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The Public Employee Can Disagree with the Boss—Sometimes: *Cox v. Dardanelle Public School District*, 790 F.2d 668 (8th Cir. 1986)

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Note

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TABLE OF CONTENTS

I. INTRODUCTION

In 1983 the United States Supreme Court decided in *Connick v. Myers*[1] that an assistant district attorney, Sheila Myers, could be fired for having circulated a questionnaire among her fellow workers concerning office policies and morale. The Court rejected the argument that the firing violated the free speech rights that Myers claimed she had been exercising through the questionnaire. The Court characterized all of the questions in the questionnaire, except one, as merely part of an ongoing dispute over a proposed job transfer for Myers. As a result, these questions did not constitute speech on matters of "public concern" and did not merit constitutional protection in the context

1. 461 U.S. 138 (1983).

of an employment discharge or disciplinary action.[2]

One question, asking the assistant district attorneys whether they felt pressured to work in political campaigns, was held to involve a topic of public concern. But this question did not save Myers because balanced against the employer's interest in the efficient operation of his office, the employer's interest prevailed.[3]

Many, including a four-vote minority on the Court, viewed the *Connick* decision with alarm. Justice Brennan, writing for the minority, said that "the Court impermissibly narrows the class of subjects on which public employees may speak without fear of retaliatory dismissal"[4] and "[t]he Court's decision . . . inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal."[5] Commentators also felt that public employees' free speech rights would be restricted because of the likelihood that the topics of their speech would be held to be of private rather than public concern, and thus not protected.[6]

Particularly worrisome was the Court's statement that the "content, form, and context" of the speech must be considered in deciding whether it involved a subject of public concern.[7] It was feared that the "content, form, and context" test would be used by the lower courts to hold that speech on topics of seemingly public interest was not protected because it arose in the context of an employment dispute.[8] Speech by the employee about actual employment conditions had little chance of ever being regarded as being of public concern.[9]

In light of these dire predictions, the decision of a panel of the Eighth Circuit in *Cox v. Dardanelle Public School District*[10] comes as a surprise. Nancy Cox, an Arkansas public school teacher, had disagreed with her principal over questions of educational policy and administrative regulation and, as a result of this disagreement, had not

2. *Id.* at 146-49. However, the speech "would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street." *Id.* at 147.
3. *Id.* at 149-53. The Court first stated the requirement for a balancing test between the public employee's free speech interests and the public employer's interest in organizational efficiency in Pickering v. Board of Educ., 391 U.S. 563 (1968).
4. Connick v. Myers, 461 U.S. 138, 158 (1983) (Brennan, J., dissenting).
5. *Id.* at 170 (Brennan J., dissenting).
6. *E.g.*, Hooker, *Balancing Free Expression and Government Interests: Connick v. Myers*, 15 WEST'S EDUC. L. REP. 633, 639 (1984); Note, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U.L. REV. 429, 430 (1984).
7. Connick v. Myers, 461 U.S. 138, 147-48 (1983).
8. Note, *Public Employees' Free Speech Rights: Connick v. Myers Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173, 183 (1985).
9. Comment, *Free Speech for Public Employees: The Supreme Court Strikes a New Balance*, 31 WEST'S EDUC. L. REP. 7, 22 (1986).
10. 790 F.2d 668 (8th Cir. 1986).

been rehired. The court held that at least part of the speech in both areas touched on matters of public concern. Also, even though disruption had followed the disagreement, the court still felt that the balance of competing interest was in Cox's favor.

The *Cox* decision does not seem to bear out the graver concerns about the results that could flow from *Connick*. A number of obvious questions arise. How did the Eighth Circuit arrive at its decision in *Cox*? Is *Cox* compatible with *Connick*? How does the Eighth Circuit position compare with that of other courts?

The view of this note is that *Cox* is the natural outgrowth of preceding Eighth Circuit decisions. Also, the Eighth Circuit position, stated in *Cox* and other decisions, is compatible with *Connick* and is a better reading of *Connick* than the position of other courts, that are more hostile to public employees' free speech rights.

Many, if not most of the cases cited, involve public school teachers. However, the discussion is meant to deal with public employees in general and not solely teachers. The Eighth Circuit in *Cox* treated the rights involved as being those of public employees[11] rather than just of teachers. *Connick*, which did not involve a teacher, was cited as controlling authority by the *Cox* court.[12] Similarly, Justice White, in writing the *Connick* opinion described it as being one of the progeny of earlier decisions which had involved public school teachers.[13]

Questions of academic freedom will not be addressed here. Also, the cases do not involve speech about subjects other than the employee's own agency.[14] Finally, the free speech rights of public safety workers (police and fire fighters) are not considered because the government is sometimes felt to have special interests as to those employees.[15]

II. THE FACTS OF COX

Nancy Cox, the plaintiff, was a probationary (untenured) teacher, employed by the Dardanelle Public School District beginning in 1977,

11. *Id.* at 672.
12. *Id.*
13. *E.g.*, Connick v. Myers, 461 U.S. 138, 145-46 (1983) (citing inter alia Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mount Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Educ., 391 U.S. 563 (1968)).
14. One case, Raposa v. Meade School Dist., 790 F.2d 1349 (8th Cir. 1986), involved a subject outside the employee's agency but arose due to speech mandated by law as within the employee's status as a public school teacher. *See infra* notes 109-16 and accompanying text.
15. *E.g.*, Kelley v. Johnson, 425 U.S. 238 (1976) (upholding police department hair regulations); Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (state patrol's interest in regulating speech of troopers is greater than that of other agencies in regulating speech of their employees).

at the district's middle school in Dardanelle, Arkansas. The principal of the middle school, during the first two years of Cox's employment, "evaluated [Cox] as having performed her duties very competently . . . and was of the opinion that she would be an outstanding teacher with further experience."[16] Accordingly, the district gave Cox a teaching contract for a third year, the 1979-80 school term.

Difficulties arose during this third year. A new principal was hired for the middle school at the beginning of the term. He implemented several changes affecting the teachers in the performance of their duties. Cox and a majority of the rest of the teachers in her building disagreed with some of these changes. On numerous occasions, Cox "spoke out concerning the administration of the educational process at the Dardanelle Middle School, oftentimes in disagreement with"[17] the principal. Specific topics of disagreement included the questions of the ability grouping of students within the school, the effect of the principal's administrative routine on teacher morale and initiative, and his regulations in such areas as teacher sign in and sign out and the use of school phones.[18]

Then, on November 6, 1979, Cox and a number of other teachers filed a grievance with the principal regarding their complaints about the administration of the educational process in the middle school. The principal told them that before he would address their complaints, they would have to file individual grievances. Cox and two others did so. All three received job-related sanctions and were the only teachers to be so disciplined during that school term.[19]

Later in the school year, the district superintendent of schools informed Cox that he was recommending that the board of education not renew her contract for another year. Following this, the president of the board, in a letter to Cox, stated eleven reasons for the superintendent's recommendation. The board held a hearing in April, 1980, at which Cox and both the principal and the superintendent presented evidence. At the end of the hearing, one of the reasons for the superintendent's recommendation was withdrawn. The board voted on the remaining ten reasons. The board found that four of the reasons were false, four were true but did not justify dismissal, and two justified dismissal. The two reasons found to justify dismissal were one, that Cox had on five occasions signed in for another teacher and two, that Cox had once allowed her class to be interrupted by a visitor without

16. Cox v. Dardanelle Pub. School Dist., No. LR-C-80-441, slip op. at 2 (E.D. Ark. Apr. 23, 1984).
17. *Id.*
18. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673 & n.6 (1986).
19. Cox v. Dardanelle Pub. School Dist., No. LR-C-80-441, slip op. at 2 (E.D. Ark. Apr. 23, 1984). "Richard Johnson was terminated in February, 1980, [Cox] was dismissed at the conclusion of the 1979-80 school term, and Maxine Kemp was placed on a probationary status for the 1980-81 school term." *Id.*

the principal's permission. Cox's dispute with the principal was not given as a reason for her dismissal.[20] The board members supposedly were not even aware of the grievance that Cox had filed and the continuing dispute between her and the principal.[21]

Cox then instituted an action in United States District Court against the Dardanelle District and the district superintendent contending that they had violated her rights under the United States Constitution and the laws of Arkansas. The district court decided that the reasons given for her dismissal were pretextual and that the actual reason for the board's action was her continuing disagreement with the principal. Further, the disagreement was based on Cox's constitutionally protected free speech, and the school district had not shown that it would have discharged Cox but for the protected speech. Thus, the court ordered Cox reinstated and awarded her back pay, $5,000 in damages for damage to her professional reputation, and attorneys' fees.[22] The appeal by the defendants to the Eighth Circuit followed.

III. ANALYSIS

A. What is Speech on Matters of Public Concern and How Can You Recognize It?

The first question the court of appeals had to answer was whether or not Cox's speech, which she alleged was the cause of her dismissal, addressed matters of "public concern" and thus had potential constitutional protection in the context of a personnel action.[23] Justice White, in *Connick*, stated that the answer to this question was to "be determined by the content, form, and context of a given statement, as revealed by the whole record."[24] The Eighth Circuit panel noted this scheme of analysis and expanded upon it.

> The focus is on the role the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to

20. *Id.* at 3-4.
21. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 676 (8th Cir. 1986).
22. Cox v. Dardanelle Pub. School Dist., LR-C-80-441, slip op. at 5 (E.D. Ark. Apr. 23, 1984). The court also found that defendants had violated ARK. STAT. ANN. §§ 80-1264.6 and 80-1264.7 (Supp. 1980) which concern teacher personnel management. Cox v. Dardanelle Pub. School Dist., LR-C-80-441, slip op. at 3 (E.D. Ark. Apr. 23, 1984). This finding was not discussed by the court of appeals. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 670 n.2 (8th Cir. 1986).
23. *Id.* at 672. The Court in *Connick* also addressed this issue first. "[I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." Connick v. Myers, 461 U.S. 138, 146 (1983).
24. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

the employees of that institution.[25]

How the court then evaluated Cox's speech suggests that *Connick* can be interpreted in a way that is not as inimical to the free speech rights of public employees as many have feared.

1. Educational Policy

The first portion of Cox's speech that the court examined was her objection "to the District's decision to abandon ability grouping of students."[26] However, even though it had just repeated the *Connick* mandate that the analysis of speech was to consider content, form, and context, the court stated that "[t]he educational theories and practices employed by school administrators is clearly a question of public concern."[27] This statement was presumably based on content as there was no mention of the form of the speech or the context in which the disagreement over ability grouping arose.

The court, however, followed an authoritative example when it labeled the subject of Cox's speech as being of public concern solely on the basis of its content. In the *Connick* decision itself, Justice White described the question in Myers' questionnaire regarding assistant district attorneys being pressured to work in political campaigns as being inherently of public concern, without making reference to content or context.[28] Much like the Eighth Circuit did in *Cox*, the Court in *Connick* did not discuss the extent of subject areas which are inherently of public concern and thus do not need to be subjected to the content, form, and context analysis.

It is also significant, particularly compared to what some other courts have done,[29] that the *Cox* court decided that student ability grouping, a matter of internal substantive policy, was nevertheless, based on its content, a matter of public concern. Previous Eighth Circuit decisions had indicated that such could be the case, although those decisions were primarily in instances where employee dismissal was eventually upheld for other reasons.

A leading pre-*Connick* case, demonstrating the Eighth Circuit's view that a public employee's speech on internal substantive policy might merit protection, involved the dismissal by the United States Army Corps of Engineers of an applications review specialist for allegedly poor job performance. The employee claimed that his dismissal was actually due to his expression of disagreement over policy in ad-

25. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 672 (8th Cir. 1986).
26. *Id.* at 673. The characterization of the speech was subject to review by the court of appeals because "[t]he inquiry into the protected status of speech is one of law, not fact." *Id.* at 672 n.4 (quoting Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)).
27. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673 (8th Cir. 1986).
28. Connick v. Myers, 461 U.S. 138, 149 (1983).
29. *See* cases cited *infra* notes 35-40.

ministering environmental programs. The district court had granted summary judgement in favor of the government.[30]

In reversing the summary judgement, the Eighth Circuit stated that "Nathanson's right to express the views in question was constitutionally protected . . . ."[31] Specifically, it was recognized that a public employee's duties could entail the use of protected speech. "Nathanson's duties involved the application of environmental protection laws and . . . a necessary aspect of those duties would involve the expression of his opinion with respect to application of those laws."[32]

Similar language, specifically involving the right of a teacher to speak on in-school affairs, was contained in *Derrickson v. Board of Education*,[33] another pre-*Connick* decision. The Eighth Circuit reversed the lower court's decision in an action arising out of the dismissal of Derrickson, a public school teacher, and remanded for consideration of the free speech issues. The Eighth Circuit decided that "Derrickson had a constitutional right, under the first and fourteenth amendments, to privately express to his superiors, in a reasonable manner, his criticism of the educational or disciplinary policies at [his school]."[34]

Thus, the holding in *Cox*, that speech on a matter of internal program policy was of public concern, is consistent with previous Eighth Circuit decisions. However, it is in marked contrast to rulings by some other courts that have treated similar matters as not even tending to be of public concern.

An example of this narrower view came in *Ballard v. Blount*,[35] in which an assistant college English professor alleged that he had received less than average salary increases because he had exercised his free speech rights. Among other things, he had objected to a "proposed freshman English syllabus which restricted a teacher's latitude in conducting the class."[36] The court formulated the professor's claim as being that his "speech was related to a matter of public concern, since the decision regarding the syllabus would have an eventual, de-

30. Nathanson v. United States, 630 F.2d 1260, 1261-63 (8th Cir. 1980).
31. *Id.* at 1263.
32. *Id.* at 1264. Nathanson's dismissal was eventually upheld on the ground that it was due to his job performance and his refusal to follow directions rather than due to the expression of his views. Nathanson v. United States, 702 F.2d 162 (8th Cir. 1983).
33. 703 F.2d 309 (8th Cir. 1983).
34. *Id.* at 316. Just as was Nathanson's dismissal, Derrickson's dismissal was eventually upheld when it reached the Eighth Circuit a second time. In this case, "the disruptive manner and frequency of Derrickson's internal criticisms" affected his ability to do his job. Derrickson v. Board of Educ., 738 F.2d 351, 353 (8th Cir. 1984).
35. 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd mem.*, 734 F.2d 1480 (11th Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984).
36. *Id.* at 162.

rivative effect on the freshman English students."[37] Although the school's decision regarding the syllabus involved the actual functioning of the educational process, as did the decision on ability grouping in *Cox*, the judge in *Ballard* rejected the contention that the subject was one of public concern. "[A]ny speech relating to the discussion of the syllabus concerned matters of internal college affairs and did not relate to matters of public concern."[38]

Similarly, when a high school teacher in Miami claimed that he had not been given the teaching assignments that he wanted because he had complained about the student registration system in his school, the Eleventh Circuit decided that his speech did not involve a matter of public concern. The teacher had expressed concern that the registration system at his school "contributed to his inability to maintain control of students and to effectively enforce discipline."[39] The court felt that the teacher's speech did not address a matter of public concern because of, rather than in spite of, his motivation. "[His] inability to govern his students is undoubtedly a matter of interest only to [him]."[40]

Other courts, however, have expressed views similar to that of the Eighth Circuit as to what constitutes a matter of public concern. The Seventh Circuit took an expansive view of what constitutes a matter of public concern in the public school area in *Knapp v. Whitaker*.[41] Knapp, a science teacher and assistant baseball coach, had had a series of disputes with supervisors over mileage money, teaching schedules and evaluations, and liability insurance for teachers and parents transporting students to athletic events. After being told that these complaints were not the proper subjects of internal grievances, he violated district policy by directly contacting members of the school board about these matters and about the grievance procedure as well.[42]

Knapp was then transferred to another school, ostensibly due to a reduction in the teaching force and his lack of seniority. At trial, the jury found that the transfer had actually been due to his complaints.[43] As to the nature of his speech, the court of appeals ruled that his complaints about teaching assignments were personal in nature and not protected.[44] A different conclusion was reached about the other matters. "Knapp's speech to School Board members concerning the ineffectiveness of the grievance procedure, . . . , informed the . . . community of possible shortcomings in the management policies of

37. *Id.* at 164.
38. *Id.*
39. Ferrara v. Mills, 781 F.2d 1508, 1515 (11th Cir. 1986).
40. *Id.* at 1516.
41. 757 F.2d 827 (7th Cir. 1985).
42. *Id.* at 830-31.
43. *Id.* at 837.
44. *Id.* at 840.

the School District that could very well have a direct financial impact upon the entire taxpaying community."[45]

Similarly, the Third Circuit viewed speech by a mechanic about the operation of the county auto repair shop where he worked as addressing matters of public concern under the *Connick* analysis.[46] The court noted that "Czurlanis did not discuss his pay, his hours, or the conditions of his employment. Rather, he challenged practices of the Division of Motor Vehicles . . . that he considered inefficient, wasteful, and possibly fraudulent and, in some cases, made suggestions for correcting the problems."[47] And, in reasoning particularly relevant to the question of public employees speaking about their areas of expertise in matters that involved their own agency, the court rejected the contention that the speaker's employment status would change the classification of speech that was otherwise of public concern.[48]

Thus, the courts have taken sharply differing views about what types of subjects are of public concern when a public employee discusses his own agency. Since these decisions explicitly rely upon *Connick*, it is necessary to consider what speech the Court in *Connick* held did not address matters of public concern. This may be helpful in determining whether the broader view, that speech on internal policy can easily be on a matter of public concern, is correct as opposed to a more restrictive view, that most such speech is not on a matter of public concern.

The speech at issue in *Connick*, the questions in Myers' questionnaire, dealt with office personnel management and morale.[49] Further,

45. *Id.* at 842. It should be noted that the court believed that the grievance procedure would normally have been an internal matter. However, it was at the time a subject of ongoing collective bargaining. "In the context of this case, the grievance procedure was a legitimate matter of interest for the citizens . . . who, as taxpayers, had a financial stake in the settlement reached between the teachers and administrators . . . ." *Id.*

46. Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983).

47. *Id.* at 104.

48. *Id. Cf.* Nathanson v. United States, 630 F.2d 1260, 1264 (8th Cir. 1980) (*see supra* text accompanying note 32).

49. The following is the text of Myers' questionnaire:

PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARANTEED.

1. How long have you been in the Office?
2. Were you moved as a result of the recent transfers?
3. Were the transfers as they effected *[sic]* you discussed with you by any superior prior to the notice of them being posted?
4. Do you think as a matter of policy, they should have been?
5. From your experience, do you feel office procedure regarding transfers has been fair?
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects *[sic]* overall working performance of A.D.A. personnel?

the questionnaire format itself indicated only that one employee had a grievance rather than stating affirmatively that personnel policies or bad morale were hindering the functioning of the district attorney's office.[50] The questions did not deal with prosecutions, child support collection, or any other function of the district attorney's office that directly involved the delivery of services to the public. If the questions had dealt with such functional matters and had still been held not to deal with matters of public concern, then *Connick* would support the view that dissension about internal policy decisions in a public agency cannot be protected in the context of a discharge or disciplinary action.

On the other hand, the Court asserted in *Connick* that it was following earlier public employee free speech cases,[51] including *Pickering v. Board of Education*,[52] in which the Court had held that a teacher's public criticism of the board over the issue of a tax increase was constitutionally protected. In support of this holding the *Pickering* Court stated:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[53]

This language was adopted by implication in *Connick* and gives an indication of what type of speech does address matters of public concern and is thus potentially protected, while the primary focus of the discussion in *Connick* itself is of speech that does not address matters of

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8. If so, how do you think it effects *[sic]* office morale?
9. Do you generally first learn of office changes and developments through rumor?
10. Do you have confidence in and would you rely on the word of:
    Bridget Bane
    Fred Harper
    Lindsay Larson
    Joe Meyer
    Dennis Waldron
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
13. How would you rate office morale?
14. Please feel free to express any comments or feelings you have.

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

Connick v. Myers, 461 U.S. 138, 155-56 (1983).

50. *Id.* at 148 & n.8.
51. *Id.* at 142-47.
52. 391 U.S. 563 (1968).
53. *Id.* at 572. The numerous references to *Pickering* in *Connick*, a non-teacher case, indicate that the Court considered the reasoning of *Pickering* as applicable to other public employees as well. The Court has also stated that speech in private by a public employee to her superior could also be protected. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

public concern and cannot be protected in the context of a discharge or disciplinary action.

Cox's expression of opinion about ability grouping seems to fit within the category of speech about the "operation of the schools." Thus Cox's expression is more a matter of public concern than a grievance about internal office policy.[54] This is a better view than to hold that speech about the conduct of a public agency's primary duties is only of private concern.

2. *Criticism of Personnel Policies as Affecting Teacher Morale*

The *Cox* court also treated Cox's criticism of the principal as a matter of public concern. Cox criticized the principal for dealing with teachers in such a manner as to affect their morale and performance and ultimately affect the students.[55] In this area the court did apparently evaluate form and context as well as content.

> Cox's statements on these matters were not the comments of a single employee bearing on issues unique to that employee. Nor were her comments concerned solely with the immediate supervisor-employee relationship between [the principal] and the faculty. They obviously touch in great measure upon the ability of [the principal] and the faculty to 'discharge . . . the public function of education.'[56]

This result would appear to be at odds with at least some of the language in *Connick*.[57] Certainly other courts have used content, form, and context analysis to reach a distinctly different conclusion.

A common approach is to hold that since speech, arguably of public concern in content, arose in the context of an employment dispute, it is only of private concern to the employee and, therefore, is not protected. This occurred in *Ferrara v. Mills*,[58] in which the teacher complained to the principal about the assignment of coaches and physical education instructors to teach social studies as contributing to "civic illiteracy."[59] The Eleventh Circuit refused to view Ferrara's complaint

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54. At least speech on the question of ability grouping seems to be of public concern in content, if one thinks that all public employee speech is to be examined according to content, form, and context in order to determine if it addresses a matter of public concern.
55. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673 (8th Cir. 1986).
56. *Id.* (citations omitted).
57. "We view the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court." Connick v. Myers, 461 U.S. 138, 148 (1983). "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149.
58. Ferrara v. Mills, 781 F.2d 1508, 1510-11 (11th Cir. 1986). For other discussion of *Ferrara see supra* text accompanying notes 39-40.
59. Ferrara v. Mills, 781 F.2d 1508, 1510 (11th Cir. 1986).

as being a matter of public concern because it "was made in response to his having been denied for the course assignments which he requested."[60]

A similar view had been advocated by Judge Ross of the Eighth Circuit in his dissenting opinion in *Patteson v. Johnson*.[61] Patteson, a Deputy Auditor of the Nebraska Office of Public Accounts, had been dismissed because of the answers he gave to a committee of the Nebraska legislature. The answers were in response to questions regarding an audit that his office had conducted. A majority of the circuit panel felt that Patteson's remarks on the audit constituted speech on a topic of public concern and that the state's interest would have to be balanced against Patteson's interest in commenting on the audit.[62]

Judge Ross, however, questioned the public interest in Patteson's remarks. He did this, in part, because the statement to the committee arose in the context of an ongoing dispute between Patteson and Johnson, the state auditor.[63] "[T]he limited first amendment interest involved here does not require that Johnson tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[64]

As opposed to Judge Ross's dissenting view in *Patteson*, the clear trend of the Eighth Circuit is to take an expansive view of what constitutes speech on matters of public concern. An example of the Eighth Circuit's disinclination to remove speech from that category due to "form and content" is *Roberts v. Van Buren Public Schools*.[65] In an opinion by Judge Gibson, who also wrote the *Cox* opinion, the court stated that the complaint by two teachers about the funding for an educational field trip and for classroom supplies could not be characterized "as an 'internal office affair' within the contemplation of *Connick*."[66] Judge Gibson and the court showed a decided tendency to label any speech about the conduct of the educational process itself as addressing a matter of public concern, because under the circumstances in which the speech occurred, the speech would not fare well

60. *Id.* at 1515.
61. 721 F.2d 228, 234 (8th Cir. 1983) (Ross, J., dissenting).
62. Patteson v. Johnson, 721 F.2d 228, 231-32 (8th Cir. 1983). On remand the district court found that the state's interests did not outweigh those of Patteson, making the dismissal an impermissible violation of Patteson's rights. The Eighth Circuit affirmed this ruling. Patteson v. Johnson, 787 F.2d 1245 (8th Cir. 1986), *modified*, 790 F.2d 712 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 109 (1986).
63. Patteson v. Johnson, 721 F.2d 228, 234-35 (8th Cir. 1983) (Ross, J., dissenting).
64. *Id.* at 235.
65. 773 F.2d 949 (8th Cir. 1985).
66. *Id.* at 956. The court ruled that a grievance by the teachers concerning how the school handled parental complaints about the field trip itself "went more to the relationship between [the principal] and the teachers as supervisor and employees rather than to the discharge by [the principal] and the school of their public function of education." *Id.*

when balanced against the interests of the employer.[67]

Thus, the Eighth Circuit has continued to take a broad view of what constitutes speech dealing with matters of public concern, rather than the more restrictive approach Judge Ross advocated in *Patteson*. It has declined to apply the form and context analysis and hold that speech of public interest in content was not of "public concern." And in *Cox*, the Eighth Circuit used the content, form, and context analysis to raise seemingly *Connick*-type employment complaints to the status of speech of public concern.[68] Justice White specifically stated in *Connick* that this could occur.[69] Also, Cox's criticisms directly asserted that the principal's style had affected faculty morale, while the questionnaire in *Connick* only intimated that its author disagreed with her superiors.[70]

Therefore, the court's approach in *Cox* to the question of what is speech of public concern appears to be well-grounded in the example of *Connick*. This is an appropriate basis for evaluating the *Cox* ruling because the content, form, and context framework, separated from the facts of *Connick*, is subject to widely varying interpretations.

3. A Proposed Test to Classify Speech

As pointed out by Justice Brennan in his dissenting opinion in *Connick*, there appear to be "two classes of speech of public concern: statements 'of public import' because of their content, form, and context, and statements that, by virtue of their subject matter, are 'inherently of public concern.' "[71] In not delineating the extent of speech that requires a content, form, and context analysis, the Eighth Circuit cases have the same flaw as does *Connick*.

How does one distinguish speech by a public employee about his agency's (employer's) organizational policy, which must pass muster as to "form and context" as well as "content," from speech that is "inherently of public concern?" This question has not been explicitly answered. A workable solution may be to focus on what function the public agency was established to perform.[72] If the employee speaks

67. *See infra* text accompanying notes 91-94.

68. One portion of Cox's speech was held not to address a matter of public concern.

> Cox's criticism of the policies requiring teachers to sign in and out and forbidding personal use of the office phones, and her criticism regarding the timing of announcements and messages during the day all bear on internal matters relevant only to the employees of the school, and are not constitutionally protected.

Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673 n.6 (8th Cir. 1986).

69. Connick v. Myers, 461 U.S. 138, 148 (1983).

70. *Id.* at 148-49.

71. *Id.* at 159-60 (Brennan, J., dissenting).

72. This formulation, focusing on why an agency was established rather than on why it continues to exist, is intended to meet the objections of those who would say

about how the agency performs this function, his speech would qualify as addressing a matter "inherently of public concern." The necessary assumption is that if the public, through its representatives, establishes an agency to perform a certain function, then the public will be concerned about how the agency performs that function. Thus, when an engineer who is employed by a public electric utility tells her superiors that a power substation cannot meet the requirements of its planned service area, she would be speaking on a subject "inherently of public concern." A city garbage collector who objected to collection routes as being inefficient would also be speaking on a subject "inherently of public concern."

The above analysis, focusing on the function an agency was established to perform, would apply to speech by the employee of an agency, which does not provide a service directly to the public but supports other public agencies.[73] The actions of such agencies are of public interest because their effectiveness affects the services that agencies which directly serve the public provide.

Such a test would be consistent with the holding in *Cox* that speech about the ability grouping of students was "inherently of public concern,"[74] although that holding was based on public interest specifically in the educational process.[75] Schools are established to educate students. Cox, in speaking on ability grouping, was addressing the manner in which students are educated. In *Nathanson*, the Eighth Circuit may have been considering a standard based on the function of an agency when it recognized the right of a public employee to speak about the substantive aspects of his duties.[76] However, because *Nathanson* was a pre-*Connick* decision, the need for a standard may not have been recognized.

A test, focusing on the function the agency was established to perform, would follow the mandate of *Connick* and exclude speech by an employee about his or her own conditions of employment from being considered as "inherently of public concern." While all governmental agencies employ and supervise people, that is not the purpose for which they are established. For speech about employment conditions to be considered as addressing a matter of public concern, it would have to be analyzed as to content, form, and context.

Thus, a test based on agency function would be compatible with *Connick* as to what it excluded from being considered "inherently of

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that the first priority of any organization, particularly in the public sector, is to ensure its own continued existence.

73. *E.g.*, the mechanic in the county garage in Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983). *See supra* text accompanying notes 46-48.

74. *See supra* text accompanying notes 26-27.

75. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673 (8th Cir. 1986).

76. *See supra* notes 29-32 and accompanying text.

public concern." More problematic may be the question of whether a function test is compatible with *Connick* in terms of what the test would bring into the category of "inherently of public concern." The *Connick* opinion did not speak to the limits of this category. The Court held that the question Myers asked about assistant district attorneys being pressured to work in political campaigns was "inherently of public concern."[77] The Court deemed this question to be "inherently of public concern" not only because of the potential violation of the assistant district attorneys' rights, but also because of the effect that such pressure could have on the functioning of the district attorney's office.[78] The concern about office performance would be compatible with a function test, but it is not known if this concern would have been independently adequate for a finding that the question addressed a matter "inherently of public concern." The best that can probably be said is that *Connick* did not foreclose the use of a test based on agency function.

A final virtue of the function test would be that the courts, by adopting it, could avoid a series of cases in which they would have to decide whether speech about each type of agencies' functions addressed a matter "inherently of public concern."

B. The Balancing Test

A public employee, challenging a dismissal or disciplinary action based on speech, has only satisfied a first requirement when the court classifies the speech as addressing a matter of public concern. The employer may have interests that justify action against the public employee as a result of the speech.[79] The interests of the two must be balanced against each other.

In balancing these two interests, the court in *Cox* primarily examined whether or not Cox's performance or effectiveness had been impaired as a result of her speech. It concluded that they had not been impaired.[80] The court also looked at whether disruption followed the speech but was skeptical about whether a cause and effect relationship existed.[81] In both areas, the court followed a well established pattern of Eighth Circuit decisions.

1. Impairment of Ability to Perform Duties

In the Eighth Circuit, once the court finds that the speech of a pub-

77. Connick v. Myers, 461 U.S. 138, 148 (1983).
78. *Id.*
79. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Later, the Court stated that this was to be a "particularized balancing." Connick v. Myers, 461 U.S. 138, 150 (1983).
80. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 673-74 (8th Cir. 1986).
81. *Id.* at 674.

lic employee addresses a matter of public concern, the employee will be in a good position to prevail. The employee will prevail unless the employer can show that the employee was insubordinate in his speech or the speech impaired the employee's ability to perform his assigned duties. Clearly, under certain circumstances, speech which would otherwise be protected can impair the employee's ability to perform assigned duties. The boundaries of what constitutes insubordination are less certain.

The balance can shift against the employee when a reasonable opinion expressed repeatedly and obstinately impairs working relationships with superiors and co-workers. This was the reasoning of the Eighth Circuit in *Derrickson v. Board of Education*.[82] Derrickson, a St. Louis teacher, alleged that he had been dismissed due to "his internal criticism of the administration and faculty."[83] However, the court found that "the disruptive manner and frequency of Derrickson's internal criticisms weighed heavily against first amendment protection of those activities . . . even assuming that all of his criticisms touched upon matters of public concern."[84]

Also, in some circumstances, speech, even on a subject of active public controversy, can directly hinder the performance of a public employee's assigned duties and amount to insubordination. This occurred in *Patterson v. Masem*.[85] Patterson had been Supervisor of Minority Studies in the Little Rock school system. While employed in this position, she had been sent to one of the city's high schools to mediate a dispute over a student play, the language and casting of which some thought racially offensive. Her supervisor, Masem, regarded Patterson's job as being to work out a compromise so that the play could be presented.[86]

However, Patterson agreed with those who found the play objectionable and "ultimately became the spokesperson for the protestors, who became progressively more intense in their protests."[87] In this role, she sent a memo to Masem recommending that the play be cancelled and gave copies of the memo to the school principal and others.[88]

This episode was one of the alleged reasons that Patterson was not

82. 738 F.2d 351 (8th Cir. 1984).
83. Derrickson v. Board of Educ., 703 F.2d 309, 316 (8th Cir. 1983). On this earlier appeal, the court had said "Derrickson had a constitutional right, under the first and fourteenth amendments, to privately express to his superiors, in a reasonable manner, his criticisms of the educational or disciplinary policies at [his school]." *Id.*
84. Derrickson v. Board of Educ., 738 F.2d 351, 353 (8th Cir. 1984).
85. 774 F.2d 251 (8th Cir. 1985).
86. *Id.* at 253.
87. Patterson v. Masem, 594 F. Supp. 386, 389 (E.D. Ark. 1984).
88. *Id.*

selected when she later applied for the position of Supervisor of English and Social Studies.[89] That she was not selected was then the basis of Patterson's claim that her free speech rights had been violated.

The Eighth Circuit rejected the contention that Patterson's objections to the play were protected speech because the way in which she voiced them directly interfered with the performance of her properly assigned duties. The "play was selected by the school district (or by the drama teacher, to whom such authority had been delegated); it was Dr. Patterson's duty to respect the district's choice."[90] Rather than performing her assigned duty of encouraging a compromise, she had become one of the public leaders of the opposition to the play.

The Eighth Circuit showed that it would uphold a discharge based on speech that it explicitly found addressed matters of public concern in *Roberts v. Van Buren Public Schools*.[91] In *Roberts*, the speech concerned subjects about which responsible authorities had already made decisions. Although the speech passed the public concern test, it lost when balanced against the interests of the employer. "[A] government as an employer has a legitimate interest in achieving compliance with decisions that, while once open to dispute and discussion, have been made through proper channels."[92] The court did not indicate that the teachers had failed to perform assigned duties in compliance with these decisions. However, the complaints made by the teachers were apparently made in an intemperate manner.[93]

Turning to *Cox* itself, the court reviewed Cox's job performance during her third year in the Dardanelle school system and found that her criticisms of the principal had not affected her performance or her ability to work with her fellow teachers. In fact, most of her fellow teachers agreed with her criticisms. Nor did the defendants claim that she had voiced her criticisms in the classroom or that she willfully failed to follow any instructions concerning her teaching responsibilities.[94]

The court did not indicate whether Cox's criticisms of the principal on such subjects as ability grouping continued after the authorities had made decisions on these subjects, a factor that was critical in *Rob-*

89. *Id.* at 394.

90. Patterson v. Masem, 774 F.2d 251, 257 (8th Cir. 1985). The court did not so describe it, but this could qualify as an example of what Justice Brennan said would not be protected speech—saying "no" to a lawful order. Connick v. Myers, 461 U.S. 138, 163 n.3 (1983) (Brennan, J., dissenting).

91. 773 F.2d 949 (8th Cir. 1985). *See supra* notes 67-69 and accompanying text.

92. Roberts v. Van Buren Pub. Schools, 773 F.2d 949, 956 (8th Cir. 1985).

93. "[The principal] stated as to both teachers that the grievances . . . had been responses to his attempts to work with them on their deficiencies and had accused him of incompetence and dishonesty and threatened him with legal action." *Id.* at 953.

94. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 674 n.8 (8th Cir. 1986).

erts. This could mean that Cox had not criticized decisions after they were made or that Judge Gibson and the other members of the panel decided that job performance and compliance with instructions provided an adequate measure of whether or not she was insubordinate. Apparently Cox's speech was restrained in tone because the court said that no "statement by Cox can fairly be said to have disrupted her relationship with [the principal]."[95]

Of course, Cox's criticisms undoubtedly had not helped her relations with the principal, at least from his viewpoint. An argument may exist that even if the criticisms were valid and of public concern, their effect on the working relationship between the two justified Cox's dismissal.[96] The court foreclosed this line of reasoning by saying that "[t]he teacher-principal relationship is not of such a personal and intimate nature that teachers must be precluded from filing responsible grievances."[97] This statement sets clear precedent for restraining discharge or disciplinary actions against public school teachers. It cannot be automatically applied to situations involving other public employees because, in *Connick*, the Court mandated a "particularized balancing" of the respective interests of the employee and the employer.[98] If the speech "substantially involved matters of public concern,"[99] the balance could shift in the employee's favor. However, a requirement for a close working relationship between supervisor and subordinate would weigh in favor of upholding the employer's actions.[100] The requirement of a close working relationship could be argued for in situations other than those between teacher and principal.

2. *Disruption: But Whose Fault?*

Disruption may follow and even be caused by speech of a public employee, even though it addresses a matter of public concern. The Eighth Circuit has required that more than a temporal relationship be established between the speech and the disruption before such disruption can be entered in the balance against the employee. With one notable exception,[101] showing that the disruption would not have occurred "but for"[102] the speech in question may not be enough to justify action against the employee.

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95. *Id.* at 674.
96. *See* Pickering v. Board of Educ., 391 U.S. 563, 570 n.3 (1968).
97. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 674 (8th Cir. 1986).
98. Connick v. Myers, 461 U.S. 138, 150 (1983).
99. *Id.* at 152.
100. *Id.* at 151-52.
101. *See infra* notes 111-17 and accompanying text.
102. This is the author's term for a view that the Eighth Circuit judges might have adopted but have not. This discussion can be cast in the language of proximate cause, but the Eighth Circuit opinions have not cast the issue in those terms and neither will the author.

In *Cox*, the court acknowledged that the relationship between Cox and her principal had been disrupted, but discounted the contention that her complaints had caused the disruption. "The evidence indicates that the primary source of the disruption in their relationship (indeed, the cause of disruption of the relationship between a majority of the faculty and [the principal]), was [his] implementation and enforcement of the personnel policies, not Cox's speech."[103]

This finding was reminiscent of earlier Eighth Circuit decisions.[104] Those cases held that disruption caused by reaction to potentially protected speech could not enter into the balance if the reaction was unreasonable or sprang from impermissible motives. In one case, two assistant junior high school football coaches reported that the head coach had corporally punished students in violation of school policy, and they then discussed the matter in public. Disruption followed. "The incident drew a considerable amount of press coverage, caused some turmoil in the community, and is blamed for dividing a previously harmonious faculty and student body."[105] The disruption was so great that even when the federal district court ruled that the assistant coaches' speech was protected, and that no adverse action could be taken against them, the head coach adamantly refused to work with them further.[106] Although disruption followed the assistant coaches' speech, the court of appeals declined to view the disruption as the fault of the assistant coaches. "[C]ounsel for the appellee was not able to adequately explain why the appellants, and not [the head] coach . . ., were deemed responsible for the unrest which followed the 'licking.' "[107]

In another case, the Eighth Circuit said explicitly that reactions to speech by a public employee engendered by racial prejudice could not be entered in the balance against the employee. In *Patterson*, there had apparently been negative reactions to the plaintiff's speech and her activity in the area of civil rights. However, "Dr. Patterson's perceived abrasiveness and the antagonism she allegedly induced among the teachers cannot be legitimate factors justifying the Board's employment decision to the extent that these reactions are the result of her peers' racism or their disagreement with her apparent activism

103. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 674 (8th Cir. 1986).

104. Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983). *See infra* notes 105-07 and accompanying text and Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985). *See infra* text accompanying note 108.

105. Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 642 (8th Cir. 1983).

106. *Id.* at 643.

107. *Id.* at 645. Nor was the court persuaded by the school superintendent's argument that action against the two assistant coaches was appropriate because " 'many subversive tactics and involvements [were] unnecessarily generated and interjected into [the] administrative personnel problem.' " *Id.*

regarding desegregation and civil rights."[108]

Unfortunately, the reasoning of another recent decision suggests that action against a public employee based on speech is permissible if the reaction to the employee's speech is extreme enough, even though reprehensible in motivation. This is arguably the message of *Raposa v. Meade School District*.[109] Raposa taught the lower grades in a two room school in South Dakota which had nineteen students during the 1982-83 school year. The principal had given her favorable formal evaluations. Then, in April, 1983, she reported a case of suspected child abuse, involving one of her students, to the State Department of Social Services, as required by state law and district policy.[110]

A series of complaints about Raposa, generated by the parents of the school's students, began shortly thereafter. A number of the complaints specifically mentioned the child abuse report. At the May, 1983 school board meeting, a spokesman read a statement claiming that nine of the school's twelve families did not want Raposa to return the following year. The school superintendent and the president of the board believed that Raposa was a good teacher and that it would be impermissible to dismiss her for performing her legal duty. However, they felt that it would be untenable to keep Raposa in the same school because of the parents' hostility. As a result of this, the board voted to transfer her to another, larger school in the district.[111]

The Eighth Circuit, in an opinion written by Judge Ross,[112] affirmed this action on two primary grounds. First, the transfer was not a disciplinary action. Rather, it was an accommodation to a very unfortunate situation that the school board could not change.[113] Given the small size of the school and the fact that the transfer was to a larger school, which would not normally be considered a punitive measure, this reasoning is not objectionable. However, this procedure could be abused by transfers which are rationalized as necessary because of irreconcilable personality conflicts, but which are in fact designed to punish an employee for protected speech.

Second, the court said that the parents' reactions could be entered in the balance against Raposa's legitimate interest in reporting the suspected child abuse. "Under the particular facts of this case, the importance of harmony and cohesion in the . . . school outweighs the teacher's interest in commenting on a matter of public concern."[114]

108. Patterson v. Masem, 774 F.2d 251, 256 (8th Cir. 1985).
109. 790 F.2d 1349 (8th Cir. 1986).
110. *Id.* at 1350-51.
111. *Id.*
112. Ross was also the author of the dissenting opinion in Patteson v. Johnson, 721 F.2d 228 (8th Cir. 1983), in which he advocated a narrow definition of what speech addressed matters of public concern. *See supra* text accompanying notes 61-66.
113. Raposa v. Meade School Dist. 790 F.2d 1349, 1353 (8th Cir. 1986).
114. *Id.*

The court distinguished the case from *Bowman*, where the teachers were also transferred, by saying that the transfer of Raposa was not intended as a disciplinary measure.[115]

This distinction is not persuasive. In *Bowman*, the court held that the speech in question was protected, but that if the continued animosity of the head coach made it unworkable for the plaintiffs to return to their original positions, they could be transferred with their consent to equal or better positions.[116] This is similar to what the school board in *Raposa* actually did, and the court could have upheld the transfer on that basis. Instead, the court allowed the severity of the reaction to the speech, even though unreasonable, to determine the protected status of the speech. On this basis, the speech in *Cox* might well have been held to be unprotected due to the severity of the principal's reaction to it.

C. Would the Discharge Have Occurred Anyway?

Cox's dismissal would have been upheld if the Dardanelle district could have shown that it would have dismissed her even without the protected speech.[117] As stated before, her speech was not the reason for her dismissal, and the board of education may not even have known of the conflict between Cox and the principal.[118] The district court, however, found that the stated grounds were pretextual and insignificant and that the school would have rehired Cox but for her protected speech.[119]

The court of appeals affirmed this finding. The review was on a "clearly erroneous" standard since the question was one of fact.[120] The reasoning indicates the tendency of at least the judges on this panel,[121] if not the rest of the circuit, to conduct such a review.

The court thought it doubtful that the board would have discharged a teacher for infractions as minor as those cited. In addition, the court noted that the principal had prepared memos that were placed in Cox's personnel file, which had mentioned the grievance she had filed. Also, the fact that the district acted only against the three teachers who had filed individual grievances supported the lower court's finding. The court stated, "[t]here is ample evidence to sustain

115. *Id.*
116. Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 645 (8th Cir. 1983).
117. Mount Healthy School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 672, 675 (8th Cir. 1986).
118. *See supra* text accompanying notes 20-21.
119. Cox v. Dardanelle Pub. School Dist., No. LR-C-80-441, slip op. at 4 (E.D. Ark. Apr. 23, 1984).
120. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 675 (8th Cir. 1986).
121. Circuit Judges Gibson and McMillian and Senior Circuit Judge Henley were the judges on the panel.

the district court's finding."[122]

Finally, if the board was unaware of the dispute between Cox and the principal and the principal had not recommended dismissal, Cox would have been rehired but for the impermissible reaction against her protected speech.[123] It is not enough that the motives of the ultimate decision maker in an action against a public employee be unaffected by the employee's protected free speech. The process leading to the decision cannot be decisively affected by a desire to retaliate against such speech.

IV. CONCLUSION

The Eighth Circuit has developed a coherent approach to cases involving speech by public employees. It takes a broad view of what speech is of public concern. The circuit seems to view speech about what type of service the employee's agency will provide to the public as addressing matters of public concern.

The circuit has followed the example of *Connick* in defining what constitutes speech of public concern. In doing so, it has not subjected all speech to a content, form, and context analysis. But, of course, neither did the Court in *Connick*. In not subjecting all speech to a content, form, and context analysis, the Eighth Circuit cases suffer the same flaw as *Connick*. How does one identify speech that must pass muster as to its "form and context" as well as "content" before it is potentially protected? This question has not been explicitly answered, but a solution may be to compare the subject of the speech to the purpose for which the employee's agency was established and to hold that the speech addresses a matter of public concern when the two match.

If the speech does address a matter of public concern, in order to prevail, the employer has had to show that something about the speech itself, or a reasonable reaction to it, has impaired the employee's job performance or effectiveness. In the alternative, the employer has had to show that the speech, by timing or manner, defies the employer's legitimate authority and amounts to insubordination.

An unresolved issue is whether some speech is so meritorious that it cannot be the basis of adverse action, no matter how much disruption results. The decisions in *Bowman* and *Patterson* suggest that there is such speech. The *Raposa* decision suggests that *all* speech must be balanced against the competing interests of the employer and may be unprotected if the reaction is extreme enough.

The concerns of the critics of the *Connick* decision have been borne out in the decisions of some courts. *Connick* has been used to narrow the range of topics on which a public employee may speak. However,

122. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 675 (8th Cir. 1986).
123. *Id.* at 676.

the Eighth Circuit decisions and this note have shown that such an interpretation is not the only, or even the best, view of *Connick*.

Edward L. Dunlay, '88