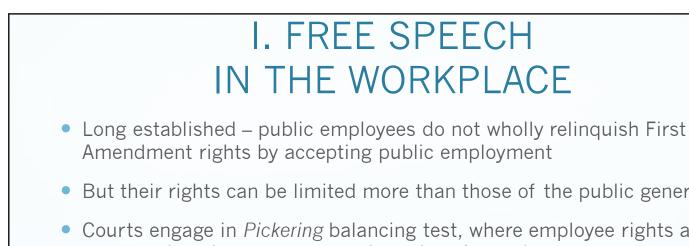
## 2019 Update – Public **Employee Issues**

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- But their rights can be limited more than those of the public generally
- Courts engage in *Pickering* balancing test, where employee rights are measured against governmental employer's needs
- Pickering v. Bd. of Educ. (Sup Ct 1968)

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## Elements – public employee Free Speech Claims

- Test for public employee free speech claims:
- 1. Did employee suffer adverse employment action?
- 2. Did employee speak on matter of public concern?
- 3. Did employee interest in speech outweigh employer's interest in gov'tal efficiency?
- 4. Was the adverse action substantially motivated by the employee's speech?

Added Element – did employee speak pursuant to official job duties?

- Seminal case Garcetti v. Ceballos, 547 U.S. 410 (2006)
- New clarification Lane v. Franks, 573 U.S. 13 (2014)
- Critical distinction speech connected to job can still be protected as long as it is not speech required by job (but courts blur this line often)

# Undecided Issue (5<sup>th</sup> Cir.): What constitutes an adverse employment action?

- Old law must have concrete action like discharge, demotion that involves loss of pay
- Transfer in some cases constitutes adverse employment action, even w/out pay loss, if it is in effect a demotion.

## Does Burlington Northern supplant Adv Emp Act standard?

- Burlington Northern any action considered materially adverse, if it would dissuade an employee from making a report.
- BN has been applied in First Amendment context by some district courts in the 5<sup>th</sup> circuit – e.g., *Rodriguez v. Laredo*, 2007 WL 2329860
- But 5<sup>th</sup> Circuit has not decided question Dumas v. St. Tammany, 2018 WL 2117240 (W.D.La.)

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First appeared as part of the conference materials for the  $26^{th}$  Annual Labor and Employment Law Conference session "Public Sector Update"