Denver Law Review

Volume 83
Issue 3 *Tenth Circuit Surveys*

Article 22

Spring 4-1-2006

Put on Your Coat, a Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims

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PUT ON YOUR COAT, A CHILL WIND BLOWS: EMBRACING THE EXPANSION OF THE ADVERSE EMPLOYMENT ACTION FACTOR IN TENTH CIRCUIT FIRST AMENDMENT RETALIATION CLAIMS

INTRODUCTION

"The First Amendment is the bedrock of American Democracy."[1] Protection of the First Amendment in the public employment context is paramount to the livelihood of a thriving democracy. Government employees must have the opportunity to speak publicly about their employer without the fear of undue retaliation.

In the recent Tenth Circuit cases of *Baca v. Sklar*[2] and *Maestas v. Segura*,[3] the court resolved two First Amendment retaliation claims brought by public employees under 42 U.S.C. § 1983.[4] First Amendment retaliation claims arise when a government employer takes some undue adverse employment action against a public employee after he or she speaks on a matter which concerns the public at large.[5] Within these two cases, the court displayed its tendency toward utilizing a broader standard of reviewing detrimental actions which employers take against their employees. However, the court did not explicitly define its standard for interpreting the adverse employment action factor.[6]

In the past, the court has refused to restrict the analysis of the adverse employment action factor to its counterpart in Title VII[7] retaliation claims. In these claims, an employee who is retaliated against for opposing employment discrimination or filing a charge of discrimination must prove that the employer's retaliation manifested itself in the form of an ultimate employment decision such as termination or demotion.[8] Conversely, the court has also refused to adhere to the broadest interpretation, that any action which tends to chill an employee's free speech is adverse.[9]

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1. Kary Love, *First Amendment Law: Free Speech Rights of Public Employees: A Natural Resource for Democracy*, MICH. B. J., June 2005, at 28, 29.
2. 398 F.3d 1210 (10th Cir. 2005).
3. 416 F.3d 1182 (10th Cir. 2005).
4. *See* U.S. CONST. amend. I; 42 U.S.C. § 1983 (2005).
5. Love, *supra* note 1, at 29.
6. *Baca*, 398 F.3d at 1220-21; *Maestas*, 416 F.3d at 1188.
7. 42 U.S.C. § 2000e to 2000e-17 (2005).
8. § 2000e-3(a) (2005); *See* Nancy Landis Caplinger & Diana S. Worth, *Vengeance is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 J. KAN. B. ASS'N 20, 21 (Apr. 2004).
9. *Maestas*, 416 F.3d at 1188 n.5.

This article is a survey of the *Baca* and *Maestas* cases wherein the court decided not to assert a position in the circuit split of adverse employment action interpretation in First Amendment retaliation claims. Instead, the court chose to "leave that question for another day."[10] However, both cases lay the foundation for a discussion of First Amendment retaliation, the circuit split regarding the adverse employment action factor of the claim, and how the Tenth Circuit should now embrace the broad "chilling effect" interpretation of adverse employment actions.

Part I of this article provides the foundation for First Amendment retaliation claim jurisprudence. Part II analyzes the circuit split, including the various circuit court interpretations of adverse employment actions: strict Title VII adherence, the "individual of ordinary firmness" model, and the "chilling effect" standard. Part III discusses the facts and merits of the Tenth Circuit *Baca* and *Maestas* cases. Finally, in Part IV the author argues that the Tenth Circuit should now embrace the "chilling effect" interpretation of adverse employment actions in First Amendment retaliation claims. By joining the circuits which utilize the "chilling effect" approach to the adverse employment action factor, the Tenth Circuit will further protect public employees from employers who punish them for exposing issues which are a matter of public interest.

I. FIRST AMENDMENT RETALIATION CLAIMS

Generally, the constitutional rights of public employees are protected under § 1983.[11] Among other claims, this statute gives a public employee the right to file suit against a government employer for violating the employee's constitutional right(s).[12] The statute states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[13]

Section 1983 gives public employees a clear advantage over private employees because it provides a cause of action for claims outside the scope of Title VII, such as a First Amendment retaliation.[14] First Amendment retaliation claims typically arise when an employee speaks out against the employer and suffers some detrimental action as a result.[15]

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10. *Id.*
11. 42 U.S.C. § 1983 (2005).
12. *Id.*
13. *Id.*
14. John R. Williams, *Public Employment Litigation Under Section 1983*, 715 PRACTISING L. INST. 441, 443 (2004).
15. DAVID L. HUDSON, BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH 31 (2002).

The Supreme Court has held that a "public employee does not relinquish its First Amendment rights to comment on matters of public interest by virtue of government employment."[16] A series of monumental Supreme Court cases established the criteria for First Amendment retaliation claims. Beginning with *Pickering v. Board of Education*[17] in 1968, the Court created a balancing test weighing the rights of an employee to comment on matters of public concern with the rights of an employer "in promoting the efficiency of the public services it performs through its employees."[18] Following *Pickering*, in *Mount Healthy City School District v. Doyle*,[19] the Supreme Court enumerated a two part test requiring that the employee's speech be a substantial motivating factor for the adverse action taken against him or her.[20] Finally, the Supreme Court concentrated its attention on what constitutes public concern.[21] In *Connick v. Myers*,[22] the Court held that as a matter of law the employee's speech must involve public issues in order for the employee to have a cognizable claim.[23]

For a First Amendment retaliation claim to prevail in the Tenth Circuit, an employee must establish that "(1) the speech involved a matter of public concern, (2) the employee's interest in engaging in the speech outweighed the employer's interest in regulating the speech, and (3) the speech was a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[24] If an employee meets these criteria, the burden shifts to the employer to prove that he would have acted in the same manner regardless of the employee's protected speech.[25]

Each element leaves room for discussion and analysis. Through *Pickering*, *Mt. Healthy*, and *Connick*, the Supreme Court set boundaries within which the lower Federal courts must operate. But within those guidelines there is room for interpretation.[26] Each circuit has created its own criteria for the public concern and the employee-employer *Pickering* balancing test.[27] However, the subject of this article is narrowly drawn to the third factor: what constitutes an adverse employment action. There is a split among the circuits regarding interpretation of this factor,

16. Connick v. Myers, 461 U.S. 138, 140 (1983).
17. 391 U.S. 563, 568 (1968).
18. *Id.*
19. 429 U.S. 274 (1977).
20. *Mt. Healthy*, 429 U.S. at 283-84.
21. *Connick*, 461 U.S. at 146-48.
22. 461 U.S. 138 (1983).
23. *See* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 694 (2005) (citing *Connick*, 461 U.S. at 145).
24. Maestas v. Segura, 416 F.3d 1182, 1187 (10th Cir. 2005).
25. *Id.*
26. Levinson, *supra* note 23, at 687.
27. *See generally* William Herbert, *The First Amendment and Public Sector Labor Relations*, 19 LAB. LAW. 325, 337-40 (2004).

resulting in three approaches: Title VII adherence, the "individual of ordinary firmness" model, and the "chilling effect" standard.

II. THE SPLIT—HIGH PRESSURE, MODERATE ATMOSPHERE, AND A CHILLY FRONT

In 1990, the Supreme Court addressed the "adverse employment action" of a First Amendment retaliation claim in *Rutan v. Republican Party of Illinois*.[28] This case blasted the "chilling" wind through the circuits.[29] In a footnote interpreted as mere dicta by its adversaries, the Court adhered to the Seventh Circuit's assertion that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech" was an adverse employment action.[30] In light of *Rutan*, the circuit courts have struggled to define "adverse employment action" in First Amendment retaliation claims.

The range of interpretation spans from the confines of Title VII to the "chilling effect" mentioned in *Rutan*. The Eleventh, Eighth, and Fifth Circuits utilize the structure of Title VII retaliation adverse employment actions, holding that only "materially adverse change[s] in the terms or conditions of employment" are actionable.[31] Additionally, there is the reasonable person of adverse employment actions, the "individual of ordinary firmness," as categorized by the Second, Third, Sixth, and D.C. Circuits.[32] However, the Seventh, Ninth, and Fourth Circuits have consistently held that any action that is likely to chill the exercise of free speech is cognizable.[33] The following subsections provide an explanation of each standard and how each of the circuit courts are applying the three applications of adverse employment actions in First Amendment retaliation claims.

A. High Pressure Likely—Title VII Adherence

To assert a successful First Amendment retaliation claim, the public employee must allege that "an adverse personnel action resulted from the protected activity."[34] The Eleventh, Eighth, and Fifth Circuits consistently borrow Title VII "adverse employment action" interpretation and apply it to First Amendment retaliation claims.[35] These circuit courts adopt a narrow approach, holding that only those actions which "demon-

28. 497 U.S. 62 (1990).
29. *Id.* at 76.
30. *Id.* at 76 n.8 (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989)). For an interpretation of *Rutan's* footnote eight as "non-controlling dicta" *see* Lybrook v. Bd. of Educ., 232 F.3d 1334, 1340 n.2 (10th Cir. 2000).
31. Levinson, *supra* note 23, at 687.
32. Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004).
33. Love, *supra* note 1, at 31.
34. Herbert, *supra* note 27, at 341.
35. Levinson, *supra* note 23, at 692; 42 U.S.C. § 2000e to 2000e-17 (2005).

strate a 'materially adverse' or 'tangible' job action" are recognizable under the third prong of the First Amendment claim.[36]

In order to prevent discrimination, Title VII prohibits employers from discriminating against employees because of their race, color, religion, sex, or national origin.[37] Included in Title VII is an anti-retaliation provision which states that employers cannot discriminate against employees who have "opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[38]

In order to prove discriminatory retaliation the employee must meet a three part prima facie test.[39] The employee must establish: "(1) protected opposition to Title VII discrimination or participation in a Title VII proceeding, (2) adverse action by the employer subsequent to or contemporaneous with such employee activity, and (3) causal connection between such activity and the employer's adverse action."[40] If all three elements are met, the burden shifts to the employer to prove that he or she had a legitimate, non-discriminatory basis for the adverse action taken against the employee.[41]

The Eleventh Circuit adheres to the Title VII standard by enumerating several key employment decisions as adverse actions. These actions include "discharges, demotions, refusals to hire or promote, and reprimands."[42] Although the court previously used the "chilling" effect language, it consistently utilizes the Title VII standard for interpreting adverse actions in First Amendment retaliation claims.[43] In *Stavropoulos v. Firestone*,[44] the public university employee was subject to a memo criticizing her, the compilation of a file which consisted of faculty letters criticizing the employee, and the encouraging of other faculty members at the university to state negative things about her in an employment review.[45] Cumulatively, these actions led to an initial faculty vote not to

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36. Levinson, *supra* note 23, at 689.
37. 42 U.S.C. § 2000e to 2000e-17 (2005).
38. *Id.* at § 2000e-3(a).
39. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
40. Caplinger & Worth, *supra* note 8, at 24 (citing Pastran v. K-Mart Corp., 210 F.3d 1201, 1205 (10th Cir. 2000)).
41. *Id.*
42. *Stavropoulos*, 361 F.3d at 619.
43. *Id.* The *Stavropoulos* court stated:

> Requiring the First Amendment retaliation claimant to show that the action she complains of not only was likely to chill her speech but *also* altered an important condition of employment insures that she satisfies the injury-in-fact requirement of federal justiciability law . . . Show[ing] that the action had an impact on an *important* aspect of her employment.

Stavropoulos, 361 F.3d at 620 (emphasis added).
44. 361 F.3d 610 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1850 (2005).
45. *Id.* at 620.

renew the employee's university contract.[46] The court held that "taken together or separately, Firestone's acts *fail to rise* to the level of an adverse employment action because they had no impact on an important condition of Stavropoulos's job, such as her salary, title, position, or job duties."[47]

Similarly, the Eighth Circuit adheres to the Title VII demand for material or tangible adverse actions for an employee to have a cognizable First Amendment retaliation claim.[48] In *Meyers v. Starke,*[49] Ms. Meyers was a monitor of children in state custody who made placement and therapy decisions for the children.[50] Shortly after a disagreement with coworkers about a regimen of treatment for two children and testifying against the treatment in a court proceeding, Ms. Meyers was transferred to another department.[51] Ms. Meyers resigned her position and filed a First Amendment retaliation claim, alleging she was demoted to a position that did not entail a full workload.[52] Relying on precedent, the court held that an adverse employment action must be "exhibited by a *material* employment disadvantage, such as a change in salary, benefits or responsibilities."[53] The court found that Ms. Meyer's transfer did not rise to the level of an adverse employment action and therefore she did not have a cognizable First Amendment retaliation claim under § 1983.[54]

Finally, the Fifth Circuit applies a slightly modified Title VII adverse employment action standard. While the court does not require an "ultimate employment decision," it repeatedly adheres to the same standard enumerated by the Eleventh Circuit.[55] The court has refused to expand the First Amendment retaliation adverse employment action prong to those acts which are trivial in nature.[56] For instance, in *Foley v. University of Houston System,*[57] the court denied a professor's First Amendment retaliation claim in part because she failed to demonstrate that she

46. *Id.* at 613.
47. *Id.* at 621 (emphasis added).
48. Levinson, *supra* note 23, at 690.
49. 420 F.3d 738 (8th Cir. 2005).
50. *Meyers*, 420 F.3d at 738.
51. *Id.* at 740.
52. *Id.* at 741, 744.
53. *Id.* at 744 (quoting Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002)). *See also* Fischer v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997). "Other Eighth Circuit cases similarly discuss the need to show significant alteration in the conditions of employment or 'a material change in the terms and conditions of employment' in order to establish a First Amendment violation." Levinson, *supra* note 23, at 691.
54. *Meyers*, 420 F.3d at 744.
55. Levinson, *supra* note 23, at 689-90.
56. *See* Terrence S. Welch, *A Primer on Texas Public Employment Law*, 56 BAYLOR L. REV. 981, 991 (2004).
57. 355 F.3d 333 (5th Cir. 2003).

suffered an adverse employment action.[58] The court relied on the precedent of *Harrington v. Harris*[59] in its determination.[60]

In *Harrington*, the court rejected the "chilling effect" interpretation, holding that "actions such as 'decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures,' while extremely important . . . do not rise to the level of a constitutional deprivation."[61] The court held that those actions which merely chill protected speech are not actionable.[62] This explicit rejection was accompanied by language consistently used in Title VII retaliation claims: "[a]dverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."[63]

While the Eleventh, Eighth, and Fifth circuits apply the Title VII "material" adverse employment action standard, several circuit courts have shied away from the strict standard.[64] These circuits have adopted a compromise of interpretation in First Amendment retaliation claims.

B. Gray Skies of Moderation—The Individual of Ordinary Firmness

The Second, Third, Sixth, and D.C. Circuits established the great compromise of First Amendment retaliation claims through the "individual of ordinary firmness" standard.[65] This "sensible standard," as articulated by the D.C. Circuit, is implicated when the acts against the employee "would chill or silence a 'person of ordinary firmness' from future First Amendment activities."[66]

In 2005, the Second Circuit stated in *Burkybile* v. *Board of Education*[67] that it would continue to apply the "individual of ordinary firmness" standard and reiterated that "an adverse employment action is one that 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'"[68] The employee in *Burkybile* was subject to the threat of suspension and possible termina-

58. *Foley*, 355 F.3d at 341.
59. 118 F.3d 359 (5th Cir. 1997).
60. *Foley*, 355 F.3d at 342.
61. *Harrington*, 118 F.3d at 365.
62. *Id.*
63. *Id.* (quoting Pierce v. Texas Dep't of Criminal Justice Inst. Div., 37 F.3d 1146, 1149 (5th Cir. 1994)).
64. Levinson, *supra* note 23, at 697-98.
65. *See* Burkybile v. Bd. of Educ., 411 F.3d 306, 313 (2d Cir. 2005); Farmer v. Cleveland Pub. Power, 295 F.3d 593, 599 (6th Cir. 2002); Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000); Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996).
66. Love, *supra* note 1, at 31 (citing *Crawford-El*, 93 F.3d at 826).
67. 411 F.3d 306 (2d Cir. 2005).
68. *Burkybile*, 411 F.3d at 313 (quoting Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004)). In *Washington*, the employee was threatened with administrative proceedings and a thirty-day suspension without pay which the court determined could deter individuals within the police department from speaking out against discrimination practices and polices. *Washington*, 373 F.3d at 320.

tion as a result of a disciplinary hearing.[69] The court determined that the looming consequences of the hearing, as well as the inconvenience of litigation costs were "clearly deterrents for even a person of ordinary firmness."[70]

Similarly, the Third and Sixth Circuits have fashioned their own "individual of ordinary firmness" standards. In *Suppan v. Dadonna*,[71] the Third Circuit recognized that the strength of the First Amendment would be diluted if "harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . ."[72] Mirroring *Suppan*, the Sixth Circuit in *Farmer v. Cleveland Public Power*[73] held that First Amendment retaliation claims require "that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity."[74] In *Farmer*, the employee was subject to reduction in supervisory, management, and policy-making tasks.[75] The court found that these changes, though not materially adverse to her employment status, were enough to deter a person of ordinary firmness from exercising her free speech rights.[76]

These cases establish a precedent of compromise among the circuits and lay the foundation for a fact-based inquiry which does not rely on a strict enumeration of materially adverse actions, but respects the serious nature of First Amendment claims. They utilize the "chilling" effect but remain wary of allowing any deterrents to be actionable.[77] While the Second, Third, Sixth, and D.C. Circuits hold a compromising interpretation of "adverse employment actions," several circuits have adopted a broad understanding of the third prong of First Amendment retaliation claims.

C. Grab A Coat, It's Chilly Out There—The "Chilling Effect"

The Ninth, Seventh, and Fourth Circuits consistently hold that less severe actions which deter or "chill" speech are adverse in First Amendment retaliation claims.[78] Within these circuits, "adverse actions need not be great where First Amendment rights are involved to allow public

69. *Burkybile*, 411 F.3d at 314.
70. *Id.*
71. 203 F.3d 228 (3d Cir. 2000).
72. *Suppan*, 203 F.3d at 235 (citing Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)).
73. 295 F.3d 593 (6th Cir. 2002).
74. *Farmer*, 295 F.3d at 602 (quoting Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998)).
75. *Id.*
76. *Id.*
77. *Suppan*, 203 F.3d at 235.
78. *See* Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003); Power v. Summers, 226 F.3d 815, 820 (7th Cir. 2000); Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000).

employees to proceed with a retaliation case."[79] Any detrimental action against a public employee need not be significant but must chill, ever so slightly, the employee from exercising his or her right to speak in the future.[80]

In *Coszalter v. City of Salem*,[81] the Ninth Circuit stated that the goal of First Amendment retaliation claims is to "prevent, or redress, actions by a government employer that 'chill the exercise of protected' First Amendment rights."[82] In *Coszalter*, the employee was transferred to new and sometimes unpleasant job duties, subjected to several unwarranted disciplinary investigations, and placed on two reviews of work product quality for his public disclosure of information about health and safety standards in the City's public works department.[83] The court determined that these actions were adverse and also held that "various kinds of employment actions may have an *impermissible chilling effect* . . . [whereby] even minor acts of retaliation can infringe on an employee's First Amendment rights."[84] Thus, the threshold in Ninth Circuit adverse employment claims is minimal deterrence of an employee's First Amendment rights.[85]

The Seventh Circuit is the Federal court system's greatest proponent of a broad interpretation of adverse employment actions in First Amendment retaliation claims. In fact, the Seventh Circuit "does not buy into the idea that adverse employment action is a necessary element of a First amendment case in the public employment context."[86] According to Judge Posner, "*any* deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable."[87]

The Seventh Circuit holds that a constitutionally-based retaliation claim is not comparable to federal employment discrimination statutes because in constitutional claims, any deterrence of the exercise of free speech is actionable.[88] In *Spiegla v. Major Eddie Hull*,[89] the court held that a transfer to more physically demanding job which required less skill and a change in schedule constituted an adverse employment action.[90] The court specifically stated that a "§ 1983 case *does not* require an ad-

79. Love, *supra* note 1, at 31.
80. *Section 1983 First Amendment Claims*, 5 EMP. COORD. EMPLOYMENT PRACTICES § 1:16 (2005).
81. 320 F.3d 968 (9th Cir. 2003).
82. *Coszalter*, 320 F.3d at 974-75.
83. *Id.* at 970-72.
84. *Id.* at 975 (emphasis added).
85. *Id. See also* Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000); Allen v. Scribner, 812 F.2d 426, 435 n.17 (9th Cir. 1987).
86. Williams, *supra* note 14, at 457.
87. *Power*, 226 F.3d at 820 (emphasis added).
88. Spiegla v. Major Eddie Hull, 371 F.3d 928, 941 (7th Cir. 2004).
89. 371 F.3d 928 (7th Cir. 2004).
90. *Spiegla*, 371 F.3d at 928.

verse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964."[91]

Finally, the Fourth Circuit also adheres to the "chilling effect" standard for adverse employment actions in First Amendment retaliation claims. To establish retaliation an employee must prove "that he was deprived of a valuable government benefit or adversely effected in a manner that, *at the very least*, would tend to chill his exercise of First Amendment rights."[92] In the Fourth Circuit the public employee does not have to show that the action was the equivalent of a dismissal.[93]

These three circuits embrace the notion that any action which deters or chills an employee from exercising his or her constitutional right to free speech is sufficiently recognizable as an adverse employment action. Where "[m]ore subtle forms of punishment are available" to an employer, the Ninth, Seventh, and Fourth Circuits will readily stand guard against the chilling adverse actions.[94]

III. *BACA* AND *MAESTAS*

The Tenth Circuit currently wavers in its interpretation of adverse employment actions in First Amendment retaliation claims. In *Baca* and *Maestas* the Tenth Circuit again refused to choose an approach for interpreting adverse employment actions within the circuit.

A. Baca v. Sklar[95]

1. Case

In *Baca*, Peter Baca alleged that David Sklar and the University of New Mexico had discriminated against him based on ethnicity and retaliated against him for "exercising his First Amendment rights."[96] The defendants removed to federal district court and moved for summary judgment.[97] The district court granted the defendants' motion for summary judgment holding that Baca had failed to raise a genuine issue of material fact as to whether his statements had motivated the defendant to take adverse actions against him.[98]

Baca began employment with the University of New Mexico in March 2001 in the Center for Injury Prevention Research and Education

91. *Id.* (emphasis added).
92. *Goldstein*, 218 F.3d at 352 (4th Cir. 2000) (emphasis added). *See also* Edwards v. City of Goldsboro, 178 F.3d 231, 246 (4th Cir. 1999).
93. *Goldstein*, 218 F.3d at 356 (citing DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995)).
94. 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, 971 (2001).
95. 398 F.3d 1210 (10th Cir. 2005).
96. *Baca*, 398 F.3d at 1210, 1215.
97. *Id.* at 1215.
98. *Id.* at 1216.

(CIPRE).[99] Shortly thereafter Baca encountered a series of discrepancies in university funding and hiring practices.[100] Baca reported this information to his supervisor, Sklar.[101] A few weeks later Baca again raised the issue to Sklar and his assistant.[102]

Shortly thereafter, two employees began directly communicating with Sklar, which allegedly usurped Baca's supervisory role.[103] In June 2001 Baca met with university human resources and attorneys to discuss the funding and hiring concerns.[104] From then on Baca faced several irregularities on the job, including employee transfers from his department which resulted in large budget cuts and a reprimand from Sklar about his attitude.[105] Additionally, and without deference to human resources protocol, Sklar sent Baca a letter reprimanding him for a vacancy announcement he had published.[106]

Baca suffered through an unfounded employee investigation after which Sklar demanded his resignation, which Baca refused to tender.[107] In early 2002, a mediation was scheduled where, after some dispute, Baca agreed to resign.[108]

2. Decision

The court applied the following test to determine whether the university's action against Baca constituted a prima facie First Amendment retaliation violation:[109] whether:

> (1) the speech in question involves a matter of public concern; (2) his interest in engaging in the speech outweighs the government employer's interest in regulating it; and (3) that the speech was a substantial motivating factor behind the government's decision to take an adverse employment action against the employee.[110]

The court determined that Baca's statements regarding the funding and hiring practices met the initial requirement that the "speech in question involve[d] a matter of public concern."[111] Utilizing the *Pickering* balanc-

99. *Id.* at 1213.
100. *Id.* at 1214.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1215.
108. *Id.*
109. *Id.* at 1218.
110. *Id.* at 1218-19.
111. *Id.* at 1219.

ing test,[112] the court found that Baca's interest in making his statements outweighed the university's interest in regulating Baca's speech.[113]

The court then turned to the third element: whether Baca's "protected speech substantially motivated CIPRE to take adverse employment actions against him."[114] The court began by discussing whether the discipline constituted an adverse employment action. The court stated, "[a]lthough we have never delineated what actions constitute 'adverse employment actions' in the First Amendment context, we have repeatedly concluded that a public employer can violate an employee's First Amendment rights by subjecting an employee to repercussions that would not be actionable under Title VII."[115]

The court noted that actions short of constructive or actual employment decisions, such as employee reprimands, transfers, and the removal of job duties, could be adverse employment actions in instances of First Amendment retaliation.[116] The court commented that if Baca's allegations of university improprieties were true, then those actions could be adverse.[117]

The court then discussed whether Baca's protected speech "substantially motivated the employer to administer such adverse consequences."[118] Consequently the court held that Baca had raised a sufficient issue of material fact regarding Sklar's motivation to survive summary judgment.[119] As such, the court reversed the district court's grant of summary judgment to the defendants and remanded the case.[120]

B. Maestas v. Segura[121]

1. Case

Plaintiff Bennie Maestas filed suit under 42 U.S.C. § 1983 alleging that David Segura and Dennis Pratt, in their official capacities, retaliated against him "for speaking out on matters of public concern in violation of the First Amendment."[122] The district court granted the defendant's motion for summary judgment holding that Maestas had met the first three

112. *See supra* Part I.
113. *Id.*
114. *Id.* at 1220.
115. *Id.* (citing Morfin v. Albuquerque Pub. Sch., 906 F.2d 1434, 1437 n.3 (10th Cir. 1990); Schuler v. City of Boulder, 189 F.3d 1304, 1310 (10th Cir. 1999)).
116. *Id.* (citing *Schuler*, 189 F.3d at 1310).
117. *Baca*, 398 F.3d at 1221 (enumerating Baca's assertions of the removal of supervisory authority, procedural discrepancies, and the filing of unfounded employment investigations as feasibly adverse).
118. *Id.*
119. *Id.* at 1222.
120. *Id.*
121. 416 F.3d 1182 (10th Cir. 2005).
122. *Maestas*, 416 F.3d at 1182.

elements of the prima facie case but it "ultimately concluded Defendants would have reached the same decision absent Plaintiff's speech."[123]

Maestas began employment with the City of Albuquerque in 1987, and in 1994 became "material manager" at the Vehicle Maintenance Department (VMD), a division of the Solid Waste Management Department (SWMD).[124] Over the next several years Maestas repeatedly complained to the city and local media about deficiencies within the SWMD.[125] Thereafter, reports and internal audits revealed improprieties within the department including verification of Maestas' concerns.[126]

Throughout the next couple of years, Maestas continued to complain about department protocol.[127] In 2001 and 2002 the city mayor required every department to make budget cuts.[128] In April 2002, Maestas was informed of the City's proposal to cut his position.[129] Maestas was reassigned to SWMD's Central Service Division (CSD) and his previous position at VMD was left vacant.[130] At CSD Maestas "retained the same salary, benefits, and job title."[131]

2. Decision

Judge Baldock began his analysis with an exhortation to government employers that they may not "as a condition of employment, compel an employee to relinquish carte blanche his First Amendment right to comment on matters of public concern."[132] The judge then set forth the prima facie case for First Amendment retaliation claims. The employee must establish that the speech was a matter of public concern, the employee's interest in voicing the speech must outweigh the employer's interest in regulating it, and "the speech [must be] . . . a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[133] The court analyzed the third element by placing the adverse employment discussion in a lengthy footnote and concentrating on the substantial motivating factor.[134]

Within the footnote, the court discussed the circuit split regarding what constitutes adverse actions in First Amendment retaliation claims.[135] The court referenced *Baca*, stating that some retaliation may

123. *Id.*
124. *Id.* at 1184.
125. *Id.*
126. *Id.* at 1185.
127. *Id.*
128. *Id.*
129. *Id.* at 1186.
130. *Id.* at 1185.
131. *Id.* at 1187.
132. *Id.*
133. *Id.*
134. *Id.* at 1188 n.5.
135. *Id.*

be actionable under § 1983 and the First Amendment, though not under Title VII.[136] Addressing the actionable range of adverse procedures, the court stated that employment decisions that do not amount to termination or dismissal could be adverse.[137] However, the court was quick to mention that the Tenth Circuit has "never held employment actions which may tend to chill free speech [as] necessarily adverse."[138] Additionally, the court refused to determine if Maestas' transfer constituted an adverse employment action: "[g]iven our conclusion that Plaintiffs' speech was not a substantial motivating factor . . . we continue to leave that question [whether a chilling effect on free speech is an adverse employment action] for another day."[139]

The court then took considerable time in explaining its stance on the substantial motivating factor.[140] The court concluded that Maestas failed to establish a link between his speech and Segura's decision to transfer him to CSD.[141] The court held that Maestas failed to establish a prima facie case and the court affirmed the district court's judgment.[142]

3. Dissent

In his dissent, Judge Briscoe disagreed with the court's analysis of adverse employment actions in Tenth Circuit First Amendment retaliation claims.[143] Judge Briscoe argued that the court already held that those actions which tend to chill free speech are adverse.[144] Referencing *Belcher v. City of McAlester*,[145] the judge stated that the court already applied the Seventh Circuit's "chilling effect" to Tenth Circuit adverse employment jurisprudence.[146]

IV. ANALYSIS—HIGH PRESSURE DISSIPATING, GRAY SKIES COMPROMISING, AND CHILLS RISING

The Tenth Circuit should adopt the approach asserted by the Ninth, Seventh, and Fourth Circuits which hold that actions which have a "chilling effect" on employees First Amendment rights are cognizable.[147]

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1188-89. "What constitutes a substantial motivating factor evades precise definition." *Id.* at 1188. However, the court stated that it was something less than "but-for" causation or the sole reason for the employer's action, but more than mere speculation or "hunches amidst rumor and innuendo." *Id.* at 1188-89.
141. *Id.* at 1189.
142. *Id.* at 1192.
143. *Id.* at 1195 n.2 (Briscoe, J., dissenting).
144. *Id.*
145. 324 F.3d 1203 (10th Cir. 2003).
146. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
147. *See* Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir. 2003); Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000); Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000).

While each standard for interpreting adverse employment actions has advantages, the "chilling effect" approach rises above the rest because it effectively advances employee protection in First Amendment retaliation claims. The Title VII standard held by the Eleventh, Eighth, and Fifth Circuits attempts to dam the proverbial flood of litigation but its statutory status is not the proper measure for interpreting a constitutional claim. In addition, the "individual of ordinary firmness" approach is appealing for its compromising nature but its application varies among the Second, Third, Sixth, and D.C. Circuits.

Subsections A and B below expand on the reasoning behind the author's assertion that the Title VII and the "individual of ordinary firmness" interpretations should not be utilized in the Tenth Circuit. In Subsection C, the author argues for the Tenth Circuit's adoption of the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.

A. Title VII's High Pressure System

The First Amendment retaliation adverse employment action approach held by the Eleventh, Eighth, and Fifth Circuits derives from Title VII retaliation claims.[148] These circuits restrict adverse employment actions to significant alterations of the conditions of employment amounting to a material or tangible change.[149] There are three reasons why the Title VII approach to adverse employment actions should not be utilized by the Tenth Circuit in First Amendment retaliation claims. First, the Supreme Court's precedent in these claims broadly protects public employees' free speech. Second, the Circuits which utilize the "ultimate employment decision" standard in First Amendment retaliation claims are applying an interpretation which is flawed in its original application to Title VII. Third and finally, the statutory Title VII approach to retaliation claims should not be used to interpret constitutional First Amendment claims.

1. Supreme Court Precedent

The Supreme Court has made it abundantly clear that it will protect an employee's freedom of speech, "absent strong countervailing interests."[150] Beginning with *Pickering v. Board of Education*[151] the Court has consistently held that First Amendment rights are paramount and that the employer ultimately has the burden to prove that his actions were not retaliatory.[152] An adoption of the Title VII approach to interpreting ad-

148. Levinson, *supra* note 23, at 687.
149. *Id.* at 674.
150. *Id.* at 692.
151. 391 U.S. 563 (1968).
152. *Pickering*, 391 U.S. at 678-80.

verse employment actions is inconsistent with the Supreme Court's broad protection of employee's rights.[153]

2. The "Ultimate Employment Decision" Interpretation

The circuits which adopt the "ultimate employment decision" interpretation of adverse employment action in Title VII claims are adopting an approach which disproportionately favors employers who retaliate against their employees.[154] This approach is flawed in its application to Title VII and should not be imposed on employees with First Amendment retaliation claims, thereby promoting the initial error. The Equal Employment Opportunity Commission's (EEOC) Compliance Manual, which has not been adopted by all the circuits, broadly construes Title VII retaliation claims.[155] Contrary to the interpretation held by the Eleventh, Eighth, and Fifth Circuits, the EEOC states that "[t]he statutory retaliation clauses prohibit *any* adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[156] The EEOC explicitly states that it does not agree with the circuits that require ultimate employment decisions to prove the adverse employment action prong of retaliation claims.[157] Conversely, the agency believes that this interpretation undermines the effectiveness of employment statutes and harms the public "by deterring others from filing a charge."[158]

The circuits which adhere to the "ultimate employment action" approach limit the remedies available to employees that are retaliated against and adopt a flawed view of adverse employment actions.[159] It is important for the Tenth Circuit to refuse to apply this defective approach to adverse employment action interpretation in both the Title VII and First Amendment retaliation contexts. While discrimination is an evil unto itself, an infringement on the ability to exercise one's constitutional right to free speech is an infringement on an essential aspect of American

153. *See infra* Part IV.C.1 (discussing the Supreme Court's recent cases expanding employee protection in First Amendment retaliation claims).

154. The Fifth and Eighth Circuits utilize the "ultimate employment decisions" standard requiring an adverse action relating to hiring, discharging, granting leave, promoting and wage adjustments for the employee to succeed in a Title VII retaliation claim. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Davis v. KARK-TV Inc., 421 F.3d 699, 706 (8th Cir. 2005) (holding that only tangible changes in working conditions such as termination or reduced pay constitute adverse employment actions in Title VII retaliation claims).

155. *See* U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 8-II(D)(3) (1998), http://www.eeoc.gov/policy/docs/retal.pdf. The Tenth Circuit has already adopted a broader interpretation of adverse employment actions in Title VII retaliation claims and has refused to apply the narrow approach to First Amendment retaliation claims. *See* Maestas v. Segura, 416 F.3d 1182, 1188 n.5 (10th Cir. 2005).

156. U.S. Equal Employment Opportunity Comm'm, *supra* note 155, at § 8-II(D)(3) (emphasis added).

157. *Id.*

158. *Id.*

159. Levinson, *supra* note 23, at 687-88.

democracy.[160] In furtherance of the EEOC's interpretation of Title VII adverse employment actions, this strict approach should be avoided when constitutional rights are at stake.[161]

3. Standards for Constitutional Claims

The statutory text of Title VII should not be used when deciding claims arising under the constitutional protection of the First Amendment.[162] Judge Posner of the Seventh Circuit asserts that First Amendment retaliation claims should not be measured or interpreted by the statutory provisions of Title VII.[163] Retaliation suits brought under § 1983 are not comparable to discriminatory retaliation suits brought under Title VII.[164] According to Judge Posner, Title VII forbids "invidious discrimination in employment" and limits "protection to victims of 'adverse employment action,' which is judicial shorthand (the term does not appear in the statutes themselves) for the fact that these statutes require the plaintiff to prove that the employer's action . . . altered the terms or conditions of his employment."[165]

No such limitation is required in § 1983 or the constitutional provisions it enforces.[166] Indeed, § 1983 does not necessitate that the claim arise in an employment context.[167] It only demands that a deprivation occur "under color of law" and "is likely to deter the exercise of free speech" or any other constitutional deprivation which is claimed.[168] Unlike Title VII, § 1983 creates government liability when the government deprives a person of his or her constitutional rights.[169] The context and content of Title VII and § 1983 constitutional deprivation claims are so dramatically different it is incorrect to use the one (Title VII) to interpret the other (§ 1983).

4. Summary—Title VII Interpretation

These three reasons establish why Title VII adverse employment action interpretation should not be applied to First Amendment retaliation

160. Love, *supra* note 1, at 29.

161. On December 5, 2005, the Supreme Court granted certiorari in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 797 (2005), in which it will decide what type of adverse employment action a plaintiff must establish to support a Title VII retaliation claim. This case has far reaching implications in the Title VII and First Amendment retaliation contexts because of the "ultimate employment decision" standard's application to both causes of action. If the strict standard is rejected by the Supreme Court, the circuits which apply it to Title VII, and First Amendment retaliation claims will have to adopt a less stringent test.

162. Levinson, *supra* note 23, at 676.

163. Spiegla v. Major Eddie Hull, 371 F.3d 928, 941 (7th Cir. 2004).

164. *Power*, 226 F.3d at 820.

165. *Id.*

166. *Id.*

167. Harvey Brown and Sarah Kerrigan, *42 U.S.C. § 1983: The Vehicle For Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 622 (1995).

168. *Power*, 226 F.3d at 820. *See also* 42 U.S.C. § 1983 (2005).

169. Love, *supra* note 1, at 31.

claims. However, even if the standard were adopted by the Tenth Circuit, the court's Title VII retaliation jurisprudence would not require strict adherence to the "material" or "significant alteration of employment conditions" interpretation.[170]

In the unlikely event that the Tenth Circuit adopts the Title VII interpretation, the court already holds a broad interpretation of adverse employment action, liberally construing each action on a case-by-case basis.[171] Generally, the Tenth Circuit holds that those employer actions which do "not rise to the level of ultimate employment decisions such as discharge, demotion, or failure to hire, may be actionable."[172] The Tenth Circuit's case-by-case approach is much less threatening than its counterparts' interpretation in the Eleventh, Eighth, and Fifth Circuits.[173]

Adherence to the Title VII approach may not be severely detrimental to Tenth Circuit public employees; however, applying this strict Title VII approach to First Amendment retaliation claims may have far-reaching implications.[174] A decision to further restrain the now liberally construed adverse employment action factor in the Title VII context could deter free speech if applied to First Amendment retaliation claims.[175] However, the Tenth Circuit will not likely adopt this position. As they stated in *Baca*, "we have repeatedly concluded that a public employer can violate First Amendment rights by subjecting an employee to repercussions that would not be actionable under Title VII."[176]

B. Weak Gray Skies of the Individual of Ordinary Firmness

The "individual of ordinary firmness" standard in First Amendment retaliation claims, though appealing as the middle ground between the strict standard of Title VII and the broader "chilling effect" interpretation, is too fickle an approach to be adopted by the Tenth Circuit.

While the "individual of ordinary firmness" is a "sensible standard,"[177] the interpretation varies from circuit to circuit, creating uncer-

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170. Caplinger, *supra* note 8, at 27.

171. *Id.*

172. *Id.*

173. *See supra* Part II.A (discussing the circuits' adherence to a strict "materially adverse" interpretation of what constitutes an adverse employment action).

174. *See* Caplinger, *supra* note 8, at 20 (asserting that there has been a steady increase of retaliation claims in the past decade possibly stemming from the ease of surviving summary judgment in Title VII retaliation claims as opposed to Title VII discrimination claims).

175. *See* Tran v. Trustees of the State Colleges in Colo., 355 F.3d 1263, 1267 (10th Cir. 2004). This case discussed the Supreme Court's definition of adverse employment action in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). The court held that the "tangible employment action" is the standard in the 10th Circuit for purposes of Title VII retaliation claims, perhaps implying a move in a more restrictive direction. *See also* Caplinger, *supra* note 8, at 28.

176. Baca v. Sklar, 398 F.3d 1210, 1220 (10th Cir. 2005).

177. Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996). *See also* Love, *supra* note 1, at 31 (explaining the D.C. Circuit's approval of the district court's holding in *Crawford-El* which stood for the proposition that the person of ordinary firmness was a "sensible standard," which was

tainty for public employees and employers.[178] For instance, the Second Circuit, in *Deters v. Lafuente*,[179] required the "combination of seemingly minor incidents to form the basis of a constitutional retaliation claim . . . [to] reach a critical mass" in retaliation claims based on a hostile work environment.[180] Those incidents which are minor and infrequent, though retaliatory, are not considered deterrent to the "individual of ordinary firmness" in the Second Circuit.[181]

For example, in *Deters*, two police officers were subject to department disciplinary proceedings after being acquitted of criminal assault charges.[182] The employees asserted that several hostile and retaliatory actions were taken against them, including false accusations of failure to respond and playing games on the police radio, as well as failure to promote.[183] However, "[l]ooking at plaintiffs' hostile environment allegations in the most favorable light," the court held "that [the allegations] *[we]re insufficient* to raise a constitutional claim of retaliation."[184]

Conversely, in the Third Circuit case of *Suppan v. Dadonna*,[185] police officers were subject to a variety of similar retaliatory actions including questionable employee "rankings and the failure to promote."[186] The court held that this retaliatory conduct *was enough* to deter an individual of ordinary firmness from exercising his First Amendment rights in the future.[187] In contrast to the Second Circuit's similarly worded standard, the Third Circuit's "individual of ordinary firmness" seems weak.

The discrepancy between circuits which hold the same standard exemplifies the ambiguity of the term and the feeble nature of this compromise between the Title VII and "chilling effect" interpretations. Additionally, the Second Circuit's need for a "critical mass" of actions while "understandable to ensure that minor incidents of retaliation do not flood the courts, deviates from the core question" of deterrence of free speech and weakens the conciliatory nature of the approach.[188] While this interpretation of adverse employment action, held by the Second, Third, Sixth and D.C. Circuits, allows employees a greater breadth of actionable claims, it does not provide public sector employees with the

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subsequently left alone by the Supreme Court). *Crawford-El*, 951 F.2d at 1322, *vacated and remanded en banc*, 93 F.3d 813 (D.C. Cir. 1996), *vacated and remanded*, 523 U.S. 747 (1998).

178. *See* Levinson, *supra* note 23, at 691; Love, *supra* note 1, at 31.
179. 368 F.3d 185 (2d Cir. 2004).
180. *Deters*, 368 F.3d at 189 (quoting Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002)).
181. *Deters*, 368 F.3d at 189.
182. *Id.* at 186.
183. *Id.* at 187.
184. *Id.* (emphasis added).
185. 203 F.3d 228 (3d Cir. 2000).
186. *Suppan*, 203 F.3d at 234.
187. *Id.* at 235.
188. Levinson, *supra* note 23, at 692.

"sensibility" it purports and therefore should not be adopted by the Tenth Circuit.

C. "Chilling Effect" Cools Retaliation and the Tenth Circuit

The Ninth, Seventh, and Fourth Circuits have adopted the broadest interpretation of First Amendment retaliation adverse employment actions.[189] While the Title VII and "individual of ordinary firmness" interpretations may serve the "laudable goal of filtering out insubstantial claims," the "chilling effect" approach most effectively protects First Amendment rights.[190] The Supreme Court has held that First Amendment retaliation claims must stop "the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."[191] By decisively embracing the "chilling effect" approach, the Tenth Circuit will further restrain public employers from retaliating against employees who exercise their constitutionally ordained rights.

Adoption of the "chilling effect" approach is proper because this interpretation protects employees who suffer discrete actions which infringe on their constitutional rights. Additionally, both the Supreme Court and the Tenth Circuit are already embracing a broader protection of employees' rights in this context.[192] Finally, the protection of public employees' speech benefits both the employees and the American public at large.

The "chilling effect" interpretation of adverse employment actions protects public employees where "any deprivation that is likely to deter the exercise of free speech" occurs.[193] Thus, "a government act of retaliation need not be severe and it need not be of a certain kind."[194] Perhaps as a result of the constitutional deprivation, the actions do not have to be great to be adverse; the slightest wariness to speak freely may be enough.[195] By their nature, demotions and discharges are adverse actions if based upon an employee's protected speech.[196] However, "the courts' limits on what counts as an [adverse action] have the effect of enabling sophisticated government supervisors to keep their employees in line

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189. *See supra* Part II.C (discussing the "chilling effect" standard adopted in these three circuits).

190. Wells, *supra* note 94, at 972.

191. Rutan v. Republican Party of Ill., 497 U.S. 62, 76 (1990).

192. *Rutan*, 497 U.S. at 76; Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477 (1995); Belcher v. City of McAlester, 324 F.3d 1203, 1207 (10th Cir. 2003); Schuler v. City of Boulder, 189 F.3d 1304, 1308 (10th Cir. 1999).

193. Levinson, *supra* note 23, at 699.

194. *Section 1983 First Amendment Claims*, 5 EMP. COORD. EMPLOYMENT PRACTICES § 1:16 (2005).

195. Love, *supra* note 1, at 31.

196. MARCY EDWARDS, ET AL., FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE 91 (1998).

without risking the loss of a lawsuit."[197] Retaliatory acts need not be monstrous but must create the *potential to chill* an employee's speech.[198] "A campaign of petty harassment may achieve the same effect as an explicit punishment" and therefore chill free speech.[199] According to the Seventh circuit, even a small effect—a chill—on freedom of speech can be actionable because there is no justification for harassing people for exercising their constitutional rights.[200]

Additionally, the Supreme Court utilizes the lower courts' "chilling effect" adverse employment action standard. This positively chilling trend was acclaimed in *Rutan* and further expanded in two decisive cases.[201]

1. The Supreme Court's Positively Chilling Front

The Supreme Court's expansion of First Amendment retaliation claims indicates the Court's desire to broadly protect individuals. In several politically charged cases regarding party patronage, public employee honoraria, and government contracting, the Supreme Court has liberally protected public employees' free speech.[202] It is likely the Supreme Court will fully embrace the "chilling effect" approach in the future, as evidenced by its expansion of public employees' First Amendment rights under § 1983. Following the Supreme Court's lead, the Tenth Circuit should adopt the "chilling effect" approach to adverse employment action interpretation and secure free speech rights for government employees.

a. *Rutan*

In 1990, the Supreme Court decided *Rutan*, a case involving the constitutionality of adverse employment actions based on a public employee's party affiliation.[203] In holding that political patronage practices such as promotion, transfer, layoff recall, and hiring could be adverse if improperly directed at non-affiliated parties, the Supreme Court further protected employees from actions effected to deter their free speech.[204] The Court soundly rejected the respondents' assertion that because the

197. Wells, *supra* note 94, at 973.

198. Levinson, *supra* note 23, at 699.

199. *Id.* (quoting Walsh v. Ward, 991 F.2d 1344, 1345 (7th Cir. 1993)).

200. Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).

201. *Rutan*, 497 U.S. at 75; *See also* Levinson, *supra* note 23, at 682-87.

202. *See Rutan*, 497 U.S. at 64; Nat'l Treasury, 513 U.S. 454 (1995); Umbehr, 518 U.S. 668 (1996).

203. *Rutan*, 497 U.S. at 64. In *Rutan*, the governor of Illinois issued a hiring freeze on several departments under his control. *Id.* at 65. No exceptions were allowed without the express consent of the Governor. *Id.* According to the petitioners, the Governor utilized the freeze to benefit those individuals loyal to the Republican party. *Id.* at 66. As a result, petitioners argued that they were denied promotions, transfers to locations nearer to home, and recalls after layoffs. *Id.* at 67. *See also* Nancy Oxfeld, *Free Speech for Public Employees: Justice Holmes Had It Wrong*, 45 KAN. L. REV. 1299, 1310 (1997).

204. *Rutan*, 497 U.S. at 64.

actions were not punitive they could not "chill the exercise of protected belief and association by public employees."[205]

The Court held that "[e]mployees who find themselves in dead end positions because of their political backgrounds *are* adversely affected."[206] The Court found that if an employee feels obligated to associate with the party in power his First Amendment right to affiliate with whichever political party he prefers is impermissibly infringed.[207] By being denied transfers or being laid off, an employee may feel compelled to change patronage, thereby being deprived a constitutionally protected freedom.[208] In turn, the Court increased the depth of First Amendment retaliation claims and furthered the noble goal of protecting public employees' rights.

b. *National Treasury v. Treasury Employees Union*[209]

Several years later the Supreme Court continued its course and struck down a federal employee honoraria ban because it infringed on a public employee's speech.[210] The Ethics Reform Act of 1989 banned public employees of all three branches from receiving honoraria for any speech, appearance, or article.[211] In *National Treasury v. Treasury Employees Union*, the Court "recognized that preventing compensation for speech may deter, and thus infringe on, protected speech rights."[212]

Here, the Court expanded the "chilling effect" recognized in *Rutan*. "Unlike an adverse action taken in response to actual speech, this ban *chills potential speech* before it happens."[213] The restraint of speech, appearance, or written word imposes such a serious burden on the public's right to read and hear and the employee's right to express that it "abridges speech under the First Amendment."[214] Acknowledgment that the ban chilled *potential* speech further solidified the Court's desire to protect public employee speech without evidence of a significant, narrowly-tailored government interest.[215]

205. *Id.* at 73.
206. *Id.*
207. *Id.*
208. *Id.*
209. 513 U.S. 454 (1995).
210. *Nat'l Treasury*, 513 U.S. at 457.
211. *Id.* at 459-460.
212. *Id.* at 466-67.
213. *Id.* at 468 (emphasis added).
214. *Id.* at 470.
215. *See* Ian H. Morrison, *The Case for Minimal Regulation of Pubic Employee Free Speech: A Critical Analysis of the Federal Honoraria Ban Controversy*, 48 WASH. U. J. URB. CONTEMP. L. 141, 164-65 (1995).

c. *Board of County Commissioners v. Umbehr*[216]

Finally, in *Board of County Commissioners v. Umbehr*, a case accepted from the Tenth Circuit, the Supreme Court established that employees contracted by the government are protected against adverse actions resulting from First Amendment retaliation.[217] The Court again utilized the "chilling effect" language regarding adverse employment actions.[218] "As in Rutan, the Supreme Court focused on whether certain government conduct chilled speech, not on whether the adverse action could be characterized as a material or substantial employment action."[219]

Citing several precedential cases, the Court held that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights."[220] The Court determined that a bright line rule distinguishing government contractors from employees would "give the government *carte blanche* to terminate independent contractors for exercising First Amendment rights."[221] The Court firmly established its support for the "chilling effect" approach to adverse actions in First Amendment retaliation claims by holding that contractors' First Amendment rights should be protected.[222] Once again the Court found that "[t]he threat of the loss of which in retaliation for speech may *chill* speech on matters of public concern" was enough to constitute an adverse employment action in First Amendment retaliation claims.[223]

In light of *Rutan*, *National Treasury*, and *Umbehr*, the Tenth Circuit should follow the Supreme Court's lead, adopt the "chilling effect" standard and broadly protect public employees' speech in First Amendment retaliation claims.

2. Chilly Air Covers the Tenth Circuit

At the heart of the argument in favor of adopting the "chilling effect" standard is the Tenth Circuit's own utilization of the "chilling effect" language, its willingness to reject the Title VII approach,[224] and its expansion of the actions it deems adverse. In several cases, including

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216. 518 U.S. 668 (1996).
217. *Umbehr*, 518 U.S. at 673.
218. *Id.* at 674.
219. Levinson, *supra* note 23, at 685 (citing *Umbehr*, 518 U.S. at 674-76).
220. *Umbehr*, 518 U.S. at 674 (alteration in original) (quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977).
221. *Umbehr*, 518 U.S. at 679.
222. *See* Levinson, *supra* note 23, at 685.
223. *Umbehr*, 518 U.S. at 674 (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)).
224. *See supra* Part V.A.

Baca, the court expanded protection of public employees' free speech rights and inched towards embracing the "chilling effect" approach.[225]

First, the Tenth Circuit has previously used the "chilling effect" language.[226] For example, in *Belcher v. City of McAlester*,[227] the plaintiff suffered adverse actions when he received a written reprimand for contacting city councilmen without following procedure.[228] Additionally, the plaintiff was told that more procedural violations would result in severe disciplinary action which could include dismissal.[229] The court found that: "[i]n reprimanding Belcher, the fire department *chilled* any future attempts to contact Council members outside of a public meeting. We conclude that this *chilling effect* is real, and that Belcher has shown that he was subject to adverse employment action as a result of his speech."[230] The court's own use of the "chilling effect" language implies that at least three of the circuit court judges are in favor of adopting this approach.

In addition to express use of the language, the court has broadened its protection of public employees by finding many actions less severe than dismissal as adverse. In *Baca,* the court found that, if true, the removal of some supervisory authority, reprimands outside of procedure, and the filing of an unfounded employment charge constituted an adverse employment action.[231] These actions do not constitute significant employment decisions, and yet the court found them adverse.

Similarly, in *Schuler v. City of Boulder*,[232] the court found that the removal of job duties, a written reprimand, a low evaluation score, and an involuntary lateral transfer constituted an adverse employment action in First Amendment retaliation claims.[233] Additionally, the court strengthened employee protection by finding that Schuler's subsequent enjoyment of her new position did not matter in light of the retaliatory actions.[234] Relying on *Rutan* the court stated its desire to protect employees from those "deprivations less harsh than dismissal which nevertheless violated a public employee's rights under the First Amendment."[235]

In *Maestas*, and in direct contrast to Judge Baldock's stated that the court had not yet decided on the matter, Judge Briscoe asserted that the

225. Baca v. Sklar, 398 F.3d 1210 (10th Cir. 2005); Belcher v. City of McAlester, 324 F.3d 1203 (10th Cir. 2003); Schuler v. City of Boulder, 189 F.3d 1304 (10th Cir. 1999).
226. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
227. 324 F.3d 1203 (10th Cir. 2003)
228. *Belcher*, 324 F.3d at 1205.
229. *Id.*
230. *Id.* at 1207 n.4 (emphasis added).
231. *Baca*, 398 F.3d at 1221.
232. 189 F.3d 1304 (10th Cir. 1999).
233. *Schuler*, 189 F.3d at 1310.
234. *Id.* at 1310 n.3.
235. *Id.* at 1309.

Tenth Circuit has already adopted the "chilling effect" approach.[236] While the honorable judges may disagree, it is now time for the court to firmly decide the issue and embrace the "chilling effect" approach to adverse employment actions in First Amendment retaliation claims. Subsequent to the rulings in *Baca*, *Belcher*, and *Schuler* the court should follow the protectionist lead of the Ninth, Seventh, and Fourth Circuits and adopt the "chilling effect" interpretation.

3. Chilling Climate Benefits Public

Finally, the Tenth Circuit should embrace the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims because it benefits both employees and the public at large. By broadly interpreting this element, the general public will be in a superior position to make intelligent decisions while voting on issues and electing officials.[237] Public employees have unique access to information not readily available to the public as a whole. Society does not benefit when government employers retaliate against their employees for speaking out on matters affecting the public. Above all, government employees are "often in the best position to know what ails the agencies for which they work."[238]

For example, the employee in *Baca* was exercising his First Amendment rights when he spoke against alleged fiscal and hiring improprieties within the state university system.[239] Without the ability to speak freely about these matters, employees like Baca will not be able to inform the public of government abuses. Government employees have unique access to information regarding the inner workings of the democratic system and their ability to speak on these matters should not be infringed upon for fear of retaliation.[240] Additionally, the public employee already has a high threshold to meet because *Pickering* and *Mt. Healthy* established that the matter spoken on must be of public concern.[241] By embracing a broad interpretation of what constitutes an adverse employment action in First Amendment retaliation claims the Tenth Circuit will further protect this "bedrock of American democracy."[242] The court has an obligation to protect the public and safeguard "the public's right to receive critical information" by embracing the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.[243]

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236. *Maestas*, 416 F.3d at 1195 n.2 (Briscoe, J., dissenting).
237. Love, *supra* note 1, at 32.
238. *Umbehr*, 518 U.S. at 674 (citing *Waters*, 511 U.S. at 674).
239. *Baca*, 398 F.3d at 1217-20.
240. Levinson, *supra* note 23, at 693.
241. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977).
242. Love, *supra* note 1, at 29.
243. Levinson, *supra* note 23, at 693.

CONCLUSION

Retaliation against public employees for exercising their First Amendment right to comment on matters of public concern is unacceptable. The Tenth Circuit should not condone retaliatory acts by refusing to adopt the "chilling effect" approach to adverse employment action interpretation. The First Amendment retaliation claim has three elements which protect government employers from unfounded actions against them.[244] The employee must establish that "(1) the speech involved a matter of public concern, (2) the employee's interest in engaging in the speech outweighed the employer's interest in regulating the speech, and (3) the speech was a 'substantial motivating factor' behind the employer's decision to take an adverse employment action against the employee."[245] By adopting the broad "chilling effect" approach to interpreting this third factor, the Tenth Circuit will insure the protection of the public employee's constitutional right to free speech. In turn, actions which are "intended to punish" an employee for free speech on issues of public interest will not be tolerated if the court adopts the "chilling effect" standard.[246] Additionally, both the Supreme Court and the Tenth Circuit utilize the "chilling effect" language which provides support for its wholehearted adoption in the Tenth Circuit. Finally, a broader interpretation of adverse employment actions in First Amendment retaliation claims benefits government employees and the public at large. By accepting the "chilling effect" approach to interpreting adverse employment actions the court will protect employees from retaliation and give the public access to "an unequalled source of information concerning public matters."[247] The Tenth Circuit must join the Ninth, Seventh, and Fourth Circuits and embrace the "chilling effect" approach to interpreting adverse employment actions in First Amendment retaliation claims.

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244. Maestas v. Segura, 416 F.3d 1183, 1187 (10th Cir. 2005).
245. *Maestas*, 416 F.3d at 1187.
246. *Rutan*, 497 U.S. at 76 n.8.
247. Love, *supra* note 1, at 29.

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