



Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com



Aja Robbins

Associate
303.293.5975
Denver
ARRobbins@hollandhart.com

Tenth Circuit Explains That 'Pickering' Balancing Is Rarely Appropriate in Ruling on Motions to Dismiss

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*In *Brown v. City of Tulsa*, involving a former police officer's First Amendment retaliation claim under 42 U.S.C. Section 1983 (Section 1983), the U.S. Court of Appeals for the Tenth Circuit held that conducting Pickering balancing at the motion to dismiss stage is almost always improper.*

In *Brown v. City of Tulsa*, 124 F.4th 1251 (10th Cir. 2025), involving a former police officer's First Amendment retaliation claim under 42 U.S.C. Section 1983 (Section 1983), the U.S. Court of Appeals for the Tenth Circuit held that conducting *Pickering* balancing at the motion to dismiss stage is almost always improper. Several other circuit courts have also commented that *Pickering* balancing in the retaliation context is generally incompatible with the Rule 12(b)(6) standard. But the Tenth Circuit's holding in *Brown* draws a more definite line in the sand.

Relevant Allegations of the Complaint

Plaintiff Wayne Brown became an at-will employee of the Tulsa Police Department in January 2019. Shortly after, an activist unearthed some of Brown's years-old Facebook posts, in which he shared controversial images, some of which supported President Donald Trump and the "Blue Lives Matter" movement, some of which decried "Islamization" and "sharia-supremic平ism," and some of which contained symbols such as the confederate flag.

On Sept. 4, 2019, the department terminated Brown and asserted that his social media posts violated the "Department Rules & Regulations and Policies and Procedures." Specifically, the department pointed to its policy prohibiting personnel from "posting speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals."

District Court Proceedings

Brown sued the city of Tulsa and Chief of Police Charles W. Jordan (Jordan) in the U.S. District Court for the Northern District of Oklahoma, alleging violations of both federal and Oklahoma law. Relying on Section 1983, he alleged that the defendants violated his First Amendment free speech rights by terminating his employment based on the content and viewpoint of his speech made as a private citizen speaking on matters of public concern, and by enforcing a social media policy that punished him for expressing his political and religious views; and the equal protection clause of the Fourteenth Amendment by selectively terminating his employment based on the content and viewpoint of his political and religious beliefs, and by arbitrarily enforcing policies to discriminate against him to appease those opposed to his views. He also brought a wrongful discharge claim under Oklahoma law, known as a *Burk* claim.

Both defendants moved to dismiss under Rule 12(b)(6). The city argued that Brown's First Amendment claim failed as a matter of law because the city's interest as an employer outweighed Brown's free speech interest; Brown failed to allege a cognizable equal protection claim; and the *Burk* claim should be dismissed. Jordan argued that the claims against him in his official capacity were duplicative and that he was entitled to qualified immunity with respect to the claims against him in his individual capacity.

The district court granted both motions. Pertinent here, it dismissed the First Amendment claim against the city, concluding that the city's interest in maintaining a police force that instills public confidence outweighed Brown's free speech rights. The court also dismissed the official claims against Jordan as duplicative and ruled that he was entitled to qualified immunity with respect to the First Amendment claim against him in his individual capacity. And it dismissed Brown's equal protection claim as an improper "class-of-one" claim and declined to exercise supplemental jurisdiction over the Burk claim.

Brown appealed the order, primarily arguing that the district court erred in dismissing his First Amendment claim against the city under Rule 12(b)(6) because it should not have conducted *Pickering* balancing at that stage.

Free Speech Retaliation Claims in the Public Employment Context and 'Pickering' Balancing

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The First Amendment undoubtedly protects public employees from being forced to relinquish their rights to comment on matters of public interest. At the same time, however, government employers "need a significant amount of control over their employees' words and actions" since "without it, there would be little chance for efficient provision of public services." See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

To reconcile these competing interests, federal courts must balance "the

interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." See *Lane v. Franks*, 573 U.S. 228, 231 (2014) (citation omitted).

In other words, to prevail on his First Amendment retaliation claim in the public employment context, Brown had to establish not only that his speech was not made pursuant to his official duties and regarded a matter of public concern, but also that the government's interests as his employer in promoting the efficiency of the public services it provides did not outweigh his free speech interests. These first three elements of a retaliation claim are ordinarily matters of law for the court to decide (the fourth and fifth elements are ordinarily questions of fact).

The third element, called *Pickering* balancing, attempts to resolve the tension between an employee's free speech rights and the government's interest as an employer. The Tenth Circuit has before held that, generally, "the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, by the speech itself, of the public employer's internal operations and employment relationships." See *Flanagan v. Munger*, 890 F.2d 1562, 1566 (10th Cir. 1989) (citation omitted). To assess whether speech disrupts workplace functioning, courts consider whether the statement creates discord among coworkers, impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise.

The government bears the burden of proffering evidence demonstrating its specific interest in taking an adverse employment action against the plaintiff (i.e., preventing disruption) and that it acted solely based on that interest, but this burden varies depending on the nature of the speech and the employee's position. For example, the more salient the speech is to public discourse, the higher the government's burden in justifying an adverse response. And the more public-facing the employee's role, the more likely their speech is to disrupt their employer's effective functioning.

Tenth Circuit Holds That 'Pickering' Balancing Is Improper Under Rule 12(b)(6)

Repeatedly emphasizing that the Rule 12(b)(6) standard is intentionally forgiving to the nonmovant, the Tenth Circuit agreed with Brown that the district court erred by conducting *Pickering* balancing the motion to dismiss stage. Notably, reviewing courts must limit their analyses of motions to dismiss to the "allegations within the four corners of the complaint," *Waller*, 932 F.3d at 1286 n.1, and plaintiffs are not required to plead facts of which they have no personal knowledge, see Fed. R. Civ. P. 11(b)(3).

The standard, in turn, impacts the way that a plaintiff might plead a retaliation claim. Plaintiffs bringing such claims face an asymmetry of information: they likely have no way of knowing the government's specific interest in taking adverse action against them or what governmental disruption their speech caused. To overcome this evidentiary hurdle, plaintiffs must conduct discovery. And without the benefit of discovery, a plaintiff cannot allege facts addressing both sides of the *Pickering*

balancing analysis. Thus, the government, rather than the plaintiff, bears the burden of demonstrating its interest/proving disruption.

For these reasons, the Tenth Circuit explained, it is “usually inappropriate—if not impossible”—to conduct *Pickering* balancing “at the motion to dismiss stage.” This is so even though *Pickering* balancing is generally considered a question of law for the court. In reaching this conclusion, Brown noted that judges in several other circuits, including the Fifth, Sixth, Seventh, and Ninth, as well as in prior unpublished decisions from the Tenth, had previously echoed this point.

The same reasoning applies in the context of qualified immunity, the court opined. Qualified immunity usually cannot be decided at the motion to dismiss stage in the public-employment retaliation claim context because the aforementioned asymmetry of information makes it impossible for the plaintiff to allege facts sufficient to show defendants plausibly violated their constitutional rights and identify a materially similar case where the employee prevailed to demonstrate their right was clearly established.

In Brown's case, the district court “clearly erred” by relying on facts not pleaded in the operative complaint that the city introduced to support its *Pickering* balancing burden, and suggesting that Brown was required to controvert those facts at the Rule 12(b)(6) stage. The Tenth Circuit added that Brown had made no allegations sufficient to support the defendant's burden and that the district court had improperly used Brown's allegations against him when the relevant allegations actually weighed in his favor. Consequently, the circuit court decided that Brown adequately stated First Amendment claim against the city and reversed the dismissal of that claim. For similar reasons, the court also determined that the district court erred in dismissing the individual-capacity First Amendment claim against Jordan on qualified immunity grounds.

Resolution of Remaining Claims

The Tenth Circuit separately affirmed the district court's dismissal of Brown's Fourteenth Amendment equal protection claim. Brown contended that “Defendants chose to selectively enforce their policies, practices, procedures, and customs against him out of an arbitrary desire to discriminate against him, because of the content and viewpoint of his political beliefs,” in violation of the equal protection clause. Agreeing with the district court, the circuit court ruled that this allegation boiled down to a “class-of-one” claim of discrimination, an avenue of relief that the U.S. Supreme Court foreclosed in the public employment context in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 605 (2008).

Finally, because the Tenth Circuit reversed the district court's dismissal on the First Amendment claims, it similarly reversed the decision to decline to exercise supplemental jurisdiction over the *Burk* claim and remanded with instructions to reconsider.

Denver office. Masciocchi co-leads the appellate team and assists clients with high-stakes federal and state appeals and class actions. Robbins helps clients navigate complex litigation at the trial and appellate level.

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