDCs with similar content.[113] Finn was then given notice that disciplinary action could ensue if he did not cease his acts which were considered to be "detract[ing] from . . . maintaining a positive work environment."[114] Finn disregarded the warning and sent another IDC to several individuals and agencies that made, among other things, statements accusing Roybal of engaging in an adulterous affair with a married employee, and promoting the employee after the employee's marriage ended.[115] Finn was terminated after this IDC.[116]

Finn then filed suit in the district court, alleging that the defendants infringed upon his right of free speech.[117] The defendants filed a motion for summary judgment, arguing that Finn's speech was unprotected by the First Amendment because it "was not a matter of public concern and that defendants' interest in regulating such speech outweighed plaintiff's interest in engaging in the speech."[118] Rahn, an individual defendant, also filed a motion for summary judgment on the basis that he had qualified immunity against Finn's claims.[119] The district court denied both motions and Rahn appealed to the Tenth Circuit.[120]

2. Decision

The Tenth Circuit affirmed the district court's ruling.[121] The court assessed Finn's First Amendment retaliation claim using the four-part test applied in Dill v. City of Edmond, another Tenth Circuit case.[122] The court concluded that only the first two parts of the test needed to be addressed in that case.[123] First, to determine whether a government employee's speech is protected, the court had to decide "whether the em-

110. *Id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *Id.* at 1246.
115. *See Finn*, 249 F.3d at 1246.
116. *See id.*
117. *See id.*
118. *Id.*
119. *See id.*
120. *See id.*
121. *Finn*, 249 F.3d at 1249.
122. *See id.* at 1247. *See also* Dill v. City of Edmond, 155 F.3d 1193, 1201-02 (10th Cir. 1998).
123. *See Finn*, 249 F.3d at 1247.

ployee has spoken 'as a citizen upon matters of public concern' or merely 'as an employee upon matters only of personal interest.'"[124]

> While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, "speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns the vital public interests." In making this determination, we consider the "content, form and context of a given statement, as revealed by the whole record."[125]

The main issue was that while portions of Finn's speech did constitute matters of public concern, much of the content of the IDCs was of personal interest to Finn.[126] The defendants argued on appeal that the district court erred when it failed to consider the speech in its entirety and instead made its decision by "picking and choosing" certain parts of the speech as protected.[127] The Tenth Circuit rejected this argument, holding that Finn satisfied the first part of the test, because limited portions of Finn's speech did "touch on matters of public concern."[128] However, the court noted that a mere "tidbit" of speech that touched on matters of public concern would limit the employee's interest in the speech.[129] In sum, enough of Finn's speech touched upon matters of public concern to protect it.[130]

Next, the court applied the second part of the *Pickering* analysis.[131] This is a balancing inquiry, weighing the "employee's interest in commenting upon matters of public concern 'against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[132] To evaluate the employer's interest, the court considered "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[133] Because the court did not find any evidence that the speech caused disruption, there was no state

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124. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

125. *Finn*, 249 F.3d at 1247 (quoting Conaway v. Smith, 853 F.2d 789, 797 (10th Cir. 1988)); Connick v. Myers, 461 U.S. 138, 147-48 (1983).

126. *See Finn*, 249 F.3d at 1247-48.

127. *Id.* at 1248.

128. *Id.*

129. *Id.* at 1249.

130. *Id.* at 1248.

131. *Id.* at 1249.

132. *Finn*, 249 F.3d at 1248. (quoting Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998)).

133. *Id.* at 1249. (quoting Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

interest to prohibit Finn's speech, and thus the First Amendment protected the speech.[134]

Overall, the court has reached many different outcomes using the same standard. For example, here, the court found Finn's speech to be protected by the First Amendment, whereas in the case of *Ballard v. Muskogee Reg'l Med. Ctr.*,[135] the court found that the First Amendment afforded no such protection.

C. *Ballard v. Muskogee Regional Medical Center*[136]

1. Facts

Ballard was employed as a psychological technician at the Muskogee Regional Medical Center ("Medical Center") and sued after she was terminated.[137] Ballard alleged that she was wrongfully terminated after she notified the County Health Department that a patient was in poor condition.[138] The Medical Center argued that Ballard's work performance was the reason for her termination.[139] The Medical Center explained that Ballard had encouraged "a known suicidal patient to jump out of a window," and misrepresented herself as a nurse.[140]

The jury had found that Ballard was wrongfully terminated on the basis of free speech retaliation, but also that she would have been terminated for reasons other than her speech.[141]

2. Decision

The Tenth Circuit reversed the district court's holding, ruling that a jury cannot award damages for the plaintiff if the jury also finds that the defendant had legitimate grounds upon which to terminate the plaintiff.[142] Using the *Pickering* analysis, the court held that the employer's liability was relieved if it could show that it terminated the employee for reasons other than the exercise of speech.[143] Thus, the employer satisfied the fourth part of the test, despite the lower court's ruling that the other reasons did not "negate the constitutional violation which occurred, and according to the Civil Rights Act of 1991, ... merely affects the Plaintiff's damages."[144] In conclusion, the court found that there were other

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134. *See id.*
135. 238 F.3d 1250 (10th Cir. 2001).
136. 238 F.3d 1250 (10th Cir. 2001)
137. *See Ballard*, 238 F.3d at 1252.
138. *See id.*
139. *See id.*
140. *Id.*
141. *See id.*
142. *See id.* at 1253.
143. *See Ballard*, 238 F.3d at 1253.
144. *Id.*

substantial reasons for the Plaintiff's termination, which negated any argument that she was terminated because of her speech.[145]

D. *Other Circuits*

1. Seventh Circuit

The Seventh Circuit reached a different outcome using the *Pickering/Connick* analysis. For example, in *Khuans v. Sch. Dist.*,[146] Khuans, a schoolteacher, was terminated after speaking to the principal about her problems with a fellow employee.[147] Khuans told the school's principal that the other employee often could not be found at school during the school day, and that she had problems communicating with the employee.[148] After complaining, the Assistant Administrator informed Khuans that she would be replaced.[149] The district court denied the superintendent's claim of immunity, and he appealed to the Seventh Circuit.[150]

The Seventh Circuit rejected Khuans' claim of retaliation because even though she did speak upon matters of public concern, she also spoke about matters that were not relevant to the public.[151] For instance, while Khuans informed school officials that the employee failed to follow mandates pursuant to the Individuals with Disabilities Education Act, the court characterized Khuans' comments about the employee's inability to communicate as not a matter of public concern.[152] The Court further wrote that the district court erred when it held that there was a constitutional violation because "one item of speech was protected."[153] Because Khuans' speech was more private than public, it was not protected by the First Amendment.[154]

Further, the court held that even if Khuans' speech was a matter of public concern, the speech must be weighed against the "actual and potential disruption caused by her remarks."[155] The court opined that Khuans' speech was shown to be disruptive by interfering with staff relationships, challenging authority, and causing meetings to be held which

145. *Id.*
146. 123 F.3d 1010 (7th Cir. 1997).
147. *See Khuans*, 123 F.3d at 1012.
148. *See id.*
149. *See id.*
150. *See id.* at 1013.
151. *See id.* at 1016-17.
152. *See id.*
153. *Khuans*, 123 F.3d at 1017.
154. *See id.*
155. *Id.*

were not part of the daily operations of the school.[156] In light of these factors, Khuans' speech was not protected.[157]

2. Eighth Circuit

The Eighth Circuit, in *Buazard v. Meridith,*[158] used the *Pickering* analysis, and held that a police officer's speech about personnel issues was not protected.[159] The court in *Buazard* held that "when a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern."[160] This is distinguishable from *Finn* in that under the *Buazard* holding, Finn's speech about management practices would not have been a matter of public concern, and thus not protected.

E. *Analysis*

Finn and other cases cited above illustrate the diverse outcomes reached through use of the same test. The Seventh and Eighth Circuits place the line between protected and unprotected speech in different places.[161] The Tenth Circuit's holding in *Finn* seems to be more favorable to employees because it protects speech that other circuits would not; namely, speech that is job-related.[162] In addition, the Tenth Circuit overlooked the fact that much of Finn's speech was directed toward individual supervisors, and not public issues.[163] Comparing *Finn* with the cases cited from other circuits, *Finn* markedly departs from the usual outcome of First Amendment speech retaliation cases brought by public employees.[164] Finn's speech was inflammatory and personal as compared with the speech denied protection in *Khuans*, yet Finn's speech was given First Amendment protection by the Tenth Circuit.[165] Further, both employees spoke about matters of private and public concern, but the speech that was protected by the Tenth Circuit was delivered in a way that seemed less disruptive to the workplace.[166]

The vast difference in outcomes is illustrative of the wide discretion of the lower court judges in applying the *Pickering/Connick* test.[167] The *Pickering* progeny use three values to decide legal outcomes of a variety of fact patterns: (1) efficiency of government services; (2) allowing em-

156. *See id.*
157. *See id.* at 1018.
158. 172 F.3d 546, 548 (8th Cir. 1999).
159. *See Buazard*, 172 F.3d at 548.
160. *Id.*
161. *See Khuans*, 123 F.3d 1017-18; *Buazard*, 172 F.3d at 548.
162. *See Finn*, 249 F.3d at 1249.
163. *See id.*
164. *Compare* Finn v. New Mexico, 249 F.3d 249 F.3d 1241 (10th Cir. 2001), *with* Khuans v. Sch. Dist., 123 F.3d 1010 (7th Cir. 1997), *and* Buazard v. Meridith, 172 F.3d 546 (8th Cir. 1999).
165. *See Finn*, 249 F.3d.at 1245-46; *See also Khuans*, 123 F.3d at 1012-13.
166. *See Finn*, 249 F.3d at 1249.
167. *See* Wells, *supra* note 82, at 960-61.

ployees to speak on matters of public concern; and (3) government's diminished interest in the speech if its relation to the workplace is low.[168] Even though the values are the same, courts focus on different parts of the analysis to decide whether the speech should be protected; some focus on aspects such as the "internal-external" aspect of the person's speech, while other courts place more emphasis on whether the speech was disruptive to the workplace.[169]

Such diversity in the area of public employee speech cases mirrors the sentiments by writers on the topic. Those that encourage public employee speech protection feel that the courts have not gone far enough to guard employees from retaliation, noting that courts should not focus on disruption or the "virtue of obedience."[170] Others assert that limiting the First Amendment speech rights of public employees fosters efficiency and a harmonious workplace.[171]

The wide range of outcomes and opinions concerning public employee speech protection may signal that a narrower test or standard is more desirable. On the other hand, the flexible *Pickering/Connick* analysis may be well suited to meet the needs of both management and employees in different government workplaces.

III. FAIR LABOR STANDARDS ACT

A. *Background*

The Fair Labor Standards Act ("FLSA") requires employers to pay any qualified employee under the FLSA minimum wage for the hours the employee worked, and must generally pay overtime for hours worked over forty hours per week.[172] Therefore, the definition of "work" becomes key to the issue of on-call time because if the definition of work only includes the time spent responding to the call, an employee will not be compensated for any time spent on-call and restricted from engaging in personal activities.[173] Compensation for on-call time is becoming a more prominent issue in the courts due to the tendency of employers to use employees more efficiently through the use of on-call time.[174]

The United States Supreme Court resolved a conflict in the lower courts in 1944 when it decided two cases on the same day: *Armour & Co. v. Wantock*,[175] and *Skidmore v. Swift & Co.*,[176] In these cases, fire-

168. *See id.* at 991.
169. *See id.* at 965-67.
170. *See id.* at 942.
171. *See id.*
172. *See* Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1132 (10th Cir. 2000).
173. *See* Eric Phillips, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2634 (1997).
174. *See* Phillips, *supra* note 173, at 2647.
175. 323 U.S. 126 (1944).

fighters sued for compensation for the time they were required to remain at the station, waiting for a call, yet were idle while waiting.[177] The Supreme Court held in both cases that the plaintiffs were entitled to compensation.[178] Framing the issue as whether the employee's "time is spent predominantly for the employer's benefit or for the employee's," the Supreme Court opined that the answer depended on "all the circumstances of the case."[179] The Court wrote that such circumstances as the "agreement between the parties, the nature and extent of the restrictions, [and] the relationship between the services rendered and the on-call time" should be examined.[180]

In the Tenth Circuit, most decisions have held that on-call time was not compensable. In *Norton v. Worthen Van Service, Inc.*,[181] the Tenth Circuit held that van drivers were not eligible for compensation for on-call time because the employees had opportunities in between calls to engage in personal activities, such as exercise, do laundry, visit friends, and go to restaurants.[182] Therefore, the restriction on personal activities was not enough to be considered predominantly for the employer's benefit.[183] Similarly, in *Armitage v. City of Emporia*,[184] the Tenth Circuit decided that an employee who is "merely required to leave word at his home or with company officials where he may be reached is not working while on call."[185]

However, the Tenth Circuit held that on-call time was compensable in *Renfro v. City of Emporia*.[186] Firefighters for the city were not required to remain on the station premises while on call but were required to report back to the station within twenty minutes of receiving a callback.[187] In addition, the firefighters received a large number of calls while on call.[188] The firefighters argued that the restrictions were so severe that the employees could not be with their children alone without a caretaker on call, could not go to dinner or a movie, could not work on their cars, nor participate in activities with groups of people for fear that they would be called.[189] The court held that the callbacks were so frequent that the fire-

176. 323 U.S. 134 (1944).

177. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 135-36 (1944); *Armour v. Wantock*, 323 U.S. 126, 127 (1944).

178. *See Skidmore*, 323 U.S. at 140; *Armour*, 323 U.S. at 134.

179. *Armour*, 323 U.S. at 133.

180. Andrews v. Town of Skiatook, 123 F.3d 1327, 1330 (10th Cir. 1997) (citing *Skidmore*, 323 U.S. 134).

181. 839 F.2d 653 (10th Cir. 1988).

182. *See Norton*, 839 F.2d at 655-56.

183. *See id.* at 656.

184. 982 F.2d 430 (10th Cir. 1992).

185. *Armitage*, 982 F.2d at 432.

186. 948 F.2d 1529 (10th Cir. 1991).

187. *See Renfro*, 948 F.2d at 1531.

188. *See id.* at 1532.

189. *See id.*

fighter was not able to use the on-call time "for his own benefit."[190] This case is one of the rare cases holding for the employee in on-call compensation disputes.[191]

B. *Tenth Circuit Decisions*

1. *Pabst v. Okla. Gas & Elec. Co.*[192]

a. Facts

Kathy Pabst, James Gilley, and Steve Barton were employed at Oklahoma Gas & Electric Company ("OG&E") as Electronic Technicians.[193] Their duties consisted of "monitor[ing] automated heat, fire, and security systems" in OG&E buildings.[194]

The plaintiffs were required to be on call from 4:30 p.m. until 7:30 a.m. and twenty-four hours a day on weekends.[195] If one of the plaintiffs received a call, they were to respond within ten minutes.[196] This was until 1996, when the response time was changed to fifteen minutes.[197] If the plaintiffs failed to respond to the call within the allotted time, it was grounds for discipline.[198] The plaintiffs were required to carry a pager to receive calls.[199] These pagers were not effective all the time, so the plaintiffs had to stay at home to receive calls either on their home telephones or via their laptop computers.[200] The plaintiffs received around three to five calls a night, not including calls for other issues.[201] On average, a response took forty-five minutes.[202]

The plaintiffs claimed they were instructed by their supervisor only to report on-call time during which they responded to an alarm.[203] The plaintiffs were paid one hour for each call answered, and two hours if the plaintiffs had to go to an OG&E facility to correct the problem.[204] The plaintiffs did not report all of the calls answered, nor did they report as overtime the remainder of the time on call.[205]

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190. *Id.* at 1538.
191. *See id.*
192. 228 F.3d 1128 (10th Cir. 2000).
193. *See Pabst*, 228 F.3d at 1131.
194. *Id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.*
199. *See Pabst*, 228 F.3d at 1131.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See Pabst*, 228 F.3d at 1131.

The plaintiffs argued that the on-call procedure significantly interfered with their personal lives.[206] The plaintiffs claimed that the calls at night substantially interrupted their sleep.[207] In addition, the plaintiffs were seldom able to leave their homes while on call because of the fear that they might miss an alarm.[208]

The district court found that all the on-call time was compensable under the Fair Labor Standards Act ("FLSA").[209] Accordingly, the court awarded the plaintiffs compensation for fifteen hours per weekday and twenty-four hours each Saturday and Sunday, minus any hours already paid by the company.[210]

b. Decision

OG&E appealed the judgment against them for prejudgment interest, damages and liability.[211] The plaintiffs appealed the ruling of the district court denying the plaintiffs' claim of liquidated damages based on the district court's finding of no willful violation.[212] The Tenth Circuit reviewed the FLSA requirement that an employer pay "a minimum wage for each hour it 'employs' an employee, as well as an overtime premium for hours in excess of forty per week."[213] The court then framed the issue as whether "on-call time is 'work' for purposes of the statute."[214] To determine whether on-call time can be classified as work, the court used the *Armour/Skidmore* inquiry of whether the "on-call time is spent predominantly for the benefit of the employer or the employee."[215] The court said that this issue could also be put in terms of whether the "employee is 'engaged to wait' or 'waiting to be engaged.'"[216] The court's analysis into whether the plaintiff's on-call time was compensable included such criteria as: "number of calls, required response time, and ability to engage in personal pursuits while on call."[217] This assessment is "highly individualized and fact-based."[218]

Here, the court held that the plaintiffs' on-call time was compensable, comparing the plaintiff's situation with that of *Renfro v. City of Emporia*,[219] which was the only case cited by the court that compensated the

206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.*
210. *See id.* at 1131-32.
211. *See Pabst*, 228 F.3d at 1132.
212. *See id.*
213. *Id.* (citing the definition of "employ" in 29 U.S.C. § 203(g) (2001) as "to suffer or permit to work").
214. *Id.*
215. *Id* (citing *Armour*, 323 U.S. at 133).
216. *Id.* at 1132 (quoting *Skidmore*, 323 U.S. at 137).
217. *Pabst*, 228 F.3d at 1132.
218. *Id.*
219. 948 F.2d. 410 (10th Cir. 1991).

employees for their on-call time.[220] Relevant to their determination was the fact that even though the plaintiffs were not required to return to an OG&E building for every call, the frequency of calls made the plaintiffs' situation particularly burdensome.[221]

The court rejected OG&E's argument that the plaintiffs' time spent doing personal activities should be subtracted from the on-call time compensated.[222] This decision was based upon the test of whether the time spent on call was predominantly spent "for the employer's benefit or for the employee's."[223]

C. *Other Circuits*

The analysis is the same in all circuits surveyed.[224] There is not much departure from the United States Supreme Court decisions *Armour* and *Skidmore*.[225] The primary analysis centers on whether the employee's time was spent predominantly for the employer or employee.[226] Even though the courts use the same analysis, the outcome can be vastly different. Some courts rule that on-call time should not be compensated despite long periods of time where the employee is on call, or short response times.[227]

1. Fifth Circuit

The Fifth Circuit uses the same test as the Tenth Circuit. In *Bright v. Houston Northwest Medical Center Survivor, Inc.*,[228] the Fifth Circuit held that an employee's on-call time was not compensable when he was required to respond within twenty minutes of a call.[229] The court found that the employee's on-call time could be spent going shopping, going to restaurants, and watching television.[230] This ruling was despite the fact

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220. *See Renfro*, 228 F.3d at 1134.

221. *See id.* at 1135.

222. *See id.*

223. *Id.*

224. *See* Bright v. Houston N.W. Med. Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (holding that an employee's on-call time was not compensable when he was required to respond within twenty minutes of a call); Dingtes v. Sacred Heart St. Mary's Hosp., Inc., 164 F.3d 1056 (7th Cir. 1999) (focusing on the argument that the time spent on call could be devoted to ordinary private activities); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912 (8th Cir. 1991) (holding that the Commission's on-call policy imposed significant restrictions upon the employees' ability to pursue personal activities).

225. *See* Armour & Co. v. Wantock, 323 U.S. 126 (1994); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

226. *See Armour*, 323 U.S. at 133.

227. *See* Bright v. Houston Northwest Med. Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (employee on-call for one year with no break); Dinges v. Sacred Heart St. Mary's Hosp., Inc. 164 F.3d 1056 (7th Cir. 1999) (employees were required to respond to call within seven minutes).

228. *Bright*, 934 F.2d at 672.

229. *Id.* at 672.

230. *See id.* at 673.

that Bright was on-call for an entire year with no reprieve.[231] "We do not deny the obvious truth that the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive. . . . But the FLSA's overtime provisions are more narrowly focused than being simply directed at requiring extra compensation for oppressive or confining conditions for employment."[232] The Fifth Circuit wrote that the "critical issue" in on-call compensation cases is "whether the employee can use the [on-call] time effectively for his or her own purposes."[233] Here, Bright was not restricted to the workplace or his home, but was able to travel anywhere within twenty minutes of the hospital because the hospital contacted him through use of a beeper.[234]

2. Seventh Circuit

Similarly, in *Dinges v. Sacred Heart St. Mary's Hosp., Inc.*, the Seventh Circuit recently held that on-call time for Emergency Medical Technicians is not compensable.[235] The court's analysis focused on the defendant hospital's argument that the time spent on call could be "devoted to ordinary private activities."[236] The court held that because the employees' actual chance of being called to work while on call was less than fifty percent, the required seven-minute response time was not conclusive that the employees were restricted in their personal activity.[237] In addition, the court held that in close cases, the court would look to the agreement of the parties because the FLSA "encouraged parties to structure a mutually beneficial arrangement."[238] By giving deference to the parties' agreement, the court assumes that both employees and management benefit.[239]

3. Eighth Circuit

The Eighth Circuit analysis is also similar to the Tenth Circuit. The Eighth Circuit determines whether the employee's time is primarily used for personal activities to decide whether on-call time is compensable.[240] In *Cross v. Arkansas Forestry Comm'n*,[241] the plaintiffs were employed by the Arkansas Forestry Commission ("Commission"), and were on-call twenty-four hours per day, seven days per week.[242] The Commission did

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231. *See id.* at 678.
232. *Id.*
233. *Id.* at 677.
234. *See Bright*, 934 F.2d at 678.
235. *See* Dinges v. Sacred Heart St. Mary's Hosp., Inc., 164 F.3d 1056 (7th Cir. 1999).
236. Vivian Illana Orlando, *Selected Recent Court Decisions*, 25 AM. J. L. & MED. 171, 172 (1999).
237. *See id.*
238. *Id.*
239. *See id.* at 172-173.
240. *See* Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17 (8th Cir. 1991).
241. 938 F.2d 912 (8th Cir. 1991).
242. *See Cross*, 938 F.2d at 914.

not compensate the employees for any time on-call, arguing that the FLSA exempted employees engaged in "fire protection activities," and as such the overtime hours were calculated over a twenty-eight day time period rather than a standard week.[243] The employees argued that the on-call policy restricted the employees from using their time for personal activities.[244] The Eight Circuit agreed, holding that the Commission's on-call policy imposed significant restrictions upon the employees' ability to pursue personal activities.[245] The court cited that the employees' ability to travel was limited, and they must monitor their radios for transmissions, which restricted the employees to an area of thirty-five to fifty miles.[246] Further, the employees' ability to attend musical or sporting events, church, or other events that cost much money was hindered due to the constant requirement to monitor their radios and the possibility of having to leave the event to respond to a call.[247] Thus the court held that the employees were engaged to wait because the on-call conditions were so restrictive that the employees could not use their time for personal activities.[248]

D. *Analysis*

Some scholars argue that on-call cases are different from "waiting time" cases like *Armour* and *Skidmore* because even though the employee may enjoy more time away from work, the burden on the employee may be greater due to the employer placing the employee on-call for more time as a result of the increased time away from work.[249] For example, some employers, as in *Cross* and *Bright,* place employees on-call for all time spent away from the workplace.[250]

The analysis of the courts appears to focus on the hindrance of the on-call situation on the employee's personal activities.[251] A key aspect in determining the burden on the employee is how many calls the on-call employee receives on average and the length of the call.[252] Therefore, the greater number of calls a person receives, the more likely it is that the on-call time will be deemed compensable. Another factor in determining the intrusion into the employee's personal life is the response time re-

243. *Id.*
244. *See id.* at 915-16.
245. *See id.* at 916.
246. *See id.* at 916-17.
247. *See id.* at 917.
248. *See Cross,* 938 F.2d at 917.
249. Phillips, *supra* note 173, at 2639.
250. *See id.*
251. *See* Pabst v. Okla. Gas & Elec. Co., 228 F3d 1128, 1131 (10th Cir. 2000).
252. *See* Phillips, *supra* note 173, at 2641-43.

quired by the employer.[253] Some scholars argue that very short response times should be enough to compel compensation for on-call time.[254]

The benefit to the employer is often overlooked in a court's analysis of an on-call time issue, even though courts cite it as part of the analysis.[255] Courts do not consider the cost efficiency of placing employees on-call for much of the employee's time spent away from work in order to gain employee time without compensation. One scholar argues that courts should compare the employer's benefit of on-call work against regular time at work.[256] Here, the employer knows that placing an employee on-call instead of requiring an employee to remain at work at all times keeps the requirement of paying employees at a minimum.[257] "If the [on-call] employee did not have to respond, then the employer either would have to go without the service or would have to pay somebody at least the minimum wage to be present at the place of employment."[258] The use of beepers and cell-phones are keeping employers increasingly in touch with their employees and this time may sometimes require compensation.

What makes *Pabst* stand out is that it is one of the few Tenth Circuit cases that awarded compensation to those employees who claimed their on-call time should be compensable.[259] It joins the *Renfro* line of decisions departing from the typical Tenth Circuit practice of denying such claims.[260]

CONCLUSION

In 2001, the Tenth Circuit decided these important cases in three areas of employment law. The Tenth Circuit refined the meaning of "reasonable accommodation" in two ADA cases, decided whether to protect free speech in the workplace, and revisited the issue of on-call time under the Fair Labor Standards Act. The three areas of law discussed in this article show the diversity of issues within the field of employment law. Surely the courts have not refined these topics to their fullest extent, and therefore, we can expect more from the Tenth Circuit in the future on these and other employment law issues.

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253. *Id.* at 2643.
254. *See id.*
255. *See Pabst*, 228 F.3d at 1132.
256. *See* Phillips, *supra* note 173, at 2646.
257. *See id.* at 2646.
258. *Id.*
259. *See Pabst*, 228 F.3d at 1133-34.
260. *See id.*