

# **MAYHEW v. TOWN OF SMYRNA: THE SIXTH CIRCUIT FRUSTRATES PUBLIC EMPLOYEES' RIGHT TO A JURY TRIAL**

**Abstract:** On May 11, 2017, the U.S. Court of Appeals for the Sixth Circuit, in *Mayhew v. Town of Smyrna*, held that the protected status of a public employee's speech in a First Amendment retaliation claim remains one of law, rather than one of mixed law and fact. In so doing, the Sixth Circuit disallowed jury determinations on the fact-intensive inquiry into the protected status of the employee's speech. This Comment argues that despite having the invaluable opportunity—as a historically conservative court—to defend the voices of public employees, the Sixth Circuit continued its obliteration of public employees' right to a jury trial. This Comment further argues that the Sixth Circuit's decision could leave much of public sector misconduct unreported.

## INTRODUCTION

Before the U.S. Supreme Court decided *Pickering v. Board of Education* in 1968, government employees were afforded minimal First Amendment protection of their critical expressions at work.<sup>1</sup> In *Pickering*, the Court held that public employees do not lose First Amendment protection while working for the government, but still limited their ability to speak out in significant ways.<sup>2</sup>

Federal Circuit Courts of Appeals are split over whether the inquiry into the protected status of speech under the First Amendment is purely a

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<sup>1</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565–66, 574 (1968) (holding that a board of education's firing of a teacher for his letter to a newspaper criticizing the board for alleged mismanagement of school funds violated his First Amendment right to free speech). A public employee is typically someone who works within a place of business in charge of the local or national government's affairs. *Civil Servant*, BLACK'S LAW DICTIONARY (10th ed. 2014). As noted by Oliver Wendell Holmes, then a Justice on the Massachusetts Supreme Judicial Court, these workers had “a constitutional right to talk politics,” but “no constitutional right to be a policeman.” *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). The U.S. Supreme Court noted ninety years later, “[f]or many years, Holmes' epigram expressed this Court's law” that public employees must accept their work as a mere privilege, which the government could regulate without fear of Constitutional review. *Connick v. Myers*, 461 U.S. 138, 143–44 (1983).

<sup>2</sup> See *Pickering*, 391 U.S. at 56 (protecting public employees' first amendment rights only in situations where the employee speaks on issue of public concern and when the employee's interest in speaking outweighs the employer's interest in efficiency). The legal theory underlying the Supreme Court's change in its interpretation of public employees' First Amendment protections is that a State cannot condition public employment on a basis that encroaches on the employee's interest in exercising their constitutionally protected free speech. *Connick*, 461 U.S. at 142; see also *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (stating that the government was not justified in restricting employees' speech that did not detract from running effective workplace).

question of law.<sup>3</sup> When a judge decides certain speech is unprotected as a matter of law, despite the existence of a material factual dispute as to the speaker's status as a public employee when speaking, the case is removed from the jury in lieu of a bench trial.<sup>4</sup> The court decides the issue, rather than the public employee's peers who may be better suited for the task.<sup>5</sup> It was against this backdrop that in 2017, the U.S. Court of Appeals for the Sixth Circuit revisited the issue in *Mayhew v. Town of Smyrna*.<sup>6</sup>

Before the Supreme Court's 2014 decision in *Lane v. Franks*—the most recent public employee First Amendment retaliation claim decided by the Court—the Sixth Circuit had treated the inquiry into the protected status of speech as one of law.<sup>7</sup> In 2017, in *Mayhew*, the Sixth Circuit had the chance to reconsider this longstanding employer-friendly tradition.<sup>8</sup>

Part I of this Comment provides an overview of the Supreme Court's public employee free speech framework, and more specifically, the protected speech element.<sup>9</sup> Part I goes on to detail the current circuit split regarding whether this inquiry is a question of law for the court to decide, or a mixed question of law and fact that may need to be resolved by a jury.<sup>10</sup> Part II details the procedural history and provides a factual overview of *Mayhew*.<sup>11</sup> Part II then examines and discusses the Sixth Circuit's holding

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<sup>3</sup> *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010) (discussing the circuit split regarding whether the inquiry into the protected status of speech remains question of law or has transformed into mixed question of law and fact); *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008) (holding that a police officer's truthful testimony constituted protected speech as matter of mixed fact and law); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1198–99, 1202, 1208 (10th Cir. 2007) (holding that a teacher's grievances for speech restrictions, charter renewal, and school elections were protected speech as matter of law).

<sup>4</sup> See *Mixed Questions of Law and Fact*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that mixed questions of law and fact are issues typically presented to a jury, not a judge); *Questions of Law*, *id.*; *infra* notes 28–31 and accompanying text (discussing the distinction between questions of law and questions of mixed law and fact).

<sup>5</sup> See *infra* notes 37–57 and accompanying text (discussing fact-intensive nature of the inquiry into whether the plaintiff spoke as a citizen or as a public employee).

<sup>6</sup> *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017).

<sup>7</sup> See *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Mayhew*, 856 F.3d at 462; *Rorrer v. City of Stow*, 743 F.3d 1025, 1047–48 (6th Cir. 2014) (holding a firefighter's testimony at arbitration about colleague's discipline by department was about private matter and unprotected as matter of law); *Dixon v. Univ. of Toledo*, 702 F.3d 269, 274, 277 (6th Cir. 2012) (holding the school administrator's op-ed column in local press that criticized comparisons between the civil-rights and gay-rights movements was on a political or policy issue and therefore unprotected as a matter of law); *Westmoreland v. Sutherland*, 662 F.3d 714, 718 (6th Cir. 2011) (holding a firefighter's critical comments of the city council constituted protected speech as matter of law); *infra* notes 39–45 and accompanying text (discussing how *Lane* affected First Amendment retaliation claim case law);

<sup>8</sup> See *Mayhew*, 856 F.3d at 462 (reviewing historic procedural treatment of the inquiry into protected status of public employees' speech).

<sup>9</sup> See *infra* notes 18–36 and accompanying text.

<sup>10</sup> See *infra* notes 37–57 and accompanying text.

<sup>11</sup> See *infra* notes 61–69 and accompanying text.

in *Mayhew* that the inquiry into protected speech remains one of law.<sup>12</sup> Part III argues that, in *Mayhew*, the Sixth Circuit properly interpreted a recent Supreme Court case as not disrupting its tradition of treating the protected status of speech in a First Amendment retaliation claim as a question of law.<sup>13</sup> Finally, Part III argues that the *Mayhew* holding will nonetheless unfairly impair public employees' right to a jury trial.<sup>14</sup>

## I. BACKGROUND

The First Amendment of the U.S. Constitution protects a person's right to free expression from unwarranted government interference.<sup>15</sup> Section A of this Part examines the development of the protection of this right and, in particular, the U.S. Supreme Court's evolving free speech doctrine for public employees.<sup>16</sup> Section B of this Part describes the different approaches taken by the Federal Circuit Courts of Appeals regarding whether the protected status of public employees' speech is purely one of law or one of mixed law and fact.<sup>17</sup>

### A. The Supreme Court's Public Employee Free Speech Framework

42 U.S.C. § 1983 allows public employees to sue employers who, under the color of state law, deprive them of their First Amendment right to free speech.<sup>18</sup> Litigants in most § 1983 First Amendment retaliation suits

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<sup>12</sup> See *infra* notes 70–84 and accompanying text.

<sup>13</sup> See *infra* notes 88–95 and accompanying text.

<sup>14</sup> See *infra* notes 96–105 and accompanying text.

<sup>15</sup> U.S. CONST. amend. I; see also Erika Schutzman, Note, *We Need Professional Help: Advocating for A Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2024–30, 2047–55 (2015) (describing the First Amendment and the professional speech doctrine). The First Amendment is a limit only on the federal government. U.S. CONST. amend. I. Through the Fourteenth Amendment, state and local governments are also prohibited from infringing on constitutional rights. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>16</sup> See *infra* notes 18–36 and accompanying text.

<sup>17</sup> See *infra* notes 37–57 and accompanying text.

<sup>18</sup> See 42 U.S.C. § 1983 (2012) (providing cause of action against any person who, under the color of state law, deprives an individual of any “rights, privileges, or immunities secured by the Constitution and [federal] law”). Its purpose is to deter state actors from using that title to infringe on individuals' federally guaranteed rights and to provide relief to those individuals when state actors are not deterred. See *McKnight v. Rees*, 88 F.3d 417, 419 (6th Cir. 1996) (providing definition and purpose of § 1983). Section 1983 was passed as § 1 of the Civil Rights Act of 1871. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. The legislation remained relatively untouched until the Supreme Court, in 1961, exempted municipalities from liability under § 1983. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Subsequently, in 1978, the Supreme Court overruled the part of *Monroe* that exempted municipalities. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 687 (1978). In 1980, in *Maine v. Thiboutot*, the Supreme Court held that § 1983 could not only be used to enforce viola-

have a right to a jury trial.<sup>19</sup> To establish a successful § 1983 First Amendment retaliation claim, a public employee must show: 1) the employee engaged in speech or conduct that was protected by the Constitution; 2) the employee suffered an adverse action likely to deter an ordinary person from continuing to engage in that protected speech or conduct; and 3) the existence of a causal connection between the first two elements.<sup>20</sup>

The first element lacked clarity until *Pickering v. Board of Education* was decided in 1968.<sup>21</sup> In *Pickering*, the Supreme Court developed a two-step inquiry to determine whether the first element of a § 1983 First Amendment retaliation claim has been met.<sup>22</sup> The first step asks whether the employee's speech addresses a matter of "public concern."<sup>23</sup> If the speech does not address a matter of public concern, it is not protected by the First Amendment, and the employer prevails.<sup>24</sup> If the speech does address a mat-

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tions of federal constitutional rights, but also to enforce violations of federal statutory rights. 448 U.S. 1, 4 (1980).

<sup>19</sup> U.S. CONST. amend. VII; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707–21 (1999) (holding that § 1983 First Amendment retaliation suits typically invoke the right to a jury trial under the Seventh Amendment).

<sup>20</sup> *Westmoreland*, 662 F.3d at 718; *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006); *see also* *Farhat v. Jopke*, 370 F.3d 580, 588 (6th Cir. 2004) (reasoning that a causal connection is present when the negative action taken against employee is motivated or substantially caused by his or her protected speech). Whether an adverse employment action was substantially motivated by an employee's protected speech is a question of fact for the jury. *Bass v. Richards*, 308 F.3d 1081, 1088 (10th Cir. 2002). If the speech is unprotected the analysis stops there and the causal connection question is not heard by the jury. *See id.* (explaining the steps in the *Pickering* analysis). In the Sixth Circuit, government acts of retaliation need not be severe or of a certain kind to be considered an "adverse action" likely to deter an ordinary person from continuing to engage in the protected speech. *See Benison v. Ross*, 765 F.3d 649, 660 (6th Cir. 2014) (holding that a decision by a state university to file suit against a professor to recover sabbatical compensation constituted an "adverse action"); *Handy-Clay v. City of Memphis*, 695 F.3d 531, 545 (6th Cir. 2012) (holding the decision by the City Attorney's Office to terminate public record coordinator's employment constituted an "adverse action").

<sup>21</sup> *See generally Pickering*, 391 U.S. 563 (finding a public employee's speech to be protected by the First Amendment where the speech addresses a matter of public concern and the employee's interest in speaking outweighs the government's interest as an employer in promoting efficiency).

<sup>22</sup> *Id.* at 574.

<sup>23</sup> *Id.* Since *Pickering*, a wide variety of matters have been considered to be of public concern. *See Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (holding that a statement made about an attempt on the President's life in the course of a conversation addressing policies of the President's administration touched on matter of public concern); *Victor v. McElveen*, 150 F.3d 451, 456 (5th Cir. 1998) (holding that a police officer's comments at a work meeting about racial discrimination touched on matter of public concern); *Am. Postal Workers Union v. U.S. Postal Serv.*, 830 F.2d 294, 302 (D.C. Cir. 1987) (holding postal employee's comments about right-to-work legislation touched on matter of public concern).

<sup>24</sup> *Pickering*, 391 U.S. at 574; *see Hesse v. Bd. of Educ.*, 848 F.2d 748, 751–52 (7th Cir. 1988) (holding that a teacher's defense of his teaching methods and appropriate discipline for students was merely personal-grievance speech); *Gomez v. Tex. Dep't of Mental Health & Mental Retardation*, 794 F.2d 1018, 1022 (5th Cir. 1986) (holding speech by an employee about the

ter of public concern, the employee's interest in speaking is weighed against the employer's interests in promoting efficiency.<sup>25</sup>

The Supreme Court refined this test in 1983, in *Connick v. Myers*, reasoning that a government employee can only pass the threshold "public concern" step when the employee speaks: 1) as a citizen; and 2) upon matters of public concern rather than "matters only of personal interest."<sup>26</sup> In *Connick*, the Court also succinctly clarified that this two-step inquiry into the protected status of the speech is purely legal.<sup>27</sup> A question of law is an issue that concerns the direct application of the law to already determined facts, and is reserved for the court and not submitted to the jury.<sup>28</sup> In contrast, juries typically resolve mixed questions of law and fact.<sup>29</sup> Their factu-

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treatment at a mental health facility did not touch on a matter of public concern); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984) (holding a public employee's statement that it was "good news" that her boss was terminated did not touch on matter of public concern).

<sup>25</sup> *Pickering*, 391 U.S. at 574. This balancing test takes into consideration that the government, as an employer, has interests in controlling the speech of its employees that differ from its interests in controlling the speech of the public at large. *Id.* at 568. The Eighth Circuit has indicated that whenever the balancing process must be invoked to determine whether the plaintiff's speech was protected by the First Amendment, any underlying factual disputes should be submitted to the jury through special interrogatories or special verdict forms. *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

<sup>26</sup> *Connick*, 461 U.S. at 143. In *Connick*, an assistant district attorney, unhappy with her supervisor's decision to transfer her to another division, circulated an intra-office questionnaire requesting her co-workers to share their views on office policies and morale. *Id.* at 141. She was subsequently fired. *Id.* Finding that, with the exception of the final question, the questionnaire touched on internal workplace grievances rather than on matters of public concern, the Court stated that no *Pickering* balancing was required. *Id.* at 146. The Court adopted the vague standard found in the *Restatement of Torts*, which deals with invasion of privacy, to further clarify "public concern." *Id.* at 143 n.5 (citing RESTATEMENT (SECOND) OF TORTS § 652D (Am. Law. Inst. 1977)) (stating standard to determine whether employees' expression is meaningful to the public is same as standard to determine whether common-law action for invasion of privacy is present).

<sup>27</sup> *See id.* at 148 n.7 (stating "[t]he inquiry into the protected status of speech is one of law, not fact"); *Questions of Law*, *supra* note 4 (defining question of law as questions for the court).

<sup>28</sup> *Questions of Law*, *supra* note 4. *See generally* *United States v. Mason*, 668 F.3d 203 (5th Cir. 2012) (treating proper interpretation of defendant's Sixth Amendment rights as question of law); *Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330 (Fed. Cir. 2007) (treating the dismissal of a declaratory judgment action for lack of jurisdiction as question of law); *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783 (6th Cir. 2007) (treating proper construction of statute as question of law).

<sup>29</sup> *Mixed Questions of Law and Fact*, *supra* note 4. The terms "law" and "fact" have become somewhat synonymous with the respective functions of the judge and jury. Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1867-68 (1966). Instances of mixed questions of law and fact arise in various contexts, which include criminal cases with constitutional elements. *See Carroll v. Renico*, 475 F.3d 708, 712 (6th Cir. 2007) (treating whether the defendant was denied the right to counsel as mixed question of law and fact); *Trevino v. Johnson*, 168 F.3d 173, 184 (5th Cir. 1999) (treating whether evidence is material under the *Brady* doctrine as mixed question of law and fact); *United States v. Torkington*, 874 F.2d 1441, 1445 (11th Cir. 1989) (treating whether the defendant made an incriminating statement as a mixed question of law and fact). Mixed questions of law and fact also arise in negligence actions in determining the standard of care. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J.

al component does not involve what the law is on that given point.<sup>30</sup> Mixed questions can be decided on summary judgment where, although the legal question remains unresolved, all material facts are undisputed.<sup>31</sup>

The framework set out in *Pickering* and *Connick* remained largely unchanged for twenty-three years until the Supreme Court revisited the issue in 2006 in *Garcetti v. Ceballos*.<sup>32</sup> Although the plaintiff in *Garcetti* technically spoke as a citizen (rather than an employee) on a matter of public concern, the Court held that the First Amendment did not protect his speech.<sup>33</sup> The Court narrowed the first step of the inquiry, holding that speech made “pursuant to” one’s duties as a public employee, rather than as a private citizen, is not protected.<sup>34</sup> The Court also held that whether a statement was spoken pursuant to one’s public employee duties is a “practical” question

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APP. PRAC. & PROCESS 101, 109 (2005). The question of whether something is protected by the Fifth Amendment has been held to be a mixed question of law and fact. *See, e.g.,* *United States v. Ins. Consultants of Knox, Inc.*, 187 F.3d 755, 759 (7th Cir. 1999) (holding that whether enforcement of a summons would violate Fifth Amendment privilege is a question of mixed law and fact).

<sup>30</sup> *Questions of Fact*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>31</sup> *Mixed Questions of Law and Fact*, *supra* note 4; *see Fox*, 605 F.3d at 350 (stating that the circuit split is irrelevant where there exists no issue of material fact regarding whether the plaintiff’s speech is protected); *see also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (holding that the court has the power to determine the law and the jury has power to determine facts).

<sup>32</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Connick*, 461 U.S. 138; *Pickering*, 391 U.S. at 568.

<sup>33</sup> *Garcetti*, 547 U.S. at 421. In *Garcetti*, Richard Ceballos, Deputy District Attorney for the Los Angeles County District Attorney’s Office wrote a memorandum of law to his supervisors regarding sheriff misconduct and recommending dismissal of the prosecution on these grounds. *Id.* He later testified about it for the defense at trial when his supervisors chose to pursue the case in the face of his memorandum. *Id.* Ceballos claimed that his superiors retaliated by transferring him to a less desirable office location, reassigning him from his supervisory position, and denying him a promotion. *Id.* at 415.

<sup>34</sup> *Id.* Compare *Reilly*, 532 F.3d at 227 (holding that a police officer’s testimony for the prosecution against a fellow officer was not made pursuant to his duties as a police officer and constituted protected speech as matter of mixed fact and law), and *Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (holding that a state lottery commission employee’s complaint to state legislators about racial discrimination at the commission was not made pursuant to her work duties), with *Connick*, 461 U.S. at 154 (holding that an assistant district attorney’s intra-office questionnaire requesting her co-workers’ views on office policies and morale was made pursuant to her workplace duties and grievances rather than on matters of public concern). *Garcetti* consequently made it easier for public employers to regulate their employees’ internal job-related communications by greatly diminishing the type of protected workplace speech. *See generally* Robert Roberts, *Developments in the Law: Garcetti v. Ceballos and the Workplace Freedom of Speech Rights of Public Employees*, 67 PUB. ADMIN. REV. 662 (2007) (arguing that *Garcetti* may deter public employees from disclosing negative occurrences in government workplaces). The disagreement between the majority in *Garcetti* and the four dissenters centered upon the authority of public employers to regulate formal workplace communications. *Id.* Although the *Garcetti* majority stated that the decision would not impair the public employees’ willingness to report misconduct, *id.* at 662, some scholars have argued the contrary. Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1470–74 (2007) (finding that *Garcetti* discourages employees from speaking out from fear of retaliation).

requiring a fact-specific inquiry.<sup>35</sup> After *Garcetti*, a public employee bringing a § 1983 First Amendment retaliation suit against his employer, must satisfy three elements: 1) the threshold inquiry into the *Connick* “matter of public concern”; 2) the *Garcetti* “pursuant to” requirement; and 3) the *Pickering* “balancing” requirement.<sup>36</sup>

*B. The Circuit Split as to Whether the Protected Status of a Public Employee's Speech Is a Question of Law or Mixed Law and Fact*

The Supreme Court's holding in *Garcetti* lead to a circuit split on whether the inquiry into the protected status of an employee's speech remained one entirely of law, as stated in *Connick*, or became one of mixed law and fact.<sup>37</sup> The U.S. Courts of Appeals for the D.C., Fifth, Eleventh, and Tenth Circuits have stayed true to *Connick*'s declaration, while the Third, Seventh, Eighth, and Ninth Circuits have concluded that whether the worker spoke as a public employee presents a mixed question of fact and law.<sup>38</sup>

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<sup>35</sup> *Garcetti*, 547 U.S. at 424; see *id.* at 436 (Souter, J., dissenting) (critiquing the implications of the factual requirement imposed by the majority's holding and concluding that the majority's holding does not guarantee against fact-intensive litigation over whether public employee spoke as citizen or as public employee); Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of Garcetti v. Ceballos*, 7 FIRST AMEND. L. REV. 92, 96 (2008) (noting that *Garcetti*'s inquiry is fact-intensive).

<sup>36</sup> Compare *Garcetti*, 547 U.S. at 421 (holding a district attorney's testimony regarding sheriff misconduct was unprotected because it was made “pursuant to” his duties as an employee), with *Connick*, 461 U.S. at 154 (holding assistant district attorney's intra-office questionnaire requesting her co-workers' views on office policies and morale was unprotected because it touched on internal workplace grievances rather than matters of public concern). See also *Pickering*, 391 U.S. at 574 (holding that a board of education's firing of teacher for his letter to a newspaper criticizing the board for their alleged mismanagement of school funds violated his First Amendment right to free speech, in part, because the employee's interests in speaking outweighed the employer's interests in promoting efficiency). A public employee's speech is protected by the First Amendment if it regards a matter of public concern, is not pursuant to any duties as a public employee, and the employee's interest in speaking outweighs government's interest as an employer. *Garcetti*, 547 U.S. at 421; *Connick*, 461 U.S. at 154; *Pickering*, 391 U.S. at 574.

<sup>37</sup> *Fox*, 605 F.3d at 350 (quoting *Garcetti*, 547 U.S. at 424–25 and *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008)).

<sup>38</sup> Compare *Posey*, 546 F.3d at 1129 (holding that fact issues precluded summary judgment as to whether a letter to district officials and subsequent meeting to complain about allegedly inadequate safety and security policies at the high school constituted protected speech because the inquiry is one of mixed fact and law), *Reilly*, 532 F.3d at 227 (holding that a police officer's truthful testimony constituted protected speech as matter of mixed fact and law), *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008) (holding that an employee's memorandum was not First Amendment protected speech as mixed matter of fact and law), and *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) (holding that an employee's private statements critical of city officials and policies were protected speech as matter of mixed fact and law), with *Charles*, 522 F.3d at 513 n.17 (holding that an employee's complaint to state legislators about racial discrimination was protected speech as matter of law), *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (holding that an interim director's assertion that salary differentiation between outside and

The Supreme Court's most recent § 1983 First Amendment retaliation case occurred in 2014 in *Lane v. Franks*.<sup>39</sup> *Lane* generated further disagreement among federal courts regarding the scope of *Garcetti*.<sup>40</sup> In *Lane*, a director of a community college youth program provided truthful sworn testimony, compelled by subpoena, regarding another employee's abuse of the program's work log system.<sup>41</sup> The Court held that the First Amendment protected the public employee's speech concerning information acquired through her job.<sup>42</sup> The Court clarified that the speech left unprotected by *Garcetti* was speech "ordinarily" within the scope of an employee's duties, not merely concerning information acquired by virtue of those duties.<sup>43</sup> *Lane* obfuscated the employee speech left unprotected by *Garcetti* because it left open the possibility that employees could speak as citizens in the workplace.<sup>44</sup> Now, employees can claim First Amendment protection against retaliation even if they speak as part of their job, so long as it is not "ordinarily" part of their job.<sup>45</sup>

When a court classifies an issue as a question of law or fact, it does so "ordinarily without fanfare or explanation."<sup>46</sup> In *Connick*, the Supreme Court

inside job applicants was unconstitutional was not protected speech as matter of law), *Brammer-Hoelter*, 492 F.3d at 1202–03 (holding that a teacher's grievances for speech restrictions, charter renewal, and school elections were protected speech as matter of law), and *Morgan v. Ford*, 6 F.3d 750, 754–55 (11th Cir. 1993) (holding that a state department of corrections employee's complaints of sexual harassment did not constitute protected speech as matter of law).

<sup>39</sup> *Lane*, 134 S. Ct. at 2369.

<sup>40</sup> See *Mayhew*, 856 F.3d at 462 (recognizing the circuit split). *Anderson v. Valdez*, 845 F.3d 580, 596 (5th Cir. 2016) (ruling that *Lane*'s addition of "ordinarily" did not clearly change the formulation used in *Garcetti*); *Flora v. County of Luzerne*, 776 F.3d 169, 179 n.11 (3d Cir. 2015) (refraining from deciding whether *Lane* changed or clarified *Garcetti*).

<sup>41</sup> *Lane*, 134 S. Ct. at 2375. The college president later fired the plaintiff and twenty-eight other employees allegedly due to budgetary constraints. *Id.* The plaintiff was one of the two employees who were not re-hired when the president rescinded the firings. *Id.* at 2376. The plaintiff consequently filed suit. *Id.*

<sup>42</sup> *Id.* at 2379. *Lane* was influential because of its unanimous ruling on the First Amendment issue. See *id.* (holding unanimously that the public employee's speech at issue was protected by First Amendment). Nevertheless, the Court ultimately also held that the defendant was protected by qualified immunity. *Id.* at 2381–82.

<sup>43</sup> *Id.* at 2379. The plaintiff's speech was protected because his job, undisputedly, did not ordinarily entail testifying at court. *Id.* The Court reasoned that if this type of speech was not protected, public employees who witnessed corruption would be torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs. *Id.* at 2379–80. *Lane* did not address the question whether the First Amendment should protect the truthful testimony of a public employee where that testimony is part of the employee's job responsibilities. *Id.*

<sup>44</sup> See *id.* at 2379 (protecting public employee speech not ordinarily within scope of employees' job); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (holding after *Lane*, the *Garcetti* exception to First Amendment protection for speech "must be read narrowly" to only include speech made as part of employee's ordinary job duties).

<sup>45</sup> See *Lane*, 134 S. Ct. at 2379 (protecting a community college director's sworn testimony regarding another employee's behavior).

<sup>46</sup> Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedur-*



provided no explicit reason for its decision to label the protected status of speech a question of law.<sup>47</sup> Other Courts of Appeals have similarly provided minimal reasoning when addressing this issue post-*Lane*.<sup>48</sup>

For example, in 2016, in *Anderson v. Valdez*, the Fifth Circuit reasoned that *Lane*'s insertion of the qualifier "ordinarily" does not affect its ruling that the inquiry into the protected status of an employee's speech is one of law.<sup>49</sup> The *Anderson* court declared that *Lane* merely provided additional guidance regarding what speech falls within an employee's official duties.<sup>50</sup>

Alternatively, the Third Circuit held in 2007, in *Foraker v. Chaffinch*, that the protected status of an employee's speech had become a mixed question of fact and law.<sup>51</sup> In 2014, the Third Circuit maintained this holding in *Dougherty v. School District of Philadelphia*, reasoning that *Lane* merely narrowed of the realm of employee speech left unprotected by *Garcetti*.<sup>52</sup>

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*al Discretion*, 64 N.C. L. REV. 993, 1018 (1986). Among the powers of the appellate courts is the power to classify questions as questions of law, fact, or mixed law and fact. *Id.* An explanation is not required. *Id.*

<sup>47</sup> *Connick*, 461 U.S. at 148 n.7 (stating "[t]he inquiry into protected status of speech is one of law, not fact").

<sup>48</sup> See *Charles*, 522 F.3d at 508, 512 (identifying inquiry into protected status of speech as a purely legal question).

<sup>49</sup> *Anderson*, 845 F.3d at 596; *Charles*, 522 F.3d at 512. Following *Garcetti*, the Fifth Circuit held in 2008, in *Charles v. Grief*, that whether a public employee engages in protected speech is a "purely legal question." *Charles*, 522 F.3d at 512. In *Charles*, an African American Texas Lottery Commission employee e-mailed high-ranking Commission officials and the state legislature regarding racial discrimination towards minority employees, including himself, and was subsequently fired. *Id.* at 510. The Fifth Circuit held that the employee had spoken as a citizen rather than pursuant to his duties as a public employee. *Id.* at 516. After *Lane*, in 2016 in *Anderson v. Valdez*, an applicant for a law clerk position alleged that a judge had told his colleague not to hire the applicant in retaliation for reporting the judge's alleged malfeasance. *Anderson*, 845 F.3d at 586–88. The Fifth Circuit affirmed the District Court for the Southern District of Texas, which had denied the defendant's motion to dismiss for failure to state claim in part because the speech was protected. *Id.* at 602.

<sup>50</sup> *Lane*, 134 S. Ct. at 2369; *Anderson*, 845 F.3d at 596.

<sup>51</sup> *Foraker v. Chaffinch*, 501 F.3d 231, 240–41 (3d Cir. 2007), *abrogated by* *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 383 (2011)). In *Foraker*, instructors in the Firearms Training Unit of the Delaware State Police reported hazardous conditions at a firing range to their superiors and the State Auditor, and were subsequently placed on light duty. *Id.* at 233–34. The Third Circuit affirmed the District Court of Delaware's dismissal, reasoning that the officers were acting within their official job duties, as a mixed question of fact and law, when they reported their concerns. *Id.* at 240.

<sup>52</sup> *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 990 (3d Cir. 2014). In *Dougherty*, the Third Circuit had occasion to consider the implications of *Lane* for a school district employee who was terminated after saying to a local newspaper that the district superintendent had improperly skirted competitive bidding rules and steered a lucrative contract toward a personal acquaintance. *Id.* at 984–85. Because the employee's routine job responsibilities did not include reporting misconduct to the press or to the school board, the Third Circuit ruled his speech was not within the scope of his employment merely because its content related to his job duties. *Id.* at 988, 990. More recently, in 2017, in *De Ritis v. McGarrigle*, the Third Circuit held that a public defender was speaking as an employee, rather than a citizen, when he made in-court statements to attorneys and

The Sixth Circuit has consistently held that the determination as to whether a public employee's speech is protected is a question of law.<sup>53</sup> For example, after *Garcetti*, the court reasoned in 2012, in *Dixon v. University of Toledo*, that a human resources employee's op-ed column was unprotected as a matter of law.<sup>54</sup>

The Sixth Circuit had not specifically addressed whether *Lane* abrogated *Connick*'s holding and subsequent Sixth Circuit case law that the protected status of an employee's speech is a question of law.<sup>55</sup> The Sixth Circuit did, however, characterize *Lane* as "narrowing" the scope of speech left unprotected by *Garcetti*.<sup>56</sup> In 2015, in *Boulton v. Swanson*, the Sixth Circuit inferred this narrowing from the Supreme Court's addition of "ordinarily" as a modifier to the scope of an employer's job duties, and from its admonishment that speech is not transformed into employee speech simply because it concerns information acquired by virtue of the speaker's public employment.<sup>57</sup>

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judges that he was being punished for taking too many cases to trial. 861 F.3d 444, 453 (3d Cir. 2017). The court cited *Garcetti* as requiring it to make a "practical" inquiry, and *Lane* as requiring it to assess whether the speech was ordinarily within the scope of an employee's duties. *Id.* at 453. Accordingly, the Third Circuit held that the plaintiff's speech was unprotected as a mixed matter of law and fact. *Id.*

<sup>53</sup> See, e.g., *Dixon*, 702 F.3d at 274 (holding that the protected status of public employees' speech is question of law); *Westmoreland*, 662 F.3d at 718 (same); see also *Rorrer*, 743 F.3d at 1047 (relying on *Connick*, among others, for this proposition). Notably, many post-*Garcetti* cases did not involve disputed material facts, and therefore the issue of whether the protected status of an employee's speech is a question of law or fact was irrelevant for purposes of summary judgment. See *Holbrook v. Dumas*, 658 F. App'x 280, 284 n.3 (6th Cir. 2016) (holding the issue as a matter of law was appropriate because the material facts were undisputed); *Dixon*, 702 F.3d 269, 275, 278 (stating that "parties do not dispute whether plaintiff spoke on a matter of public concern"); *Westmoreland*, 662 F.3d 714, 718 (treating the protected nature of speech as question of law where there was no factual dispute regarding what was said). When these cases were decided, eight of the sixteen Sixth Circuit judges were nominated by President George W. Bush. Eirich, Kevin, *United States Court of Appeals for the Sixth Circuit*, BALLOTPEDIA (Sept. 9, 2017), [ballotpedia.org/wiki/index.php?title=United\\_States\\_Court\\_of\\_Appeals\\_for\\_the\\_Sixth\\_Circuit&oldid=6925684](https://ballotpedia.org/wiki/index.php?title=United_States_Court_of_Appeals_for_the_Sixth_Circuit&oldid=6925684) [https://perma.cc/28PW-93GW]. One was nominated by President George H.W. Bush, making a majority of the judges on the circuit affiliated with the Republican party. *Id.* Since then, two more judges, nominated by Donald Trump, have joined the already predominantly Republican Sixth Circuit. *Id.*

<sup>54</sup> *Dixon*, 702 F.3d at 271. In *Dixon*, the interim Associate Vice President for Human Resources at the University of Toledo wrote an op-ed column in the local press that criticized comparisons between the civil-rights and gay-rights movements. *Id.* at 271–73. The plaintiff was fired shortly after she wrote the op-ed column. *Id.* The Sixth Circuit held that the plaintiff's op-ed column was on a political or policy issue and therefore unprotected as a matter of law. *Id.* at 277. The Sixth Circuit did not find *Garcetti*'s use of "practical" and fact-specific approach to the inquiry into the protected status of speech as reason to depart from their holding that the inquiry was a question of law. *Dixon*, 702 F.3d at 277.

<sup>55</sup> *Mayhew*, 856 F.3d at 462.

<sup>56</sup> See *Boulton*, 795 F.3d at 534 (holding that after *Lane*, the *Garcetti* exception to First Amendment protection for speech "must be read narrowly" to only include speech made as part of an employee's ordinary job duties).

<sup>57</sup> *Id.*; *Mayhew*, 856 F.3d at 463.

## II. *MAYHEW V. TOWN OF SMYRNA*

It is within this shifting landscape that the U.S. Court of Appeals for the Sixth Circuit recently addressed a wastewater-treatment plant employee's § 1983 First Amendment retaliation claim against the Town of Smyrna and its city manager in *Mayhew v. Town of Smyrna*.<sup>58</sup> Section A of this Part provides the procedural history and a factual overview of *Mayhew*.<sup>59</sup> Section B of this Part examines and discusses the Sixth Circuit's holding in *Mayhew* that the inquiry into protected speech remains one of law.<sup>60</sup>

### A. *The Facts of Mayhew v. Town of Smyrna*

Mayhew, the plaintiff, had been a long-time employee of the plant and, as the lab's supervisor, oversaw the collection and analysis of samples to comply with reporting requirements.<sup>61</sup> He was terminated after reporting violations of federal and state regulatory requirements at the plant and voicing concerns about the town's hiring practices.<sup>62</sup>

Specifically, Mayhew had reported concerns that the plant's chief operator was engaging in questionable conduct relating to the plant's collection, recording, and reporting of its water samples to the then-plant manager.<sup>63</sup> In addition, Mayhew complained about the town's hiring practices following the promotion of the city manager's nephew to chief operator and the offending chief operator to plant manager.<sup>64</sup> At a meeting at city hall

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<sup>58</sup> *Mayhew v. Town of Smyrna*, 856 F.3d 456, 459 (6th Cir. 2017). Mayhew filed suit under 42 U.S.C. § 1983, which authorizes public employees to file suit for improper employer retaliation against public employers. 42 U.S.C. § 1983 (2012).

<sup>59</sup> See *infra* notes 61–69 and accompanying text.

<sup>60</sup> See *infra* notes 70–84 and accompanying text.

<sup>61</sup> *Mayhew*, 856 F.3d at 461. The plant was subject to extensive regulation by the EPA and the Tennessee Department of Environment and Conservation ("TDEC"), including various water-quality permits and reporting requirements under the Clean Water Act's National Pollutant Discharge Elimination System. *Id.* at 460. As part of his job, Mayhew had to obtain a TDEC "Grade IV" wastewater-treatment certification, which required him to "comply with the laws, rules, permit requirements, or orders of any governmental agency or court which govern the water supply system or the wastewater system he/she operates." *Id.*

<sup>62</sup> *Id.* at 461. This was not the first time that the Sixth Circuit had adjudicated a § 1983 action brought by employees who had been terminated from their wastewater treatment plant jobs. See *Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607, 617–18 (6th Cir. 2001) (holding that letters written by employees of a wastewater treatment plant to the Ohio Environmental Protection Agency and to the authority's board of trustees, which reported environmental violations at wastewater treatment plant, were protected speech).

<sup>63</sup> *Mayhew*, 856 F.3d at 459. After the plant manager's resignation, Mayhew began escalating his reports up the chain of command. *Id.* Mayhew reported his concerns to the plant manager's supervisors who relayed Mayhew's complaints to the city manager, defendant Harry Gill. *Id.*

<sup>64</sup> *Id.* Specifically, Mayhew sent an email that was forwarded to the city manager. *Id.* It is not uncommon for § 1983 claims to turn on whether an employee's e-mails, which were sent to his or her supervisors, involve a matter of public concern. See e.g., *LeFande v. District of Columbia*, 841

scheduled to address his complaint, Mayhew was asked whether he could work with the chief operator, and Mayhew indicated that he would put forth his best effort.<sup>65</sup> The city manager fired Mayhew at the end of the meeting, however, because he felt Mayhew was not genuinely willing to work with the chief operator.<sup>66</sup>

Mayhew subsequently filed suit, alleging that the town and city manager violated the First Amendment to the United States Constitution and the Tennessee Public Protection Act (“TPPA”) by terminating his employment in retaliation for his reporting activities.<sup>67</sup> Following discovery, the District Court for the Middle District of Tennessee granted summary judgment in favor of the town and city manager on Mayhew’s § 1983 First Amendment retaliation claim, and declined to exercise supplemental jurisdiction over his state law TPPA claim.<sup>68</sup> Mayhew re-filed his TPPA claim in Tennessee state

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F.3d 485, 495 (D.C. Cir. 2016) (holding that a police officer’s e-mails that ridiculed his superiors’ handling of a public disturbance did not involve a matter of public concern); *Schwartz v. Anderson*, 98 F. Supp. 3d 460, 475 (D. Conn. 2015) (holding that a state veterinarian employee’s e-mail to a state university official and members of the university body regarding use of a lab’s controlled substances to euthanize animals did not involve a matter of public concern); *Anderson v. Kent State Univ.*, 804 F. Supp. 2d 575, 584 (N.D. Ohio 2011) (holding that e-mails by a carpenter at Kent State University to other university employees regarding the university’s employee vacation policy did not comment on matters of public concern).

<sup>65</sup> *Mayhew*, 856 F.3d at 459. The city manager accused Mayhew of being insubordinate and “bitter against [the chief operator],” to which Mayhew responded: “No, sir. I’m not bitter towards him. This has nothing to do with personal issues. It has to do with what I reported.” *Id.*

<sup>66</sup> *Id.* The city manager felt that “there wasn’t really a full declaration that [Mayhew] was willing to work with [the chief operator]. [Mayhew] said, I would do my best”; and that “his work ethics could be [compromised] if he had to work with [the chief operator].” *Id.*

<sup>67</sup> See Brief of Appellant at 10, *Mayhew*, 856 F.3d 459 (No. 16–5103), 2016 WL 3680247, at \*10 [hereinafter *Mayhew* Appellant’s Brief] (arguing that the court should hold that the question of whether speech is constitutionally protected is one of mixed law and fact or purely fact and that Mayhew’s speech was constitutionally protected). Specifically, Mayhew filed suit against the Town of Smyrna and Gill approximately one month after he was discharged, raising the following claims: (1) a claim for violation of Mayhew’s First Amendment rights based on allegations that the defendants terminated him in retaliation for protected speech, brought under 42 U.S.C. § 1983, and (2) a claim for violation of the Tennessee Public Protection Act, TENN. CODE ANN. § 50-1-304 (2015), based on allegations that the defendants terminated Mayhew in retaliation for his refusal to remain silent about, or participate in, violations of federal and state laws and regulations. *Mayhew* Appellant’s Brief, *supra*. at \*10.

<sup>68</sup> *Mayhew* 856 F.3d at 466. The district court reasoned that given Mayhew’s explicit job responsibilities to oversee the plant’s water-sampling regime and report any issues regarding that regime, his reports of Noble’s misconduct did not involve an issue of public concern. *Mayhew v. Town of Smyrna*, No. 3:14–CV–1653, 2016 WL 128524, at \*7 (M.D. Tenn. Jan. 12, 2016), *aff’d in part, rev’d in part*, 856 F.3d 456 (6th Cir. 2017). The district court dismissed Mayhew’s claim regarding his complaints about the town’s hiring practices on procedural grounds, but also ruled it would have failed on the merits because that speech was not protected. *Id.* at \*10. In the court’s view, Mayhew’s e-mail did not address a matter of public concern, but instead aired an internal employee grievance. *Id.* at \*11. Typically, the doctrine of supplemental jurisdiction allows a federal court, in its discretion, to exercise jurisdiction over claims that it does not ordinarily have

court and appealed the district court's dismissal of his First Amendment claim to the Sixth Circuit.<sup>69</sup>

*B. The Sixth Circuit Holds the Analysis as to the Protected Status of a Public Employee's Speech Remains a Question of Law*

On appeal, the Sixth Circuit stated that a public employee alleging First Amendment retaliation must satisfy: 1) the *Connick* "matter of public concern" requirement; 2) the *Garcetti* "pursuant to" requirement; and 3) the *Pickering* "balancing" requirement.<sup>70</sup> The Sixth Circuit then turned to the procedural question: whether the Supreme Court's most recent § 1983 First Amendment retaliation case, *Lane v. Franks*, abrogated its decision in *Connick v. Myers* and the Sixth Circuit's subsequent cases holding that the protected status of an employee's speech is entirely a question of law.<sup>71</sup>

The Sixth Circuit acknowledged the circuit split caused by *Garcetti v. Ceballos* and discussed its subsequent analysis of the protected status of an employer's conduct as one solely of law.<sup>72</sup> Mayhew argued that, as a result of *Lane*, whether a public employee's speech is protected is now a question of fact or mixed law and fact.<sup>73</sup> He also argued that the use of the term "or-

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authority to hear when those issues are inextricably intertwined with matters over which the district court properly and independently has jurisdiction. 28 U.S.C. § 1367 (2012).

<sup>69</sup> *Mayhew*, 856 F.3d at 461.

<sup>70</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (holding that a district attorney's testimony regarding the sheriff's misconduct was unprotected because it was made pursuant to his duties as employee); *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that an assistant district attorney's intra-office questionnaire requesting her co-workers' views on office policies and morale was unprotected because it touched on internal workplace grievances rather than matters of public concern); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that a board of education's firing of a teacher for his letter to a newspaper criticizing the board for their alleged mismanagement of school funds violated his First Amendment right to free speech, in part, because the employee's interests in speaking outweighed the employer's interests in promoting efficiency); *Mayhew*, 856 F.3d at 462 (quoting *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337–38 (6th Cir. 2010)).

<sup>71</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (stating that speech is not transformed into employee speech simply because it concerns information acquired by virtue of the speaker's public employment and adding "ordinarily" as a modifier to the scope of an employer's job duties); *Connick*, 461 U.S. at 148 n.7 (stating that "[t]he inquiry into the protected status of speech is one of law, not fact"); *Mayhew*, 856 F.3d at 462 (quoting *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010)) (citing the circuit split).

<sup>72</sup> *Mayhew*, 856 F.3d 462–63; *Dixon v. Univ. of Toledo*, 702 F.3d 269, 274 (6th Cir. 2012) (holding that the school administrator's op-ed column in local press that criticized comparisons between the civil-rights and gay-rights movements was on a political or policy issue and therefore unprotected as a matter of law); *Westmoreland v. Sutherland*, 662 F.3d 714, 718 (6th Cir. 2011) (holding that a firefighter's critical comments of the city council constituted protected speech as matter of law); see also *Rorrer v. City of Stow*, 743 F.3d 1025, 1047–48 (6th Cir. 2014) (holding that a firefighter's testimony at an arbitration about colleague's discipline by department was about a private matter and unprotected as matter of law).

<sup>73</sup> *Mayhew* Appellant's Brief, *supra* note 67, at 23. Mayhew cited *Lane*'s "unprecedented" use of "ordinary" nine times for this proposition. Reply Brief of Appellant at 4, *Mayhew*, 856 F.3d 459

dinarily” in *Lane* requires a factual inquiry into whether the speech was within the scope of the employee’s usual duties.<sup>74</sup>

The Sixth Circuit recognized that *Lane* narrows *Garcetti* by reason of the Supreme Court’s addition of the word “ordinarily” to modify the scope of an employer’s job duties.<sup>75</sup> The court further inferred *Lane*’s limiting effect from the Supreme Court’s caution that speech is not transformed into employee speech simply because it concerns information pursuant to the speaker’s employment duties.<sup>76</sup> Yet the Sixth Circuit pointed out that because *Lane* did not explicitly refer to the circuit split, overrule *Connick*, or otherwise address the issue, the court therefore had no reason to depart from precedent.<sup>77</sup>

The Sixth Circuit also rejected Mayhew’s argument that prior cases required a finding that the question was one of fact or mixed law and fact.<sup>78</sup> The

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(No. 16-5103), 2016 WL 5921704, at \*4 [hereinafter *Mayhew* Appellant’s Reply Brief]. Mayhew also cited to the Sixth Circuit’s 2015 decision in *Boulton v. Swanson* that recognized *Lane*’s use of “ordinarily” to modify the scope of an employee’s job duties as narrowing the speech left unprotected by *Garcetti*. *Id.* at \*1 (citing *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (quoting *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 990 (3d Cir. 2014))). Lastly, Mayhew cited the opinions of other Circuit Courts of Appeals that have held the inquiry into whether an employee’s speech is protected was treated as a question of mixed law and fact. *Id.* at \*2–3 (citing *Dahlia v. Rodriguez*, 735 F.3d 1060, 1072–73 (9th Cir. 2013) (en banc)) and *Flora v. County of Luzerne*, 776 F.3d 169, 175–76 (3d Cir. 2015).

<sup>74</sup> *Mayhew* Appellant’s Brief, *supra*, note 67, at \*1–2. Mayhew contended that determining whether his complaints of town hiring practices and reports of regulatory violations were part of his “ordinary” job duties necessitated a trier of fact. *Id.* at \*1–2. According to Mayhew, the defendants and the district court relied on his written job description and “did not even ask Mayhew about [his job duties] at his deposition.” *Mayhew* Appellant’s Reply Brief, *supra* note 73, at \*2. Mayhew pointed out that, in *Garcetti*, the Court had warned that formal job descriptions are not accurate depictions of the duties an employee is actually expected to complete. *Id.* (citing *Garcetti*, 547 U.S. at 424–25). Instead of looking at his formal job description, Mayhew urged the court to have the jury make a factual determination as to whether his job duties included complaining about town hiring and reporting regulatory violations. *Id.*

<sup>75</sup> *Mayhew*, 856 F.3d at 463 (citing *Boulton*, 795 F.3d at 534).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 464. The court explicitly asserted that “[i]t is not our prerogative to set this binding precedent aside until the Supreme Court tells us we must.” *Id.* (citing *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam)); see also *Agostini v. Felton*, 521 U.S. 203, 207 (1997) (warning lower courts against “conclud[ing] the Supreme Court’s] more recent cases have, by implication, overruled an earlier precedent”).

<sup>78</sup> *Mayhew*, 856 F.3d at 463. Mayhew cited several cases from other circuits. See, e.g., *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260, 1264 (9th Cir. 2016) (holding a teacher’s communication with administrators about the failure of the school district to implement individualized education programs and its mismanagement of emotional-behavioral disorders program was unprotected as a mixed question of law and fact); *Flora*, 776 F.3d at 179–80 (holding that whether a former chief public defender’s ordinary job duties encompassed making statements about a lawsuit relating to lack of funding for state public defender, or about incomplete expungements of juvenile convictions, was mixed question of law and fact and due to disputed material facts could not be decided on summary judgment); *Dahlia*, 735 F.3d at 1072, 1077–78 (holding that a police detective’s meeting with Internal Affairs in connection with an investigation into police abuse was protected as question of mixed law and fact); *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546

court characterized the decisions cited by the employee as non-binding because they either relied on pre-*Lane* authority or were decided by other circuits.<sup>79</sup> Ultimately, the Sixth Circuit held that the inquiry into the protected status of speech made by a public employee would remain a question of law under *Lane*.<sup>80</sup>

Returning to the substantive component of the employee's § 1983 First Amendment retaliation claim, the Sixth Circuit held that the District Court did not err in granting summary judgment for the defendants regarding the Mayhew's reports of regulatory violations.<sup>81</sup> The court reasoned that Mayhew spoke as a public employee, rather than as a citizen when he reported questionable conduct related to the plant's water samples. The Sixth Circuit also reversed in part and remanded the part of Mayhew's claim relating to complaints about the town's hiring practices.<sup>82</sup> The court reasoned that Mayhew spoke on a matter of public concern when he questioned these decisions made by management.<sup>83</sup> Thus, on remand, the District Court was tasked with adju-

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F.3d 1121, 1129, 1131 (9th Cir. 2008) (holding that an issue of material fact remained as to whether a high school employee wrote and delivered his letter to school officials, complaining of inadequate safety and security policies at the high school, was pursuant to his duties as a security specialist, thus precluding summary judgment). *Mayhew*, 856 F.3d at 464 (listing cases that Mayhew cited to); *Mayhew* Appellant's Brief, *supra* note 67, at \*31 (citing cases).

<sup>79</sup> *Mayhew*, 856 F.3d at 464. Mayhew argued that the cases he cited required the Sixth Circuit to revisit its holding that the inquiry into protected speech remained one of law after *Lane*. *Mayhew* Appellant's Brief, *supra*, note 67, at \*1–2. Nevertheless, Mayhew had relied on two cases decided before *Lane*. See, e.g., *Dahlia*, 735 F.3d at 1079 (holding, before *Lane* was decided, that protected status of public employees' speech is one of fact); *Posey*, 546 F.3d at 1129, 1131 (holding, before *Lane* was decided, that protected status of public employees' speech is one of mixed law and fact). Mayhew had also relied on decisions from other circuits. See, e.g., *Coomes*, 816 F.3d at 1260, 1264 (9th Cir. 2016) (holding that the protected status of public employees' speech is one of mixed law and fact); *Flora*, 776 F.3d at 175 (holding that protected status of public employees' speech is one of mixed law and fact).

<sup>80</sup> *Mayhew*, 856 F.3d at 463. The Sixth Circuit joined the D.C., Fifth, Eleventh, and Tenth Circuits by resolving this procedural question in favor of the employer defendants. See *Charles v. Grief*, 522 F.3d 508, 512, 516 (5th Cir. 2008) (holding an employee's complaint to state legislators about racial discrimination was protected speech as matter of law); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (holding an interim director's assertion that salary differentiation between outside and inside job applicants was unconstitutional was not protected speech as matter of law); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1198–99, 1202, 1208 (10th Cir. 2007) (holding that a teacher's grievances for speech restrictions, charter renewal, and school elections were protected speech as matter of law); *Morgan v. Ford*, 6 F.3d 750, 754–55 (11th Cir. 1993) (holding an employee of the State Department of Corrections' complaints of sexual harassment did not constitute protected speech as matter of law).

<sup>81</sup> *Mayhew*, 856 F.3d at 463.

<sup>82</sup> *Id.* at 466, 469.

<sup>83</sup> *Id.* at 469. The court determined that Mayhew's complaints about the town's hiring process constituted more than a personal grievance about his supervisor, and instead involved the hiring process in general, which was a matter of public concern. *Id.* The court's decision was similar to other cases in which it found protected speech outside the scope of an employee's job duties. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 543–44 (6th Cir. 2012) (holding that a city public

dicating the substantive issue of whether the Town's termination of employment after Mayhew spoke out about its hiring practices violated his First Amendment rights.<sup>84</sup>

### III. THE AFTERMATH OF *MAYHEW V. TOWN OF SMYRNA*

The U.S. Court of Appeals for the Sixth Circuit's resolution of the procedural issue of whether the protected status of public employees' speech is one of law or mixed law and fact in 2017, in *Mayhew v. Town of Smyrna*, has far reaching consequences.<sup>85</sup> Section A of this Part argues that, in *Mayhew*, the Sixth Circuit properly interpreted a recent U.S. Supreme Court case as not disrupting its tradition of treating the protected status of speech in a First Amendment retaliation claim as a question of law.<sup>86</sup> Section B of this Part argues that the *Mayhew* holding will nonetheless unfairly impair public employees' right to a jury trial.<sup>87</sup>

#### *A. The Sixth Circuit Properly Held That the Protected Status of Speech Is a Question of Law Within Its Jurisdiction Post-Lane*

In *Mayhew*, the Sixth Circuit properly held that the protected status of speech in a § 1983 First Amendment retaliation claim remains a question of law within its jurisdiction.<sup>88</sup> The court had to reach this holding because the question before it was not whether the inquiry into the protected status of speech should have remained one of law immediately following the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, but instead, the issue

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records coordinator's comments to various city officials about potential corruption within the office were made as a citizen because she was not asked to provide her opinion on the alleged misconduct or to investigate it, and speaking with individuals outside of her department was not part of her official duties).

<sup>84</sup> *Mayhew*, 856 F.3d at 466, 469.

<sup>85</sup> See *Lane v. Franks*, 134 S. Ct. 2369, 2369 (2014) (holding that the speech left unprotected by *Garcetti* was speech "ordinarily" within the scope of an employee's duties, not merely concerning information acquired by virtue of those duties); *Mayhew v. Town of Smyrna*, 856 F.3d 456, 463–64 (6th Cir. 2017) (holding that the inquiry into the protected status of speech in a First Amendment retaliation claim is a question of law); *infra* notes 88–95 and accompanying text (arguing that, in *Mayhew*, the Sixth Circuit properly interpreted *Lane* as not disrupting its tradition of treating the protected status of speech in a First Amendment retaliation claim as a question of law).

<sup>86</sup> See *infra* notes 88–95 and accompanying text.

<sup>87</sup> See *infra* notes 96–105 and accompanying text.

<sup>88</sup> *Mayhew*, 856 F.3d at 456; see *Lane*, 134 S. Ct. at 2379 (protecting public employee speech not ordinarily within scope of employees' job); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015); *Dixon v. Univ. of Toledo*, 702 F.3d 269, 274 (6th Cir. 2012) (holding protected status of public employees' speech remains question of law post-*Lane*).



was limited to whether the Supreme Court's 2014 decision in *Lane v. Franks* subsequently transformed the inquiry into one of fact.<sup>89</sup>

There was no viable argument that *Lane*'s addition of "ordinarily" as a modifier to the scope of an employer's job duties procedurally transformed the inquiry.<sup>90</sup> First, *Lane* did not explicitly address the procedural aspects of the inquiry into the protected status of speech.<sup>91</sup> The Supreme Court granted *certiorari* in *Lane* for the limited purpose of determining whether a public employee may suffer adverse employment consequences for speech outside his ordinary job duties.<sup>92</sup> Second, the Sixth Circuit had already set a precedent in previous cases, such as in 2015, in *Stinebaugh v. City of Wapakoneta*, and in 2012, in *Dixon v. University of Toledo*, that *Lane*'s language

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<sup>89</sup> See *Lane*, 134 S. Ct. at 2379 (holding that the speech left unprotected by *Garcetti* was speech "ordinarily" within the scope of an employee's duties, not merely concerning information acquired by virtue of those duties); *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (holding that the inquiry into the status of public employees' speech is a practical and fact-specific inquiry); *Mayhew*, 856 F.3d at 464 (holding the inquiry into the protected status of speech in a First Amendment retaliation claim is a question of law). The Sixth Circuit had already held that the inquiry into the protected status of speech remained one of law after *Garcetti*. See *Dixon*, 702 F.3d at 274 (holding school administrator's speech unprotected as a matter of law); *Westmoreland v. Sutherland*, 662 F.3d 714, 718 (6th Cir. 2011) (holding a firefighter's comments constituted protected speech as matter of law); see also *Rorrer v. City of Stow*, 743 F.3d 1025, 1047 (holding a firefighter's testimony at arbitration unprotected as matter of law). In *Mayhew*, the Sixth Circuit was constricted to addressing the plaintiff's argument that *Lane*'s use of "ordinary" to modify what fell within an employee's job duties required a departure from treating this inquiry as a question of law. See *Mayhew*, 856 F.3d at 464 (holding that *Lane* did not transform the inquiry into the protected status of public employees' speech into question of mixed law and fact).

<sup>90</sup> See *Lane*, 134 S. Ct. at 2379 (holding that *Garcetti* requires an inquiry into whether the public employee's speech concerned a matter ordinarily within the scope of his or her duties); *Mayhew*, 856 F.3d at 464 (rejecting the plaintiff's argument that *Lane* transformed the inquiry into the protected status of public employees' speech into question of mixed law and fact); *Mayhew* Appellant's Brief, *supra* note 67, at 23 (arguing *Lane* transformed the inquiry into the protected status of public employees' speech into question of mixed law and fact).

<sup>91</sup> See generally *Lane*, 134 S. Ct. 2369 (holding that the speech left unprotected by *Garcetti* was speech "ordinarily" within the scope of an employee's duties and treating this inquiry as one of law without analysis). Foremost, *Lane* did not overtly mention the issue of whether the inquiry into the protected status of speech is a question of law or mixed question of law and fact. *Id.* at 2376. The terms "question of law," "question of fact," "mixed question of fact and law," "fact-specific inquiry," "practical," nor any other related procedural terms appear within the text of *Lane*. *Id.*

<sup>92</sup> *Id.* Specifically, the plaintiff's petition for *certiorari* asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. *Id.* at 2378 n.4; Petition for Writ of *Certiorari*, *Lane v. Franks*, 134 S. Ct. 2369 (No. 13-483), 2013 WL 5652570, at 6 (presenting question as "Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?"). Accordingly, *Lane* did not address the procedural aspect of the inquiry into the protected status of employees' speech under the First Amendment. See *Lane*, 134 S. Ct. at 2378 n.4 (limiting its holding to whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is protected by the First Amendment).

did not have an effect on its decision to treat the inquiry as a question of law.<sup>93</sup> Lastly, the *Mayhew* court would have reached the same holding even if it had found the inquiry into the protected status of speech was a question of mixed fact and law.<sup>94</sup> The court relied on undisputed facts to determine that the plaintiff's reports on regulatory violations were protected, and the First Amendment did not protect complaints about the town's hiring practices.<sup>95</sup>

*B. The Sixth Circuit's Holding That the Inquiry into the Protected Status of Speech Is One of Law Undermines the First Amendment Rights of Public Employees*

Because the right to a jury trial usually exists in § 1983 First Amendment retaliation suits, the *Mayhew* holding impairs employees' customary right to a jury trial.<sup>96</sup> In this sense, the Sixth Circuit's holding, although ne-

<sup>93</sup> *Stinebaugh v. City of Wapakoneta*, 630 F. App'x. 522, 525 (6th Cir. 2015) (holding that the inquiry into protected status of public employees' speech is a question of law); *Dixon*, 702 F.3d at 274 (stating that the Sixth Circuit has consistently held the inquiry into protected status of a public employees' speech is a question of law and refusing to depart from such precedent). In a similar fashion, other circuits have also refrained from holding that *Lane* has transformed the procedural aspects of the inquiry into whether speech is protected; circuits that held the inquiry is one of law have continued to do so while circuits that held the inquiry is a mixed one of fact and law have also continued to do so post-*Lane*. *Anderson v. Valdez*, 845 F.3d 580, 596 (5th Cir. 2016) (ruling that *Lane*'s addition of "ordinarily" did not clearly change formulation used in *Garcetti*); *Dougherty*, 772 F.3d at 990 (ruling *Lane* may merely narrow the speech left unprotected by *Garcetti*'s holding). The only exception occurred in 2015 in *Flora v. County of Luzerne*, which did not rely on *Lane*. 776 F.3d 169, 175 (3d Cir. 2015). In *Flora*, the Third Circuit determined that whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law; and more specifically, the scope and content of a plaintiff's job responsibilities is a question of fact but the ultimate constitutional significance is a question of law. *Id.* The *Flora* court did not cite *Lane* in support of this proposition and relied almost entirely on pre-*Lane* cases, offering no suggestion that *Lane* affected this holding. *Id.*

<sup>94</sup> See *Mayhew*, 856 F.3d at 469 (relying on undisputed facts); Brief of Defendants at 37–38, *Mayhew*, 856 F.3d 456 (No. 16–5103), 2016 WL 4761022, at \*37–38 (arguing the procedural question regarding the protected status of public employees' speech immaterial to case's disposition).

<sup>95</sup> *Mayhew*, 856 F.3d at 459–60. The District Court found that it was undisputed between the parties that Mayhew's job duties included the requirement that Mayhew "report any appropriate situations and accidents" regarding federal and state regulations "immediately to management." *Id.* at 459–60. The District Court also found that Mayhew never disputed that Smyrna required him, as the Lab Supervisor, to comply with all permit and reporting requirements, notify TDEC of any conditions that are "violative" of water quality standards, and exercise reasonable care to prepare reports that do not contain inaccurate data." *Id.* at 459–60. Furthermore, Mayhew did not argue a reasonable jury could have found that his job scope and duties were different than those determined by the District Court. *Id.* at 459–60. Therefore, the judge would have independently reached the same holding because there were no genuine issues of material fact for a jury to find at trial. See *Questions of Law*, *supra* note 4 (defining questions of law as questions for the court); *Questions of Fact*, *supra* note 30 (defining questions of fact as questions for the fact-finder).

<sup>96</sup> See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707–11 (1999) (holding that a § 1983 action seeking legal relief guarantees the right to trial by jury under Seventh

cessitated by precedent, nonetheless endorsed an antiquated version of First Amendment protections for public employees.<sup>97</sup>

The right to a jury trial in a § 1983 First Amendment retaliation suit is particularly important to the protection of public employees because of the fact-intensive nature of analyzing whether the employee spoke as a citizen.<sup>98</sup> Jurors, who are representatives of the community, are better suited than a single judge, who may impose his or her own understanding of work duties, to decide whether the plaintiff spoke as a citizen or as a public employee.<sup>99</sup> Furthermore, empirical data suggests that juries typically rely on

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Amendment); *supra* note 18–19 and accompanying text (explaining that 42 U.S.C. § 1983 provides for the right to a jury trial). In *Mayhew*, the Sixth circuit held that the inquiry into the protected status of speech is a question of law. *Mayhew*, 856 F.3d at 464. Therefore, the question of whether an employee's speech is protected is reserved for the court and excluded from the jury, which allows it to be decided on summary judgment. *See supra*, note 28 and accompanying text (explaining that questions of law are reserved for the court); *supra* note 31 and accompanying text (explaining questions of law are properly decided on summary judgment). In contrast, if it the Sixth Circuit had held the question was a mixed question of law and fact, whether the employee's speech was protected would be resolved by juries who are intended to find facts. *See supra* note 29 and accompanying text (explaining juries typically resolve questions of law and fact).

<sup>97</sup> *See Mayhew*, 856 F.3d at 464 (restricting public employees' speech by holding *Lane* did not transform the inquiry into the protected status of public employees' speech into question of mixed law and fact). By making it more difficult for a public employee to have their case heard by a jury, the predominately conservative Sixth Circuit was promoting an old notion: a State may condition public employment on a basis that encroaches on the employee's interest in exercising their constitutionally protected free speech. *See Connick v. Myers*, 461 U.S. 138, 142 (1983) (limiting government restriction of public employees' speech).

<sup>98</sup> *See Garcetti*, 547 U.S. at 424 (stating that inquiry into whether individual spoke as citizen or as public employee is "practical one"); *Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 547 (1899) (stating that an analysis on whether employee spoke within his or her scope of employment may present genuine issue of fact for jury); Sarah F. Suma, Note, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under Garcetti v. Ceballos*, 83 CHI. KENT L. REV. 369, 379 (2008) (noting that courts cannot rely on job descriptions to determine whether speech was part of one's work duties).

<sup>99</sup> *See Suma*, *supra* note 98, at 379–85 (describing how courts have defined job duty). Some courts construe work duties very broadly so that an employee will almost always speak pursuant to his work duties. *See, e.g., Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1198–99, 1203–05 (10th Cir. 2007) (interpreting work duty broadly); *Piggee v. Carl Sanburg Coll.*, 464 F.3d 667, 670 (7th Cir. 2006) (interpreting employment duties broadly). Other courts have interpreted employment duties very narrowly so that speech is more likely to fall outside of one's work. *See, e.g., Charles v. Grief*, 522 F.3d 508, 516 (5th Cir. 2008) (finding that the plaintiff spoke as private citizen); *cf. Jackson v. Jimino*, 506 F. Supp. 2d 105, 110 (N.D.N.Y. 2007) (stating that it is not clear whether the plaintiff spoke pursuant to his work duties); *Kodrea v. City of Kokomo*, 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (denying defendants' summary judgment motion because it was unclear whether plaintiff spoke as citizen or as public employee); Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide "Your Conscience or Your Job,"* 41 IND. L. REV. 187, 196–207 (2008) (supporting a narrow interpretation of work duty). Therefore, the question should instead be resolved by the jury. *See R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 663–64 (1873) (declaring "twelve men know more of the common affairs of life than does one man," and can therefore draw better inferences from facts than a judge); Julia Reytblat, *Is Originality in Copyright Law a "Question of Law" or a "Question of Fact?"*: The Fact Solution, 17

reasonable strategies to evaluate conflicting evidence and produce defensible verdicts in cases closely resembling §1983 suits.<sup>100</sup>

The Sixth Circuit's decision in *Mayhew* is a blow to employees' rights and is especially forceful because it heavily influences the eventual resolution of the debate.<sup>101</sup> All historically liberal Circuits Courts of Appeals have persistently taken the employee-friendly position by letting the jury determine the status of speech as a mixed question of law and fact.<sup>102</sup> Historically conservative Circuit Courts, however, remain split, with some holding the inquiry remains a question of law and others holding it has transformed into a mixed question of law and fact.<sup>103</sup> This pattern renders the Sixth Circuit's decision in *Mayhew* especially relevant to determining where the majority lies on the issue because it will likely be determined by the more flex-

CARDOZO ARTS & ENT. L.J. 181, 207–09 (1999) (arguing that juries represent standards of community and are therefore better equipped to find fact).

<sup>100</sup> Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519–51, 549–50 (1991) (finding jurors interpret evidence in a cognitively sound manner). Specifically, juries are well equipped to handle tort-like cases. *See City of Monterey*, 526 U.S. at 709 (finding § 1983 suits are similar to tort suits because plaintiffs allege damage from constitutional violation); Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 414–436, 421 (2013) (finding research provides little support for widely held view that jurors are indiscriminately pro-plaintiff); Pennington & Hastie, *supra*, at 549–50 (1991) (finding jurors interpret evidence in cognitively sound manner). Ultimately, jurors are neither incompetent, nor biased, and therefore are well suited for deciding whether speech fell within the scope of an employee's ordinary job duties. *See generally* Pennington & Hastie, *supra* (studying narrative structures created by mock jurors).

<sup>101</sup> *Fox v. Traverse City Area Pub. Sch. Bd. Of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010) (citing the circuit split). The sides of this circuit split over whether the inquiry into the status of an employee's speech is one of law remain level with the D.C., Fifth, Eleventh and Tenth Circuits holding the issue is a question of law, while the Third, Seventh, Eighth, and Ninth Circuits concluding the issue presents a mixed question of law and fact. *Id.*

<sup>102</sup> *See id.* (citing circuit split and listing the positions of the Federal Courts of Appeal); *Circuit Court Map*, PRATT SCH. INFO., <http://visualfa.org/circuit-court-map/> [<https://perma.cc/NB2W-2TX2>] (providing an analysis of the political ideologies of the Federal Circuit Courts of Appeals). The political ideology of the Circuit Courts has been measured by the number of conservative and liberal decisions they have made between 1943 and 2010, as well as how the Supreme Court ruled when hearing cases that passed through each circuit. *Circuit Court Map*, *supra*. The Eighth and Ninth Circuits, which have been characterized as historically liberal, both found the inquiry into the protected status of an employee's speech to be a mixed question of law and fact. *Fox*, 605 F.3d at 350 (citing circuit split); *Circuit Court Map*, *supra*.

<sup>103</sup> *Fox*, 605 F.3d at 350 (citing the circuit split and listing the positions of the Federal Courts of Appeal). The Fifth, Tenth, and Eleventh Circuits, which have been characterized as historically conservative, found the inquiry into the protected status of an employee's speech to be purely legal. *Id.* (citing the circuit split); *see Circuit Court Map*, *supra* note 102 (providing analysis of the political ideologies of the Federal Circuit Courts of Appeals). Conversely, the Third and Seventh Circuit, which have also been characterized as historically conservative, found the inquiry to be a question of mixed law and fact. *See Circuit Court Map*, *supra* note 102. The differing holdings among the Federal Circuits suggest that liberal courts may remain united in protection of employees' rights, while conservative courts' opinions may be more malleable. *Id.*

ible conservative courts.<sup>104</sup> Unfortunately for employees within its jurisdiction, it seems that *Lane* will not be the case to shift the Sixth Circuit's current position that the question is one of fact.<sup>105</sup>

### CONCLUSION

Beginning in 1968, a long line of cases has established the First Amendment right of public employees to speak as citizens on matters of public concern without the fear of retaliation. Historically liberal courts have all taken the employee-friendly position that the inquiry into the protected status of employees' speech has transformed into a mixed question of law and fact. Conversely, historically conservative courts remain divided on whether the inquiry remains a question of law. In *Mayhew v. Town of Smyrna*, the historically conservative U.S. Court of Appeals for the Sixth Circuit had the rare opportunity to protect the voices of public employees by enlarging their First Amendment protections. By holding that the protected status of speech remains a question of law for the court to decide, the Sixth Circuit instead frustrated public employees' right to a jury trial that typically accompanies § 1983 First Amendment retaliation claims. The public sector could go unchecked as public employees become hesitant to report misconduct at their jobs.

MARGAUX JOSELOW

**Preferred cite:** Margaux Joselow, Comment, *Mayhew v. Town of Smyrna: The Sixth Circuit Frustrates Public Employees' Right to a Jury Trial*, 59 B.C. L. REV. E. SUPP. 83 (2018), <http://law.digitalcommons.bc.edu/bclr/vol59/iss9/83/>.

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<sup>104</sup> See *Circuit Court Map*, *supra* note 102.

<sup>105</sup> See *Lane*, 134 S. Ct. at 2369 (holding that public employees' speech ordinarily within the scope of their job duties is unprotected by the First Amendment); *Mayhew*, 856 F.3d at 464 (holding the inquiry into the protected status of public employees' speech is a question of law). Despite several public employees' attempts to argue for the contrary, it seems *Lane* will not disrupt other Circuit Courts' holdings either. See *Anderson*, 845 F.3d at 596 (ruling that *Lane*'s addition of "ordinarily" did not clearly change the formulation used in *Garcetti*); *Flora*, 776 F.3d at 179 n.11 (refraining from deciding whether *Lane* changed or clarified *Garcetti*).