

9.9 Particular Rights—First Amendment—Public Employees—Speech

As previously explained, the plaintiff [name] has the burden of proving that the act[s] of the defendant [name] deprived the plaintiff [name] of particular rights under the United States Constitution. In this case, the plaintiff [name] alleges the defendant [name] deprived [him] [her] [other pronoun] of [his] [her] [other pronoun] rights under the First Amendment to the Constitution when [insert factual basis of the plaintiff's claim].

Under the First Amendment, a public employee has a qualified right to speak on matters of public concern. I instruct you that the plaintiff [name]'s speech was on a matter of public concern. To prove the defendant [name] deprived the plaintiff [name] of this First Amendment right, the plaintiff [name] must prove the following additional elements by a preponderance of the evidence:

First, the plaintiff [name] spoke as a private citizen and not as part of [his] [her] [other pronoun] official duties as a public employee;

Second, the defendant [name] took an adverse employment action against the plaintiff; and

Third, the plaintiff [name]'s speech was a substantial or motivating factor for the adverse employment action.

An action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable worker from engaging in protected activity.

A substantial or motivating factor is a significant factor, though not necessarily the only factor.

If the plaintiff [name] establishes each of the foregoing elements, the burden shifts to the defendant [name] to prove by a preponderance of the evidence that [the defendant [name] would have taken the action(s) in question, even in the absence of any motive to retaliate against the plaintiff [name]] [legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption outweigh the plaintiff's First Amendment interests]. If you find that the defendant [name] is able to demonstrate this, you must find for the defendant [name]. If you find that the defendant is not able to demonstrate this, you must find for the plaintiff [name].

Comment

Use this instruction only in conjunction with the applicable elements instruction, Instructions 9.3-9.8, and when the plaintiff is a private citizen, use Instruction 9.11 (Particular Rights—First Amendment—"Citizen" Plaintiff). Because this instruction is phrased in terms

focusing the jury on the defendant's liability for certain acts, the instruction should be modified to the extent liability is premised on a failure to act to avoid any risk of misstating the law. *See Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009). If there is a dispute about whether the public employee was speaking as a private citizen, use Instruction 9.10 (Particular Rights—First Amendment—Public Employees—Speaking as a Private Citizen).

As to whether a public employee's speech is protected under the First Amendment, the Supreme Court has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) (applying *Garcetti* public concern test to public employee's First Amendment Petition Clause claims).

In *Hernandez v. City of Phoenix*, 43 F.4th 966, 976 (9th Cir. 2022), the Ninth Circuit reiterated that the "five sequential steps to analyze First Amendment retaliation claims brought by government employees," require considering

(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. (quoting *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)); *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *see also Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776-77 (9th Cir. 2022) (setting forth legal standard for public employee First Amendment retaliation claims); *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 721 (9th Cir. 2022) (same).

Under the framework above, the government employee bears the burden of proving the first three steps of the test. *See Moser v. L.V. Metro. Police Dep't*, 984 F.3d 900, 904 (9th Cir. 2021). If the employee succeeds in making that threshold showing, the burden then shifts to the government to prove steps four and five. *See id.*; *Ohlson v. Brady*, 9 F.4th 1156, 1162 (9th Cir. 2021); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 (2022) (discussing the burden shifting framework of the *Pickering-Garcetti* analysis); *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1147 (9th Cir. 2025) (reversing summary judgment for defendants on the application of *Pickering* when, viewing the facts in the light most favorable to the plaintiffs, the defendants had not "shown the actual or reasonably predicted disruption [was] so substantial they prevail under *Pickering* as a matter of law").

The “public concern inquiry is purely a question of law,” *Eng*, 552 F.3d at 1070, that depends on the “content, form, and context of a given statement, as revealed by the whole record.” *Moser*, 984 F.3d at 905 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)); see also *Adams v. County of Sacramento*, 143 F.4th 1027, 1034-37 (9th Cir. 2025) (amended opinion) (holding that private text exchange related to offensive images did not involve a matter of public concern).

In *Garcetti*, the Supreme Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” 547 U.S. at 421-22. The Supreme Court, however, limited its ruling in two respects. First, in an explicit effort to avoid having its holding serve as an invitation for employers to restrict employees’ rights “by creating excessively broad job descriptions,” the Court noted that “the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” *Id.* at 424-25. Second, the Court recognized that

[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence ... [F]or that reason [we] do not[] decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

In *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), however, the Ninth Circuit answered the latter question and held that “*Garcetti* does not apply to ‘speech related to scholarship or teaching.’” Rather, the Ninth Circuit held that such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968) (considering speech by public school teacher critical of school board). *Id.* In *Demers*, the court went on to conclude that a state university professor’s plan for changes in his department addressed a matter of public concern under *Pickering*. *Id.* at 414-17; see also *Jensen v. Brown*, 131 F.4th 677, 688-89, 694 (9th Cir. 2025) (relying on *Demers* to apply the *Pickering* test to a community college professor’s First Amendment retaliation claim against his employer based on his criticism of curriculum changes); *Reges v. Cauce*, 162 F.4th 979 (9th Cir. 2025) (analyzing, under *Pickering*, professor’s statement about and refusal to adopt “land acknowledgment” of university recognizing ownership of university’s lands by Native American tribe). In the university setting, which is a “special niche” deserving of heightened protection for professors’ speech under the First Amendment, the university’s goal of creating an inclusive environment, maintaining harmony among staff, and quelling students’ unrest did not justify restricting professor’s speech on a matter of public interest. *Reges*, 162 F.4th at 997-1002. But in *Thompson v. Central Valley School District No. 365*, 163 F.4th 654, 666 (9th Cir. 2026), the

Ninth Circuit held under the *Pickering* test that the employer, a school district, “sufficiently showed a reasonable prediction of disruption” by the middle school administrator in a public-facing role. The court gave little weight to the administrator’s speech and, thus, determined that the District’s interest in “creating a safe and inclusive school environment outweigh[ed] the public interest commentary of [the administrator’s] speech.” *Id.* By contrast, in *Kennedy v. Bremerton School District*, the Supreme Court held that a football coach spoke not as a public employee, but as a private citizen, when he decided “to persist in praying quietly without his players after three games in October 2015,” 597 U.S. 507, 525-26 (2022), which were “the three prayers that resulted in his suspension,” *id.* at 529.

The definition of “adverse employment action” in this instruction is substantially the same as that in Instruction 10.12 (Civil Rights—Title VII—“Adverse Employment Action” in Retaliation Cases). See the Comment to that instruction for supporting authorities.

With respect to causation, “[i]t is clear . . . that the causation is understood to be but-for causation, without which the adverse action would not have been taken.” *Hartman v. Moore*, 547 U.S. 250, 260 (2006). Proximity in time can support a causal connection between speech and an adverse employment action. See *Burch v. City of Chubbuck*, 146 F.4th 822, 838 (9th Cir. 2025). Thus, “upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee).” *Id.*; see *Burch*, 146 F.4th at 839-40 (holding that there was no genuine dispute of fact that defendants had an adequate justification for the adverse employment actions or would have reached the same adverse employment actions even in the absence of the protected action speech, which in this case was plaintiff’s placement of a yard sign supporting his superior’s election opponent).

The Ninth Circuit has held that “a final decision maker’s wholly independent, legitimate decision to terminate an employee [can] insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired” when, as a matter of causation, “the termination decision was not shown to be influenced by the subordinate’s retaliatory motives.” *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 799 (9th Cir. 2009); see also *Greisen v. Hanken*, 925 F.3d 1097, 1115-17 (9th Cir. 2019) (holding substantial evidence supported proximate causation conclusion even though plaintiff was terminated by defendant’s successor because “[defendant]’s actions were a causal factor in [the successor]’s decision”).

Regarding motive, the defendant’s actions must have been substantially motivated by a desire to deter or chill the employee’s speech. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004); see *Dodge*, 56 F.4th at 781. Defining “substantial or motivating factor” as a “significant factor” does not misstate the law. *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884-85 (9th Cir. 2003); see also *Capp v. City of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019) (explaining that retaliatory intent may still be one substantial or motivating factor for retaliatory conduct even if other, non-retaliatory reasons exist).

This instruction should be modified when an employee was allegedly subjected to an adverse employment action based on an employer's erroneous belief that the employee engaged in protected speech. In such cases, it is the employer's motive for taking the adverse action that triggers the employee's right to bring an action. *See Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.").

This instruction also should be modified when a public employee alleges an adverse employment action based on the employee's refusal to enter into an unconstitutional prior restraint, limiting the public employee's right to speak as a private citizen on a matter of public concern. *See Barone v. City of Springfield*, 902 F.3d 1091, 1101-06 (9th Cir. 2018).

"Although the [Supreme] Court first applied this framework to government employees, it extended its application to retaliation cases brought by government contractors because 'the similarities between government employees and government contractors with respect to this issue are obvious.'" *Riley's Am. Heritage Farms*, 32 F.4th at 720 (quoting *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)). Moreover, the Ninth Circuit has extended this framework "to a range of situations where 'the relationship between the parties is analogous to that between an employer and employee,'" including cases involving "a business vendor operating under a contract with the government for weatherization services," "a domestic violence counselor employed by a private company that performed counseling services for a municipal court," and "a volunteer probation officer." *Id.* at 720-21. The Ninth Circuit has also extended this framework to a case in which a school district relied on a private company to provide educational services for public school students. *Id.* at 722.

This instruction does not apply to restrictions on the speech of elected officials because "an elected official's speech is protected regardless [of] whether the official is speaking 'as a citizen upon a matter of public concern.'" *See Boquist v. Courtney*, 32 F.4th 764, 780 (9th Cir. 2022) (quoting *Garcetti*, 547 U.S. at 418).

After a plaintiff establishes the first three steps, he or she has made out a prima facie case, and at step four the burden shifts to the government "to show that 'under the balancing test established by *Pickering*, [the government's] legitimate administrative interests outweigh the employee's First Amendment rights.'" *Moser*, 984 F.3d at 906 (quoting *Eng*, 552 F.3d at 1071) (holding the government failed to satisfy its step four burden because it did not produce any evidence indicating the speech at issue caused or would cause disruption). "[T]he *Pickering* balancing test is a legal question, but its resolution often entails underlying factual disputes that need to be resolved by a fact-finder." *Id.* at 911 (quoting *Eng*, 552 F.3d at 1071).