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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (OCTOBER 6, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANYELLE E. BENNETT,

Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE,

Defendant-Appellant.

No. 19-5818

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:17-cv-00630—Eli J. Richardson, District Judge.

Before: DAUGHTREY, GIBBONS, and MURPHY, Circuit Judges.

MARTHA CRAIG DAUGHTREY, Circuit Judge.

At issue in this case is whether a public employee's use of a racial slur when discussing politics on Facebook is sufficiently protected by the First Amendment to outweigh a government agency's interest in having an efficient workplace and effectively serving the public. Plaintiff Danyelle Bennett was terminated

from her position at the Emergency Communications Center (ECC) of the Metropolitan Government of Nashville (Metro) for a Facebook comment she made on November 9, 2016. On the night of the Presidential election, Bennett posted from her public-facing Facebook profile concerning Trump's victory. In response to someone else's comment, Bennett replied using some of the commenter's words: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" As a result of Bennett—a white woman—using what Metro deemed racially-charged language, several employees and a member of the public complained to ECC leadership and the Mayor's office. ECC officials determined that Bennett violated three Civil Service Rules and, after paid administrative leave and a due process hearing, they terminated her from her position. Bennett sued Metro for retaliation under the First Amendment and, following a jury trial that determined certain issues of fact, the district court found in favor of Bennett.

Metro appeals, arguing that the district court gave greater protection to Bennett's speech than the law warrants and improperly minimized the disruption Bennett's speech caused in the agency. A review of the record reveals the district court erred in its analysis, and we therefore reverse the district court's decision and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Bennett began working for Metro's ECC as an Emergency Telecommunicator in 2001 and was employed there for 16 years. Her role was to field emergency calls, and she was also certified in emergency medical dispatch and emergency fire dispatch. On the

evening of November 8, 2016—Election Day—Bennett anxiously awaited the results of the Presidential election, hoping for a win by the candidate she supported, Donald Trump. She stayed up watching the results until about 3:00 a.m. on November 9, when the electoral votes for Trump reached 270. At that time, she made a Facebook post from her public-facing profile of an image of the electoral map revealing Trump as the winner. Shortly thereafter, before Bennett went to bed, she received a notification that Mohamed Aboulmaouahib—a man she did not know— commented on her post, writing that "Redneck states vote[d] for Trump, niggaz and latinos states vot[ed] for hillary." She replied: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" The following morning, Bennett was off-duty when she received a notification that her friend and former colleague had commented on her post, asking "Was the niggaz statement a joke? I don't offend easily, I'm just really shocked to see that from you." Bennett replied, and several other comments demonstrating offense to Bennett's use of the racial slur followed. At approximately 3:45 p.m., after Bennett's friend and former colleague, Tamika Barker, responded to the comment, Bennett spoke on the phone with her and, as a result, deleted the entire Facebook post.

During this same day, the Facebook comment also became an issue at the ECC office. On the morning of November 9, Lynette Dawkins, the Metro Human Resources (HR) coordinator, began receiving complaints about Bennett's comment. Two ECC employees came to her office upset and complained about a derogatory comment on Facebook made by Bennett. She also

received an anonymous text with a screenshot of Bennett's comment to her post, asking "when is this ever acceptable?" Dawkins informed her supervisor, Bruce Sanschargrin, of these complaints when he arrived in the office. He then opened Facebook, found Bennett's public post, and agreed that her comment on the post was "racially offensive" and "degrading" towards both African Americans and Caucasians. Sanschargrin then contacted ECC director Michele Donegan to make her aware of the complaints and how Metro employees were being impacted. Shortly thereafter, Assistant Director Angie Milliken came to his office. She also had received reports about complaints and conversations over the post; she noted that the office was unusually quiet that day.

When Donegan arrived to Sanschargrin's office, she learned that Bennett not only identified herself as a Metro employee in her Facebook profile, but also as an ECC employee and a Metro Police Department employee. Donegan became concerned about the potential impact Bennett's use of racially charged language could have on the workforce and determined that the next step would be to have Sanschargrin reach out to Bennett to have her remove the post and to speak with her first thing in the morning.

Throughout that day, additional complaints were made. Alisa Franklin, Emergency Telecommunicator and chief steward of the Service Employees International Union (SEIU), received multiple complaints, both in person and over text messaging, complaining about Bennett's comment and use of the racial slur. Franklin conveyed to her supervisor that, in addition to the complaints she received, she, too, was shocked, hurt, and disgusted by Bennett's post. Donegan also received

an email from the mayor's office that included a complaint from a constituent. The mayor's office specifically questioned whether Bennett identified herself as a Metro employee on her Facebook page. The complaint contained a screenshot of the constituent's Facebook post showing only Bennett's response and omitting Aboulmaouahib's, with a caption:

> If you've called 911 & officers don't get there as quickly as you need them it may not be the officer. And it may not have anything to do with calls around the city. In fact it may be the dispatcher that got your call. If your skin is too dark your call may have just been placed on the back burner. #WelcomeToNashville #MusicCity #Metro.

The screenshot was accompanied by a statement:

> These kind of derogatory statements are being made by our own government here in Davidson County. Despite everything else going on across the country I've always had a sense of hope for my city, Nashville. But after seeing things in this light I don't know anymore. I want to know that my life is valuable and that I will be protected just as well as any other citizen despite the color of my skin. Please fix this!

Sanschargrin also received a screenshot via text message of the same cropped Facebook post with the message "I just came across this post. I know it doesn't matter but this is an ex-employee throwing gasoline on the fire."

Later that afternoon Bennett returned Sanschargrin's call. Sanschargrin asked Bennett to remove the

post because several other employees had spoken to him that day and were upset about it. She explained that it had already been removed. He then asked Bennett to come to work early the next day, prior to roll call, to discuss the matter further with him and Donegan.

The following morning Bennett met with Sanschargrin and Donegan. Bennett explained that her comment on the post was a sarcastic response mocking the comment by Aboulmaouahib. Sanchargrin, and Donegan made clear that the language she used was inappropriate and that it was viewed as racially charged. Although Bennett acknowledged that other employees appeared to be outwardly offended, she believed they were just "playing the victim" and were not really offended. Bennett claimed that she was the real victim in the situation and resented being ganged up on. Donegan was concerned by Bennett's lack of remorse about her language and by her failure to acknowledge that it was an issue. It was only when Sanschargrin said it was possible the situation could result in some form of corrective or disciplinary action that Bennett changed her tune. Bennett asked how to fix the situation and offered to apologize to employees, but she declined Donegan's offer to issue an apology at roll call that morning. In the end, Donegan decided to place Bennett on paid administrative leave for a week or two to give management time to investigate the matter and allow the "uproar that had started to settle down."

Donegan was concerned about the impact of Bennett's language on the dynamics of the office. Communication between telecommunicators was essential to the work they did and, after the racially charged comment and the reactions of the employees,

she was anxious about the team dynamics and the creation of a racial divide. She directed Sanschargrin to complete a summary of what had happened, investigate the facts, and identify any policies that Bennett may have violated.

Conversations about the issue continued after Bennett's leave began. The following week, Donegan received a call from the "second-in-command" for Metro Human Resources telling her that some ECC employees had come to his office with concerns. Franklin—in her role as chief union steward—reported that there was a level of general discomfort throughout the center and that "things were not harmonious like they normally were." The union stewards again raised the issue at the SEIU monthly meeting with Donegan. They described a great deal of tension in the call center, explaining that there was not the same level of communication going on as there was before the incident, reflecting a disconnect among the employees. As a result, they recommended diversity training for employees and Donegan agreed, telling them that she also had been considering it. In addition, because "so many people were offended and hurt," Franklin advocated for having a counselor come in during roll call to speak with employees about diversity, the background of the racial slur Bennett had used, and why people might be bothered or concerned about its use. The counselor came in to address the ECC workforce and stayed to talk to employees one-on-one, an offer some employees took advantage of until they had to go back to work because there was insufficient coverage of incoming calls.

Sanschargrin determined that Bennett's conduct violated three policies of the Metropolitan Government Civil Service Commission: (1) her behavior "reflect[ed]

discredit upon [her]self, the department, and/or the Metropolitan Government," (2) her conduct was "unbecoming of an employee of the Metropolitan Government," and (3) her Facebook profile disclosed that she was a Metro employee but failed to include a disclaimer that her "expressed views are [hers] alone and do not reflect the views of the Metropolitan Government." At Donegan's direction, Sanschargrin drafted a charge letter for Bennett that included a summary of the incident, described the three rules she was accused of violating, and outlined her due process rights. The letter explained that "[t]o advance the mission [of ECC], it is vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability and honesty," and that "[t]he success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency."

Donegan felt the charges were appropriate, first, because she felt that inclusion of a particularly offensive racial slur in a public social-media post was objectionable because it did not reflect Metro policy or the beliefs of people who worked there. Further, she thought such racially charged language would bring discredit to the office and testified that "the public that we serve is very diverse, and it's my expectation that when someone calls[,] regardless of who they are or where they're from, that they're going to receive the appropriate service." Donegan also concluded that Bennett's behavior warranted discipline because of the disruption it caused: employees were upset at work, counselors needed to be involved, and stress levels increased for the agency as a whole.

The charge letter was approved by Donegan and sent to Bennett on December 28, 2016, upon her return from Family Medical Leave. Bennett was again placed on administrative leave pending a hearing set in January. The purpose of the hearing was to allow Bennett to state her case, present evidence or witnesses, and "expand on [her] side of what happened" after having time to process the initial conversation and regroup. At the hearing, Bennett appeared with an attorney, was read the charge letter, and pleaded not guilty to all three charges. Bennett spoke on her own behalf, primarily discussing incidents other than the Facebook post, and defended her decision to use the language in question. In Donegan's view, Bennett failed to show any remorse or accountability. Although Bennett wrote an apology letter while on leave saying that she had been embarrassed and humbled by the experience, she did not mention any of those sentiments at the hearing. Because Bennett did not acknowledge that there was anything wrong with the post, Donegan feared that similar incidents would continue to happen and felt that the necessary healing among the ECC workers could not succeed with Bennett there. She decided to terminate Bennett's employment.

In March 2017, Bennett filed a lawsuit against Metro under 42 U.S.C. § 1983 alleging violations of her First and Fourteenth Amendment rights and a claim under the Tennessee Constitution. Both Bennett and Metro filed motions for summary judgment. The district court denied the plaintiff's motion for summary judgment and dismissed the state constitutional claim and the Fourteenth Amendment claims, leaving only the First Amendment claim for trial.

When the case went to the jury, the district court included in the instructions a set of interrogatories related to the balancing test outlined in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and the issue of causation. The jury concluded that Bennett's Facebook comment was not reasonably likely to impair discipline by superiors at ECC, to interfere with the orderly operation of ECC, or to impede performance of Bennett's duties at ECC. However, the jury did conclude that the Facebook post was reasonably likely to have a detrimental impact on close working relationships at ECC and undermine the agency's mission, that Metro terminated Plaintiff "[f]or using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook," and that doing so violated the three charges outlined in Bennett's termination letter. Based on these findings, the district court ruled from the bench that the *Pickering* balance weighed in Bennett's favor. Following a second phase of jury deliberations, Bennett was awarded $6,500 in back pay and $18,750 for humiliation and embarrassment. This appeal followed.

DISCUSSION

The application of the *Pickering* balancing test is a matter of law for the court to decide and, thus, we review it *de novo*. *Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017).

To establish a claim for First Amendment retaliation, a public employee must show that:

> (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage

> in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.

Gillis, 845 F.3d at 683 (alteration in original) (citations omitted). Here, only the first element of this framework is in question.

To determine whether the discharge of a public employee violates the First Amendment, we apply the two-step analysis laid out in *Connick v. Myers*. *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995) (citing *Connick v. Myers*, 461 U.S. 138, 140 (1983)). First, we must determine whether the statement in question constitutes speech on a matter of public concern.[1] *Id.* Then, if it does, we apply the *Pickering* balancing test to determine whether the Plaintiff's "interest in commenting upon matters of public concern . . . outweigh[s] the interest of [Metro], as an employer, in promoting the efficiency of the public services it performs through its employees." *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (quoting *Pickering*, 391 U.S. at 568). These two steps are sub-elements of the first element of the First Amendment retaliation framework.

Because neither party appears to argue that the speech is not of public concern, we direct our analysis to the second part of the *Connick* test—the *Pickering* analysis.

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[1] The first part of the test also includes whether the employee spoke as a private citizen or public employee in the course of employment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This prong is not at issue in this case, as neither party argues that Bennett's post was made in the course of employment.

Before applying the balancing test, it is appropriate to begin this analysis by determining the degree of protection the speech warrants, *i.e.*, the level of importance the speech has in the community. Because "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression," *Connick*, 461 U.S. at 150, we first consider the context of the speech for which Metro fired Bennett. On appeal, Metro does not challenge the district court's finding that the statement in question was political in nature. But Metro does argue that it "was not purely political" and, thus, was not entitled to the heightened level of protection the district court had granted to it. Bennett, on the other hand, argues that Metro's decision to terminate her "was based on the entirety of her post-election, political comment as a whole."[2]

Bennett bases her argument that she was fired for political speech on the jury's interrogatory response indicating that Metro terminated her "for using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook." Though

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[2] The crux of Bennett's argument that her speech was protected was that it was attached to a statement celebrating the outcome of the Presidential election, with a strong inference that her termination, at least in part, had to do with her support of Trump. The record does not support such a conclusion. Testimony and the facts of the case indicate that Bennett was fired specifically for her use of a racial slur, for her lack of regret for doing so, and for the disruption it caused—not for the political nature of her original post. For one, Bennett acknowledged that she had made previous political posts on Facebook that did not use racial slurs and that she had never been disciplined for any of those posts. Also, both Donegan and Sanschargrin testified that it was specifically the words Bennett used that led them to determine that she had violated civil service rules, and the situation in which she used them—political or not—was irrelevant.

the district court similarly relied on the jury's response, its reliance is somewhat misleading. The interrogatory form was presented in a multiple-choice format, and the selected answer was the only answer choice that included the actual slur. The alternative responses included: "For expressing her views regarding the outcome of a national election on Facebook;" "For lack of accountability;" and "For the workplace disruption her Facebook comment caused."[3] Presented with its options, it seems logical to infer that the jury believed the speech at issue was the term "niggaz" and not statements expressing Bennett's views on the election, as selecting option one would have indicated. So, even though Bennett's speech was protected, it was not in the "highest rung" of protected speech as the district court erroneously found.

This conclusion is bolstered by the First Amendment's focus on "not only . . . a speaker's interest in speaking, but also with the public's interest in receiving information." *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003) (quoting *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 574 (6th Cir. 1997)) (finding that a teacher's airing of issues in a school district were of public interest because "[t]he community has an interest in knowing when the district does not follow state law or its own hiring practices" and such practices "could affect the community"). The Supreme Court described the "employee-speech jurisprudence" as "acknowledg[ing] the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in

[3] The form also included "other," which was placed not as an option, but rather as a space to add additional information.

civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (emphasis added). Central to the concept of protecting the speech of government employees is the idea that public employees are the most likely to be informed of the operations of public employers and that the operation of such entities is "of substantial concern to the public." *See v. City of Elyria*, 502 F.3d 484, 492 (6th Cir. 2007) (quoting *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004); *see also Garcetti*, 547 U.S. at 419. "Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law."[4] *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (*per curiam*). Here, even if we consider Bennett's speech to include her comment on the election, we must consider the public's interest—or lack thereof—in receiving the information she shared. Compare Bennett's comment on the election—of which she had no special insight—to the litany of cases protecting speakers that are exposing inner workings of government organizations to the public. *See, e.g. Banks*, 330 F. 3d at 897 (finding that a board of education engaging in illegal hiring practices is a "concern to the community"); *City of Elyria*, 502 F.3d at 492 (holding that operations of public employers "are of substantial concern to the public," and thus, a

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[4] Examples of speech that would involve such matters of public concern include "statements 'inform[ing] the public that [a governmental entity] was not discharging its governmental responsibilities' or statements 'seek[ing] to bring to light actual or potential wrongdoing or breach of public trust on the part of' government employees," as well as speech protesting racial or sexual harassment or discrimination within a public organization. *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 182 (6th Cir. 2008) (citations omitted).

public employee's right to comment on such matters are protected).

It is true that the speech in question was couched in terms of political debate, made in response to and repeating back the words of another person, and used a more casual version of an offensive slur.[5] Still, Bennett's speech does not garner the high level of protection that the district court assigned to it, and the balancing test requires less of a showing of disruption and other factors than the district court would require. *See Connick*, 461 U.S. at 152 (explaining that the greater extent to which the speech involves public concern, the stronger the showing of disruption necessary). In any event, the evidence of disruption caused by the language in Bennett's Facebook post was substantial.

We apply the *Pickering* test "'to determine [whether] the employee's free speech interests outweigh the efficiency interests of the government as employer.'" *Gillis*, 845 F.3d at 684 (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006)). The test considers "the manner, time, and place of the employee's expression." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The "pertinent considerations" for the balancing test are "whether the statement [(a)] impairs

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[5] Employees acknowledged that the form of the slur used by Bennett, ending as it did with "-az," is generally less offensive, but they also said that it depends on the context in which it was used. Employees also testified that African Americans have a "history of trauma with the word" and that their own use of it, in any form, is "trying to recapture that word to use it amongst [them]selves, to change the meaning, and use it as a term of camaraderie." They added that such use by people outside of the community would not have the same meaning.

discipline by superiors or harmony among co-workers, [(b)] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, [(c)] impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise," *id.*, or (d) undermines the mission of the employer. *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003) (citing *Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir. 1994)). The consideration of the employee's performance, impaired discipline by superiors, harmony among co-workers, and undermining of the office's mission is "focuse[d] on the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388 (avoiding interference with the functioning of the government office "can be a strong state interest").

Consideration of the first factor of the *Pickering* test, whether the speech impaired discipline by superiors or harmony among co-workers, weighs heavily in favor of Metro. The record makes clear that the harmony of the office was disrupted, and the district court erred in discounting the importance of harmonious relationships at ECC. Employees testified that Bennett's post prompted a "nonstop conversation" in the office that lasted for days, and for as much as three weeks to a month after Bennett's comment, there was a need for a counselor to address the office. Donegan testified:

> I was concerned, after learning about the need for [counselors] and for additional diversity training, to hear how we needed to heal as an agency. And it made me realize that for them to work side by side and to have to work as a team, I wasn't confident. I wasn't confident that that could continue with Bennett there. And to be honest, I wasn't confident that Ms.

> Bennett would not . . . say that again. . . . [S]he had broke my confidence at that time.

At Bennett's disciplinary hearing and during trial, she did not exhibit concern for her colleagues' feelings, called them hypocrites, and indicated that she would not apologize because someone else took something the wrong way—indeed, she believed her colleagues should instead apologize to her. Such facts indicate that if she had returned to work at ECC, her presence would have continued or exacerbated the disharmony.

In Bennett's favor, there is no indication that the speech itself impaired discipline by superiors. However, it is possible that any inaction on Donegan's part in the face of Bennett's derogatory speech could have been seen as an endorsement of the speech and impaired future discipline of similar derogatory statements.

The second factor, whether the speech had "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," also weighs heavily in favor of Metro. *Rankin*, 483 U.S. at 388. The district court acknowledged the importance of the close working relationships among the Emergency Telecommunicators at ECC, despite its failure to sufficiently credit the importance of those relationships. The jury also confirmed such a finding by indicating that Bennett's "Facebook comment was reasonably likely to have a detrimental impact on close working relationships" at ECC. (Emphasis added.) Donegan, Sanschargrin, and other supervisors and employees testified to the invaluable role that team dynamics play in the success of the agency. Sanschargrin highlighted the necessity of call takers and dispatchers being able to work together harmoniously, testifying that without

that collaboration and communication, the public would be at risk.

Several ECC employees had concerns about being able to work effectively with Bennett after her use of the racial slur in her post. Because the job of an Emergency Telecommunicator is so stressful, the employees operate somewhat as a team and need to depend on one another. They said that when Bennett used such a hurtful word, it made them question whether they could rely on her in their work and, as African Americans, whether Bennett would fairly assist their families when they called for help. Some also began to wonder whether Bennett had the requisite judgment to do her job effectively, one saying that "you need to be able to trust [that] the person beside you is making good decisions."

The district court minimized this substantiation by focusing on the lack of evidence "of any detrimental impact on any working relationships at the ECC other than Plaintiff's working relationships with whoever might be upset with her, or lose respect for or confidence in her, based upon her Facebook comment." The district court reasoned that the employees, "if anything, were brought closer together" by the emotions and ameliorative response from ECC leadership. But what the court failed to recognize is that the removal of Bennett from the agency was part of ECC's "ameliorative response." Indeed, the increased solidarity among the employees demonstrates how critical Bennett's termination was to fostering the close working relationships in the agency.

The third factor, whether Bennett's speech "impede[d] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise,"

is a close call. *Rankin*, 483 U.S. at 388. There is little indication, as supported by the jury's verdict, that Bennett's speech would impact the way Bennett did her job. But it is also possible that a damaged relationship with her colleagues could affect the quality and quantity of her work. Nevertheless, the jury found that her speech was not likely to interfere with the regular operation of ECC.

Finally, Bennett's comment detracted from the mission of ECC, weighing again in favor of Metro. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The agency's mission is to provide "the vital link between the citizens and first responders for all emergency and non-emergency calls, and to do so in an efficient, court[eous], and polite manner." As Metro stated in its letter to Bennett: "To advance that mission, it is vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability, and honesty. The success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency."

Donegan, in making her decision to terminate Bennett, considered the importance of public perception to achieving ECC's mission.

> The fact that we had had people contact the mayor's office, that was concerning to me. Her Facebook post apparently, at that time, was open to the public. We can't run an agency that provides a service to the citizens and

> people think that our workplace is not free of bias. So that was concerning to me as well.

Had Bennett's profile been private, or had it not indicated that she worked for Metro, Metro's argument for terminating Bennett would not be as strong. But the relevant Civil Service Rules support the idea that public perception is central to ECC's mission. Bennett's public comments discredited ECC because they displayed racial bias without a disclaimer that the views were hers alone. This court and several others "have recognized the interest of a governmental entity in preserving the appearance of impartiality." *Thomas v. Whalen*, 51 F.3d 1285, 1292 (6th Cir. 1995) (listing courts that have held as such).

The district court acknowledged that the jury found Bennett's comment to undermine the mission of ECC but decided that the weight of such a determination was "relatively slight." We disagree and conclude that more weight should be given to this consideration.

First, the district court found the concerns were "attenuated," but the concerns about Bennett's interference in the mission of ECC were not as attenuated as the district court described. In weighing Metro's interest in fulfilling the mission of the office, we consider the role and responsibilities of the employee and, when the role is public-facing, whether the danger to successful functioning of the office may increase. *Rankin*, 483 U.S. at 390. In *Rankin*, the employee was not in a public contact role, and thus, concerns about public perception were too attenuated to limit the free speech rights of the employee. *Id.* at 391. Here, however, Bennett was in a public-facing role and used the slur in a public forum from a profile that implicated not only Metro Government but also the Metro Police Department.

This situation is exactly the type that *Rankin* warned could warrant a higher level of caution for public employees' choice of words. *Id.* at 390 (stating that if the employee is in a "confidential, policymaking, or public contact role," the danger to the agency's successful functioning may be greater).

Second, the district court determined that because the record contained evidence of only one member of the public expressing concern, the fear of the post "going viral" was not a sufficiently substantial justification. But, although we have not addressed the issue directly, other circuits have held that a reasonable prediction that the public perception will impact the government's operations is sufficient. *See Locurto v. Giuliani*, 447 F.3d 159, 179-181 (2d Cir. 2006) ("Where a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations. . . . [The Government] may legitimately respond to a reasonable prediction of disruption."); *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 346 (4th Cir. 2017) (finding that part of the job of public servants "is to safeguard the public's opinion of them" and that even the threat of deteriorated "community trust" grants greater discretion to the employer). *Grutzmacher* acknowledges that speech on social media "amplifies the distribution of the speaker's message." 851 F.3d at 345. Although this situation, in some respects, "favors the employee's free speech interests," it also "increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency." *Id.*

Third, the district court "view[ed] it as highly speculative that even if an African American were familiar with Plaintiff's Facebook comment and was offended by it, such African American would be deterred from calling in an emergency." The concern, however, was not that African Americans will no longer call for emergency service, but rather—as Metro explains—that "damaged public perception can lead to many ills" for an agency that serves the public directly. The Second Circuit has effectively captured the importance of public trust in such relationships:

> The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. If the police department treats a segment of the population . . . with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged.

Locurto, 447 F.3d at 178 (emphasis added) (citing *Pappas v. Giuliani*, 290 F.3d 143, 146-47 (2d Cir. 2002)). The

Ninth Circuit similarly reasoned that the government's interest in effectively maintaining their operations allows them to "rely on 'reasonable predictions of disruption'" if an employee's speech, "when known to the public," would harm the employer's mission.[6] *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008).

The district court's reference to Bennett's use of "niggaz" as "the mere use of a single word" demonstrates its failure to acknowledge the centuries of history that make the use of the term more than just "a single word." The use of the term "evok[es] a history of racial violence, brutality, and subordination." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004). It "may appear innocent or only mildly offensive to one who is not a member of the targeted group, but be intolerably abusive or threatening when understood from the perspective of a [person] who is a member of the targeted group." *Id.* "The use of this word, even in jest, could be evidence of racial apathy."[7] *Hull v.*

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[6] In writing as *amicus curiae*, the International Municipal Lawyers Association emphasized this point: "When the public distrusts officials and employees within a public safety organization, cooperation with the police plummets, community watch programs crumble, witnesses to crimes no longer come forward, and criminals enjoy the passive support of local residents." Brief for Int'l Munic. Lawyers Ass'n as *Amicus Curiae* Supporting Appellants at 12.

[7] Several other courts have acknowledged the weight of the word: "The word 'nigger' [is] 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry[.]'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (citing Merriam-Webster's Collegiate Dictionary 784 (10th ed.1993)) (finding that even though the word may have been used in a joking manner, because the African-American employee did not take it that way, the court understood it to be "undesirable and offensive"); *Morgan v. Commc'n Workers of*

Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 514 (6th Cir. 1991) (citing *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990)). Surely the use of such an impactful and hurtful word can lead to the ills outlined in *Locurto*.

Further, the level of teamwork required for the effective functioning of an emergency-dispatch agency makes it more analogous to a police department than the district court determined. Although there are differences between emergency communications agencies and a police department, the distinction between the two may not be clear to the public, whose first point of contact in an emergency warranting police action is often with the employees fielding the emergency call. The diverse constituents of Metro Government need to believe that those meant to help them in their most dire moments are fair-minded, unbiased, and worthy of their trust.

Bennett raises the argument that ECC's anticipatory action—without further complaints from the public or employees—amounts to a "heckler's veto." A heckler's veto involves burdening or punishing speech "simply because it might offend a hostile mob." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). We have not addressed a heckler's veto in this context, but the Ninth Circuit has held that those concerns are not applicable to the "wholly separate area of employee activities that affect the public's view of a governmental agency in a negative

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Am., AFL-CIO, Dist. 1, No. 3:08-cv-249-FLW, 2009 WL 749546, at *7 n.3 (D.N.J. Mar. 17, 2009) ("The word "nigger" persists as an ugly vestige of racial intolerance, bigotry, and brutality; its use in any setting is inappropriate and indefensible [ ] [a]gainst the backdrop of this country's mixed history of race relations.")

fashion, and thereby, affect the agency's mission." *Dible*, 515 F.3d at 928-29. The Second Circuit has taken a similar view, finding that "members of the African-American . . . communities whose reaction . . . the defendants legitimately took into account . . . cannot properly be characterized as 'outsiders seeking to heckle [the plaintiffs] into silence.'" *Locurto*, 447 F.3d at 182-83 (citation omitted). Because effective emergency service "presupposes respect for the members of those communities," such agencies are permitted to account for the possible reaction of the public when disciplining their employees. *Id.* The public—as the consumers of ECC's services—and Bennett's colleagues with whom she must work collaboratively can hardly be said to be "a hostile mob."

Last, Sanschargrin's failure to investigate further is not fatal to Metro's argument. "Management can spend only so much of their time on any one employment decision." *Waters*, 511 U.S. at 680 (holding that basing a termination decision on "the word of two trusted employees, the endorsement of those employees' reliability," and "a face-to-face meeting with the employee he fired" was reasonable and "no further time needed to be taken"). Additionally, employers may rely on conduct and evidence that "the judicial process ignores." *Id.* at 676 (finding that government managers are able to give standing to complaints that they know from experience to be credible, which may be "the most effective way for the employer to avoid future recurrences of improper and disruptive conduct.").

Sanschargrin saw the Facebook post before Bennett deleted it and considered the complaints made to his human resources staff, assistant director Milliken, a trainer of front-line employees, the chief union steward,

and the mayor's office. He also discovered that Bennett violated three Civil Service Rules. Bennett, at her disciplinary meeting, had the opportunity—with counsel—to present additional information or evidence that countered what was in the charge letter, which would have been considered in Donegan's disciplinary decision. Bennett presented no evidence that any of the complaints were invalid or that she did not violate the Civil Service Rules. There is no precedent requiring further disruption to an office environment once the government confirms violations of policy and ascertained disruption. "[I]f the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." *Id.* at 680.

> It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do not believe that the First Amendment requires it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Id. at 676-77.

The question in this case is not whether members of the judiciary would have made the decision to terminate Bennett for using a racial slur in this instance.[8] The question is whether Bennett's language

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[8] Bennett argues at length, and the district court elaborates in a footnote, that the context of her speech is relevant because she might not have had grounds for discipline if she had use the word

was sufficiently protected for the court to interfere in our proclivity for "affording government employers sufficient discretion to manage their operations." *Garcetti*, 547 U.S. at 422.

> Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.

Waters, 511 U.S. at 678. Donegan's response cannot be considered unreasonable in light of the record, the jury responses, and Sixth Circuit precedent. The Civil Service Rules that Bennett violated cover all Metro employees, not just those at ECC, and are left largely undefined to give "department heads the latitude and the discretion to . . . apply them appropriately." In this case, the Civil Service Commission had the opportunity to determine whether Donegan applied them inappropriately and chose not to reverse her decision.

Because Bennett's speech does not occupy "the highest rung" of public concern, less of a showing of disruption is required. Several factors weigh heavily in favor of Metro. Although there are factors weighing in favor of Bennett, sufficient disruption was shown to tip the *Pickering* balance towards Metro. Based on the above analysis and in light of the discretion we must

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to quote Dr. Martin Luther King or Barack Obama, or used it to "denounce[ ] the bigoted use of the N-word."

grant leadership at Metro, its interest in maintaining an effective workplace with employee harmony that serves the public efficiently outweighs Bennett's interest in incidentally using racially offensive language[9] in a Facebook comment.

CONCLUSION

The result we reach today should not be taken as reflecting a lack of deep appreciation for First Amendment values. As this court stressed in an earlier case involving a public employee's speech:

> We wish to emphasize that in seeking to strike the appropriate balance here today, we have carefully considered the parties' respective

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[9] As one author put it:

> The slur is a "speech act"—an act with meaning and consequences. In fact, when a white person uses the term "nigger," regardless of his conscious intentions, he is making a fundamental statement about his place in the world and, by extension, the place of African Americans. The history embedded in the term (its exclusive use in the nineteenth century as an assertion of power by whites over their black slaves) combined with the race of the white speaker and black listener is akin to the speaker saying explicitly: "I reject the concept of equality, I reject your humanity, I am more powerful than you, and because of that power, I can say anything I want, and you have no recourse." And the act has that consequence. It typically renders the targeted listeners speechless and often demoralized, and creates in them a feeling of helplessness that is met with anger, fear, or sadness.

Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 Berkeley J. Emp. & Lab. L. 299, 319-20 (2012).

> interests and have not taken our task lightly. Just as we "hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance—a value protected by every clause in the single sentence called the First Amendment." [W]e also hope that whenever we decide that intolerant speech should be restricted, it is understood that we do so with no less commitment to the value of tolerance and the First Amendment in which it is enshrined.

Bonnell v. Lorenzo, 241 F.3d 800, 826-27 (6th Cir. 2001) (quoting Edward J. Cleary, *Beyond the Burning Cross* 198 (1995), from a speech given by Justice Stevens at Yale Law School in October 1992).

The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

CONCURRING OPINION OF JUSTICE GIBBONS

GIBBONS, Circuit Judge, concurring.

I join Judge Daughtrey's opinion and write separately only to highlight my specific disagreements with the district court's *Pickering* analysis.

The district court's principal error in its *Pickering* analysis was that it assigned insufficient weight to the disruption caused by Bennett's highly offensive and inflammatory language, given the evidence in the case and the jury's findings. The jury indicated that Bennett's comment was reasonably likely to have a detrimental impact on close working relationships at the ECC and to undermine the mission of the ECC. While the district court found these to not be "especially strong points" in Metro's favor, DE 147, Order, PageID 1716, it did so by understating the extent to which Bennett's comment jeopardized "the effective functioning of the [ECC]," *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

First, the district court unreasonably discounted the importance of harmonious working relations at the ECC by comparing the ECC to police and fire departments. *See* DE 147, Order, PageID 1718-19 (noting that "the ECC is not precisely akin to a police or fire department and does not have quite the same enormous need for . . . harmonious relations"). True, police and fire departments depend on harmonious relationships in navigating possible life-or-death situations. But the mere fact that another entity might have a greater need for harmonious relations does not mean that such relationships are not quite important to the ECC. Testimony at trial demonstrated the essential role of team dynamics and collaboration at the

ECC, and this finding was confirmed by the jury. And the district court provided no authority or reasoned basis for diminishing the value of close working relations in one context simply because there might be a greater need for those relations in another context.

The district court further minimized Bennett's disruption to the ECC by noting, without support, that "disharmony counts far less in the defendant's favor when it takes the form . . . of seemingly everyone else with an opinion deeming the plaintiff's conduct beyond the pale and treating her as something of a pariah." DE 147, Order, PageID 1717. The district court viewed Bennett's comment as creating solidarity among her co-workers—in opposition to Bennett—and therefore concluded that the risk of an office schism was low. *See id.* (observing that ECC employees were, "if anything, brought closer together by the emotions, and ameliorative response from ECC leadership, provoked by Plaintiff's Facebook comment"). If ECC employees' solidarity against Bennett shows anything, it demonstrates that the termination of Bennett was essential to preserving close working relations at the ECC.

Beyond causing disruption within the ECC, Bennett's use of an offensive racial slur on a public platform was highly likely to impair the public's perception of the ECC as an unbiased entity. A government entity has a significant interest in preserving the legitimacy and credibility of its law enforcement institutions, and, specifically here, the ECC has a stated mission of helping all citizens, regardless of race. If the ECC fails to discipline an employee who publicly uses racist language, without remorse, it would put the legitimacy and credibility of the ECC—a functional

arm of Metro's police and fire services—at risk. And I do not believe this risk to be "attenuated" or "remote," as the district court concluded. DE 147, Order, PageID 1723. This direct risk is not only intuitively obvious, but it was also supported by evidence at trial where a member of the public expressed concern over the possibility that the ECC would not provide equal, race-neutral services.

Finally, Bennett's failure to apologize, show remorse, or otherwise recognize the harmful implications of her use of the n-word suggests that any disruptions to the ECC—both in its working relations and in its mission to the public—would have not only continued but would have been exacerbated by Bennett's presence at the ECC. Faced with evidence of actual disruption caused by Bennett's speech, along with the reasonable expectation that such disruption would continue to harm the ECC, Metro appropriately concluded that Bennett's continued employment would have impaired the "effective functioning of the [ECC]." *Rankin*, 483 U.S. at 388.

For these reasons, I believe the *Pickering* factors weigh more heavily in Metro's favor and accordingly agree that the district court's judgment should be reversed.

CONCURRING OPINION OF JUSTICE MURPHY

MURPHY, Circuit Judge, concurring in the judgment.

Under the Supreme Court's current framework, I agree that the Metropolitan Government of Nashville did not violate the First Amendment when it fired Danyelle Bennett for using a highly offensive racial slur on her Facebook page while commenting on the 2016 presidential election. Yet I have found this case difficult because the Court's framework requires us to "balance" what strike me as two incomparable values—a public employee's interest in speaking about politics and a public employer's interest in its efficient operations. I write to explain my reasoning.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It was once thought that the government did not "abridge" the "freedom of speech" (*i.e.*, "contract" the freedom or "deprive" a citizen of it) when the government made employment decisions based on its employees' expression. Noah Webster, *A Compendious Dictionary of the English Language* 2 (1806). In the words of Justice Holmes, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). And governments had long made hiring and firing decisions based on their employees' political activities when the Fourteenth Amendment was adopted and the First Amendment incorporated against the states. *See Elrod v. Burns*, 427 U.S. 347, 377-79 (1976) (Powell, J., dissenting). This right was instead traditionally thought to protect private citizens against efforts to stifle their speech with, say, criminal fines.

The Supreme Court eventually rejected the Holmesian view that the greater power (to deny a person a job) includes the lesser power (to condition the job on any and all speech restrictions) under its emerging "unconstitutional conditions" doctrine. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Still, the Court recognized (more as a pragmatic matter than a textual or historical one) that the "government as employer" must have "far broader powers" to regulate an employee's speech when making personnel decisions than "the government as sovereign" has the power to regulate a citizen's speech when meting out punishments. *Waters v. Churchill*, 511 U.S. 661, 671-74 (1994) (plurality opinion). So once the Court departed from the traditional rule, it needed to develop an alternative framework for restricting the government's ability to fire employees for their speech. *See* Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm. & Mary L. Rev. 1985, 2005-07 (2012).

The Court has gradually done so. Today, a public employer's decision to discharge an employee for speech violates the First Amendment if that speech satisfies three conditions. To begin, the employee must speak as a private citizen, not as part of the employee's official job duties. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). Next, the speech must touch on "matters of public concern," not personal concern. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Last, the employee's interest in speaking must outweigh the government's interest in operating—a balancing test known as "*Pickering* balancing." *See Pickering*, 391 U.S. at 568.

Here, Bennett's speech was not part of her duties as a 911 operator, so this case turns on the other two

conditions. I believe that Bennett spoke on a matter of public concern. And I see the "balancing" inquiry as a difficult one. On Bennett's side, she spoke on her personal time about a topic at the First Amendment's core (a presidential election). On Nashville's side, Bennett used a version of what is perhaps the most offensive word in the English language. The city could reasonably find that her speech risked the public trust in its Emergency Communications Center. Which interest is "greater"? I must express my uncertainty over how to engage in this putative "balancing." But in the end the deference that federal courts owe state governments under the Supreme Court's current approach leads me to conclude that we should reverse the district court's holding that Bennett's firing violated the First Amendment.

I

I agree with the district court that this case involves a matter of public concern because Bennett's comment addressed an election. To be sure, her use of a racial slur (even if only to respond to a stranger's comment) was "patently offensive, hateful, and insulting." *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting). Yet the Supreme Court's cases teach that we cannot isolate the offensive word from the broader context. *See Rankin v. McPherson*, 483 U.S. 378, 385 (1987); *see also Marquardt v. Carlton*, 971 F.3d 546, 550-51 (6th Cir. 2020).

To decide whether a statement addresses a matter of public concern, we must consider the "content, form, and context of [the] statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. This "public concern" element asks a question like the question

central to a "common-law action for invasion of privacy": Does the employee's statement address "a subject of legitimate news interest"? *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam).

Under this rubric, it should be obvious that political elections are legitimately newsworthy. In fact, the Supreme Court's expansion of the First Amendment into public employment started with political speech. The expansion took root in the 1950s and 60s, when governments were barring employees from participating in "subversive" political groups. *See Connick*, 461 U.S. at 144 (citation omitted). In one of the more famous cases, the Court held that a state's ban on public employment for those belonging to the Communist Party violated the First Amendment. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-06 (1967). It reasoned: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* (citation omitted). The First Amendment thus offers protections to public employees if their speech fairly relates "to any matter of political . . . concern[.]" *Connick*, 461 U.S. at 146.

The facts of *Rankin* next show that this public-concern test considers offensive remarks in their full context. In March 1981, Ardith McPherson, a clerical employee in a constable's office, heard that President Reagan had been shot. 483 U.S. at 381. After McPherson criticized the President's policies, she said, "shoot, if they go for him again, I hope they get him." *Id.* She made this statement to a coworker while on the job, and another employee overheard it. *Id.* at 381-82. That employee reported her to the constable, who fired

McPherson "because she hoped that the President would be assassinated." *Id.* at 390 n.16. The Court held that her discharge violated the First Amendment. *Id.* at 392. McPherson's professed desire for a criminal assassination touched a matter of public concern because it was "made in the course of a conversation addressing the policies of the President's administration." *Id.* at 387. And "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387; *cf. Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

Neutral principles require us to apply the same rules here. There, as here, an employee made an offensive remark. In *Rankin*, the Court found that the statement touched a matter of public concern because McPherson made it in the context of discussing the President's policies. 483 U.S. at 387. In this case, the statement likewise touches a matter of public concern because Bennett made it in the context of discussing the President's election. In both cases, the "inappropriate" nature of the employee's statement is "irrelevant to the question whether it deals with a matter of public concern." *Id.*; *see also Connick*, 461 U.S. at 149.

To be sure, this is not to suggest that employees may use offensive language at their leisure while discussing matters of public concern. *See Waters*, 511 U.S. at 672 (plurality opinion). A statement's offensive nature may well make it unprotected under *Pickering* balancing. But a statement about a matter of public concern does not become a statement about a personal matter merely because the employee makes the statement in an offensive manner. As to this public-concern question, the offensive nature of the statement is "irrelevant." *Rankin*, 483 U.S. at 387.

II

A

We must instead resolve this case using *Pickering*'s "balancing test." *Roe*, 543 U.S. at 82. This test instructs courts to "arrive at a balance between 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." *Pickering*, 391 U.S. at 568. When assessing the employee's interest, the Court has told us to consider "the manner, time, and place of the employee's expression[.]" *Rankin*, 483 U.S. at 388. When assessing the government's interest, the Court has told us to consider whether the employee's "statement impairs discipline by superiors or harmony among co-workers," "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," "impedes the performance of the speaker's duties," "interferes with the regular operation of the enterprise," or "undermines the mission of the public employer[.]" *Id.* at 388, 390. When balancing these interests, the Court has said that the employer's operations-based rationales for firing an employee must increase as the employee's speech interest increases. *See Connick*, 461 U.S. at 150, 152; *cf. Lane v. Franks*, 573 U.S. 228, 242 (2014).

"Because of the enormous variety of fact situations," however, the Court has refrained from offering more specific guideposts about how to undertake this balancing. *Pickering*, 391 U.S. at 569. It has thus repeatedly acknowledged that the "balancing is difficult." *Connick*, 461 U.S. at 150; *Garcetti*, 547 U.S. at 418. As Justice

O'Connor put it, balancing will never be easy "unless one side of the scale is relatively insubstantial." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 482 (1995) (O'Connor, J., concurring).

This case proves the point. The jury issued sharply divided findings about the effects of Bennett's speech on the Emergency Communications Center. Three of its answers favored Bennett: The jury found that her speech would not impair discipline by supervisors, impede her ability to perform her job, or interfere with the Center's operations. Two of its answers favored Nashville: The jury found that Bennett's speech would affect working relationships and undermine the Center's mission. When assessing these findings in a thoughtful opinion, the district court concluded that Bennett had significant interests in her political comments, but that the Center had only limited operational concerns in her use of the offensive racial slur. When assessing these findings in another thoughtful opinion, the majority concludes that Bennett has limited interests in her use of offensive language, but that the Center has significant interests in ensuring harmonious operations. In my view, both parties have significant interests on their side.

Bennett's Speech Interests. For two reasons, Bennett's speech should receive significant First Amendment weight. Reason One: The general content of the speech. The Court's cases distinguish speech about an employee's job from speech about broader policy. The more the speech looks like a mere "grievance" about working conditions, the more the government can use that speech as the grounds for a discharge. *Connick*, 461 U.S. at 154. The more the speech discusses "issues of public importance," the less the government can do

so. *Pickering*, 391 U.S. at 574. This factor supports Bennett. Her social-media comment was not about her job as a 911 operator; it was about a presidential election. Despite her comment's offensive nature, therefore, her speech falls near the First Amendment's core. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Even outrageous "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 452 (quoting *Connick*, 461 U.S. at 145).

Reason Two: The "time" and "place" of Bennett's speech. *Rankin*, 483 U.S. at 388. The Court's cases distinguish "on-the-job" speech from speech during the employee's own time. If the employee speaks pursuant to official job duties, the speech receives no constitutional protection. *Garcetti*, 547 U.S. at 426. And even if the speech is not part of an employee's duties, an employer has greater leeway to regulate speech that occurs on the employer's premises than speech away from the office during the employee's own time. *See Connick*, 461 U.S. at 153. If, by contrast, the employer seeks to "leverage" the employee's job by restricting the employee's off-the-job speech as a private citizen, this restriction raises more First Amendment red flags. *Garcetti*, 547 U.S. at 419; *see Connick*, 461 U.S. at 153 n.13. This factor also supports Bennett. She posted a comment on her Facebook page while at home. She was acting like a private citizen, not a 911 operator. *Cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017).

Indeed, in other "unconstitutional conditions" contexts, that Bennett's speech occurred "on her own time and dime" might well lead the Supreme Court to

protect it without more. *Compare Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) (*AOSI*), *with Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991). Consider speech restrictions on entities that receive government funds to implement government programs. There, the Court distinguishes speech restrictions imposed inside the context of the program (that is, "those that specify the activities [the government] wants to subsidize") from speech restrictions "that seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI*, 570 U.S. at 214-15. When invalidating a law that sought to regulate outside-the-program speech, the Court did not consider whether that outside speech would disrupt the program's effectiveness. *See id.* at 214-21; *cf. B.L. ex rel. Levy v. Mahanoy*, 964 F.3d 170, 178-91 (3d Cir. 2020).

All told, Bennett's speech interests are significant in this case because she spoke on her own time as a private citizen and because her expression concerned a presidential election.

Nashville's Operational Interests. Yet Nashville identifies two significant reasons for terminating Bennett. Reason One: The jury found that Bennett's comment was likely to "undermine" the Emergency Communications Center's mission. *Rankin*, 483 U.S. at 388. Many decisions recognize that public entities performing law-enforcement functions have an interest in maintaining "the respect and trust of the community"—an interest that has often allowed these entities to fire employees who circulate "racist messages" even on their own time. *Pappas*, 290 F.3d at 246-47; *see Grutzmacher v. Howard County*, 851 F.3d 332, 347 (4th Cir. 2017); *Sczygelski v. U.S. Customs & Border*

Prot. Agency, 419 F. App'x 680, 681 (8th Cir. 2011) (per curiam); *Locurto v. Giuliani*, 447 F.3d 159, 178-83 (2d Cir. 2006); *Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112, 121-22 (Mass. 2000). To give the extreme example, the government may fire law-enforcement officers who promote the views of the Ku Klux Klan to ensure the community's trust in the government's nondiscriminatory enforcement of the laws. *See Weicherding v. Riegel*, 160 F.3d 1139, 1143-44 (7th Cir. 1998); *cf. Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 700 (1996) (Scalia, J., dissenting). Nashville could reasonably conclude that Bennett's use of the n-word implicated this interest in maintaining the community's trust in the Emergency Communications Center. She made the comment publicly on a Facebook page that mentioned her affiliation with the Center. That fact distinguishes Bennett from the employee in *Rankin*, who made her remark "in a private conversation" with a trusted coworker. 483 U.S. at 389. And while Bennett was not a police officer, her job as a 911 operator still entailed the type of "public contact role" that the clerical employee's job in *Rankin* did not. *See id.* at 390-91.

Reason Two: The jury likewise found that Bennett's public use of the n-word would undermine relationships at the Emergency Communications Center. *Id.* at 388. That is not surprising. Many cases recognize this slur's offensive nature and its potential effect on employment relations. "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *Rodgers v.*

Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993). When used in the workplace, courts often have found that the word offers evidence of a racially hostile environment in violation of Title VII. *See, e.g.*, *Gates v. Bd. of Educ. of the City of Chi.*, 916 F.3d 631, 638-40 (7th Cir. 2019); *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1251-53 (11th Cir. 2014). Here, while Bennett's speech occurred outside the workplace, Nashville could reasonably conclude that it hindered employee relationships. According to the district court, some six employees of the 120 or 125 employees at the Emergency Communications Center complained about her racial slur to supervisors.

Unlike in other contexts, moreover, the Supreme Court has not drawn a clear divide between on-the-job speech and off-the-job speech in this employment setting. It has, for example, long upheld laws that restrict employees from engaging in core political speech even outside the job on their own time. *See Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 556 (1973). If the government can terminate employees for core political speech outside the workplace, it would be odd if they could not consider an employee's use of an offensive racial slur outside the workplace too.

B

With significant interests on both sides, what are courts to do? As in other contexts where "we must juggle incommensurable factors," I'm not sure I see a "right" or "wrong" answer to this balancing question. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting). In my

respectful view after struggling with the task, *Pickering*'s instructions to engage in open-ended balancing do not provide helpful guidance to resolve concrete cases.

First, I find the Solomonic weighing of interests difficult because it is "out of step with our interpretive tradition." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in the judgment). As I understand it, the balancing entails a "utilitarian calculus" about what outcome best promotes the public good: protecting the employee's speech or the government's operations. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (citation omitted). Such a policy question requires us to act more like "legislators" than "judges." *Id.* The Supreme Court's usual method of constitutional interpretation, by contrast, relies on the text, structure, and history of a provision (*e.g.*, the Confrontation Clause) to develop a workable legal test that we can neutrally apply in individual cases (*e.g.*, its divide between testimonial and non-testimonial hearsay). *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004).

This balancing especially stands out from the Supreme Court's free-speech jurisprudence. The Court has rejected as "startling and dangerous" the notion that we may engage in "an ad hoc balancing of relative social costs and benefits" of speech. *United States v. Stevens*, 559 U.S. 460, 470 (2010); *June Med. Servs.*, 140 S. Ct. at 2179 (Gorsuch, J., dissenting). If the government targets speech based on content, the Court instead asks whether the speech falls within a category that the government has historically regulated. *See Stevens*, 559 U.S. at 468-69. If not, the Court applies rigorous scrutiny rather than legislative balancing. *Reed v.*

Town of Gilbert, 576 U.S. 155, 163 (2015); *cf. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring). If so, the Court strives to adopt an administrable legal rule to define and delimit the category. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992). Take libel law. There, the Court adopted the "actual malice" test. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). It did not require lower courts to weigh in every case an individual's reputational interests against the speaker's expressive interests.

Second, this balancing requires us to compare incomparable interests. *Cf. Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Start with the employee's speech "interest." If we are to "measure" that interest using standard First Amendment gauges, the interest should increase as the speech becomes more controversial. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he proudest boast of our free speech jurisprudence," then, is that we protect the speech "we hate." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (Alito, J., opinion) (citation omitted). The "Nazi Party may march through a city with a large Jewish population." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985). The Westboro Baptist Church may shout "Thank God for Dead Soldiers" outside the funeral of a soldier killed in the line of duty. *Snyder*, 562 U.S. at 448, 460-61. And Gregory Lee Johnson may protest this country

by burning the American flag, no matter "how repellent his statements must be to the Republic itself." *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring). As these cases symbolize, the First Amendment has its most urgent application for speech on public issues that many in our society might find dangerously wrong. *See Snyder*, 562 U.S. at 460-61. Conversely, the First Amendment would serve no purpose if it safeguarded only "majority views." *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc). Democracy does that well enough on its own.

Turn to the government's operational "interest." If we are to "measure" that interest under a consider-everything test, it will surely increase as the speech becomes more controversial (and thus more entitled to protection). *Rankin*, 483 U.S. at 388. We must consider such things as whether the speech will impair "harmony among co-workers" or negatively affect "working relationships." *Id.* If an employee's off-the-job political advocacy sufficiently annoys coworkers who hold opposite views, does that suffice to terminate the employee? What if non-religious coworkers are offended by a religious coach's decision to pray in a stadium on his personal time? *Cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (Alito, J., respecting the denial of certiorari). How about if an employee's decision to kneel during the national anthem (again on the employee's own time) garnered significant complaints? *Pickering* has been the law for decades, yet it remains unclear how much its balancing "constitionaliz[es] a 'heckler's veto' for controversial expressions"—even expressions that occur on the employee's personal time. Kozel, *supra*, 53 Wm. & Mary L. Rev. at 2019. In short, an employee's

speech interest will often move in lockstep with an employer's operational interest. How, then, can we realistically assess which is "greater"?

Third, because this task requires us to compare incommensurate interests, the proper outcome is bound to be in the eye of the beholder. As one of my colleagues said in another context, a subjective weighing of interests "affords far too much discretion to judges in resolving the dispute before them." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment). And as Chief Justice Roberts reminded, "under such tests, 'equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'" *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

These concerns have great force in this free-speech context. For employees, *Pickering*'s opaque test has an "obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). It "force[s] potential speakers to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (Alito, J., concurring in the judgment) (citation omitted). Indeed, if a legislature enacted *Pickering*'s balancing approach, I doubt it would survive a void-for-vagueness challenge. For employers, *Pickering*'s opaque test creates "unavoidable risks and costs" too. *Wales v. Bd. of Educ. of Cmty. Unit Sch. Dist. 300*, 120 F.3d 82, 85 (7th Cir. 1997). Just as an unclear test may deter worthwhile

expression, so too it may deter a worthwhile termination. By making the answer turn on an assessment of each side's generic interests, employers can have little confidence that a federal court will agree that their operational interests outweigh their employees' speech interests. This uncertainty and the litigation risk it creates could entrench employees in positions for which they are ill-suited and thereby disserve the populace the employer serves. *Id.*; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

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If the abstract balancing does not help resolve this case, where else should courts look? As best I can glean from precedent, the public employer must win where, as here, both sides have substantial interests on their side. The Court has told us to give "substantial deference" to an employer's decision under *Pickering*. *Umbehr*, 518 U.S. at 678. The plurality in *Waters*, for example, noted that we should give "greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." 511 U.S. at 673 (plurality opinion). *Connick* likewise said that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. Our court, too, has "long recognized 'the importance of deference' to law enforcement officials when speech threatens to undermine the functions of organizations charged with maintaining public safety." *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017) (quoting *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989)). In cases like this one, therefore, precedent tells me to defer to

a government's decision that its operational interests outweigh the employee's speech interests.

History might further justify this default rule of deference. Recall that, until the 1950s, the government was not thought to have abridged the freedom of speech by "curb[ing] the tongues of its own employees[.]" *Brown*, 867 F.2d at 321; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96-97 (1990) (Scalia, J., dissenting). If accurate, *cf. Janus v. Am. Fed'n of State, Cnty. and Mun. Emps.*, 138 S. Ct. 2448, 2470-71 (2018), this historical account might confirm that public-employee speech represents a "category" of expression over which the government has far greater room to make content-based decisions. *See Stevens*, 559 U.S. at 472; *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009).

Or perhaps the Court should consider another default rule. One scholar suggests that it should move away from a "balancing" test to a default "of parity: employees and other citizens are presumed to be similarly situated for purposes of the First Amendment." Kozel, *supra*, 53 Wm. & Mary L. Rev. at 2011. Under this view, courts should not engage in a broad balancing of interests; they should narrowly ask whether an employee's speech (like an employee's job performance) sheds light on whether the employee can adequately do the job. *See id.* at 2022-35. (Here, the jury found that Bennett's speech did not impair her ability to do her job.) The Court has also refused to engage in "halfway originalism." *Janus*, 138 S. Ct. at 2470. So once it rejected Justice Holmes's view by holding that a firing (like a fine) can amount to an "abridgment" of the "freedom of speech," why should pragmatic concerns about government operations outweigh longstanding free-

speech values (such as the prohibition on the heckler's veto)? An abridgment is an abridgment. But these proposals must be directed to a different tribunal. As an intermediate appellate judge, I must apply current doctrine where it stands. And I see a current default rule of deference. For that reason, I concur in the judgment.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE (JUNE 25, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANYELLE BENNETT,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant.

No. 3:17-cv-00630

Before: Eli RICHARDSON,
United States District Judge.

This First Amendment retaliation case is before the Court in the aftermath of the jury returning its unanimous answers to the special interrogatories after several days of trial. As explained below, it now falls upon the Court to determine, based in part on those jury answers, whether Plaintiff's speech at issue in this case was constitutionally protected conduct. As

set forth below, the Court answers that question in the affirmative.

A. First Amendment Retaliation: General Legal Standards

The Court will begin by setting forth the general legal framework for a First Amendment retaliation claim, noting where the current question for the Court fits into it, and then identifying the sub-issues and general legal principles applicable to that question.

1. The Three Elements of a First Amendment Retaliation Claim

To state a claim for First Amendment retaliation, a plaintiff must establish that:

> (1) [s]he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against h[er] that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by h[er] protected conduct.

Gillis v. Miller, 845 F.3d 677, 683 (6th Cir. 2017) (quoting *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 294 (6th Cir. 2012)). Whether the first element is satisfied—*i.e.*, whether the public-employee plaintiff's speech at issue is protected—is a question of law for the court to decide.[1] *Mayhew v. Town of Smyrna, Tenn.*, 856 F.3d 456, 462-64 (6th Cir. 2017). But that question

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[1] The parties are in mutual agreement with this proposition. (Doc. No. 123 at 2; Doc. No. 124 at 1).

is appropriately answered with input from the jury regarding relevant issues of fact,[2] and the input provided by the jury in this case is identified and discussed below.

As for the second element, it was never truly in dispute at the trial of this case, as Plaintiff asserted and Defendant ("Metro") conceded before trial. (Doc. No. 123 at 6; Doc. No. 124 at 2). And, as discussed below, it was satisfied in this case.[3]

The third element—causation—is one for the jury if the plaintiff can get that far, *i.e.*, can satisfy the court as to the first element such that the remaining two elements must be addressed. As Metro correctly has noted, however, it is appropriate to seek jury input regarding causation, even prior to reaching the third element, to assist in the analysis of the first element. As Metro put it, "(1) the jury should determine whether Plaintiff was terminated for a particular portion of her speech and/or for any other reasons, and (2) the Court should apply *Pickering* only to the conduct for which Plaintiff was terminated." (Doc. No. 124 at 6) (referring to the balancing test derived from *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968), and its progeny). This approach makes sense because the so-called *Pickering* balancing test—which as discussed

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[2] *See Pucci v. Nineteenth Distr. Ct.*, 596 F. App'x 460, 470 (6th Cir. 2015). The parties are in mutual agreement with this proposition also. (Doc. No. 123 at 6; Doc. No. 124 at 3, 4).

[3] Plaintiff has asserted that the satisfaction (or lack thereof) of this element is "arguably" for the jury to decide. (Doc. No. 123 at 6). However, neither party requested that this issue be submitted to the jury, perhaps because each party had concluded that it was essentially a non-issue given the facts in this case.

below is the last of three sub-elements of the first element of a First Amendment retaliation claim—is applied to the plaintiff's "speech," and the only speech that can support a plaintiff's retaliation claim is speech that resulted in adverse action.[4] Thus, as discussed further below, to assist it in connection with the issue now before it, the Court submitted a special interrogatory to the jury, asking the jury to identify the reason or reasons for which Plaintiff was terminated.[5]

2. The First Element, Constitutionally Protected Speech, and Its Three Sub-Elements

To show that she was engaged in constitutionally protected activity, a public employee alleging First Amendment retaliation must satisfy three sub-elements:

> First, the employee must speak on "matters of public concern." *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337 (6th Cir. 2010) (citing *Connick* [*v. Myers*, 461 U.S. 138, 142 (1983)]). Second, the employee must speak as a private citizen and not as an employee

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[4] The same goes for the first two sub-elements; those two elements are pegged to the plaintiff's "speak[ing]," and it would make little sense to apply the test to anything other than the "speaking"—*i.e.*, speech—for which the plaintiff suffered adverse action, since that alone is the speech that can support a retaliation claim.

[5] If the Court finds that one or more such reasons constitutes constitutionally protected conduct, it would seem a foregone conclusion that the jury will find that Plaintiff has satisfied the third element of her retaliation claim, *i.e.*, that the adverse action against Plaintiff was motivated at least in part by such protected conduct. Be that as it may, the satisfaction (or non-satisfaction) of the third element is one that the jury must decide, and thus the Court will submit that issue to the jury.

> pursuant to his official duties. *Id.* at 338 (citing *Garcetti* [*v. Ceballos*, 547 U.S. 410, 417 (2006)]). Third, the employee must show that his speech interest outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (quoting *Pickering*, 391 U.S. at 568).

Mayhew, 856 F.3d at 462.

"'[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.'" *Id.* (quoting *Garcetti*, 547 U.S. at 417). While it has been "long 'settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression,'" *Connick*, 461 U.S. at 142, such protections must be construed in balance with the efficient functioning of government services. *Mayhew*, 856 F.3d at 461-62. In other words, if you bring a claim against your employer under the First Amendment, you must convince the court that your interest in speaking openly on a matter of public concern outweighs the government's interest in having an efficient workplace. "Thus, an individual's First Amendment rights as a public employee are narrower than those of the citizenry at large." *Haddad v. Gregg*, 910 F.3d 237, 244 (6th Cir. 2018) (citing *Mayhew*, 856 F.3d at 461-62).

B. The Jury's Answers to Special Interrogatories

For the reasons and to the extent indicated above, the Court submitted special interrogatories to the jury. The number of submitted interrogatories, the purpose of each submitted interrogatory, and the general syntax

of each submitted interrogatory matched Metro's proposal for special interrogatories. *Compare* Doc. No. 124 at 5-6, 7 *with* Doc. No. 145. As to each of the first five interrogatories (which solicited merely a "Yes" or "No" answer), the question posed was identical to the question proposed by Metro, except that one phrase was removed from interrogatory No. 2 at the request of Plaintiff without objection from Metro.[6] As to the final submitted special interrogatory, No. 6, it asked the jury to identify the reason or reasons for Plaintiff's termination by checking one or more boxes corresponding to pre-identified choices and/or by handwriting in any additional reason(s) for termination. As submitted, this interrogatory reflected various changes to the language proposed by Metro for purposes of clarity and avoidance of redundancy but, in the Court's view, was entirely consistent with the spirit of Metro's proposal. With these changes, the special interrogatories were submitted to the jury without objection from either party after closing arguments on the fifth day of trial, June 20, 2019.

The next afternoon, the jury returned its special verdict, unanimously answering each of the six special interrogatories. (Doc. No. 145). To summarize, the jury found that Plaintiff's Facebook comment was reasonably likely to (1) have a detrimental impact on close working relationships at the Emergency Communication Center ("ECC"), and (2) undermine the mission of the ECC, but not reasonably likely to (1) impair discipline by superiors at the ECC, (2) impede the performance of Plaintiff's duties at the ECC, or (3) interfere with the

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[6] In addition, submitted interrogatory No. 3 removed an extraneous letter "s" erroneously contained in Metro's proposal).

orderly operation of the ECC.[7] As to the nature and extent of the (a) detrimental impact on close working relationships and (b) undermining of the ECC's mission, the jury was not asked and did not indicate. As set forth below, however, based on the evidence at trial the Court can and does draw some conclusions as to the nature and extent of these forms of disruption visited upon the ECC by Plaintiff's Facebook post.

As for the reason(s) for Plaintiff's termination the jury indicated two. First, the foreperson checked the box, "for using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook." Second, the foreperson handwrote, "because the box we checked above violated Charge 1, 2 and 3 of Plaintiff's termination letter." Given the (understandable and indeed expected) relative brevity of the answers provided by the jury, the question arises as to the identity and value of the speech for which she was terminated. However, as set forth below, based on the evidence at trial the Court can and does draw some conclusions as to the identity (and the corresponding First Amendment value) of the speech at issue.

C. The Constitutionally Protected Nature of the Speech That Was the Reason for Plaintiff's Termination

It falls upon the Court, given the above background, to determine whether Plaintiff's speech at issue—*i.e.*,

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[7] In response to inquiries from the jury via notes from its foreperson, the Court, without objection, provided some degree of explanation as to the meaning of the terms "likely to impair discipline by superiors" and "interfere with the orderly operation of the ECC." (Doc. Nos. 143-144). Each party agreed to the explanation provided.

the speech that was a reason for her termination—is protected speech, such that she may maintain her claim of retaliation based on it.

To make this determination, the Court need not and will not pronounce judgment on numerous issues that appear to surround this case. Among them are: whether the use of the N-word is in fact always offensive; whether the history of the use of the word reflects a stain on the American legacy; whether complainants were rightly upset at Plaintiff's use of the N-word; whether leadership at ECC was rightly concerned about Plaintiff's use of the N-word and the resulting complaints it generated; whether certain other responsive steps taken by ECC leadership (besides taking adverse action against Plaintiff), including speaking with Plaintiff about it, were appropriate; whether Metro's adverse action was taken in good faith; and whether Metro in this litigation has sought to vindicate a disciplinary action it sincerely believes was appropriate. Also not directly at issue, despite any suggestion by Metro or its witnesses to the contrary, is whether Plaintiff "should have" used a different word. Instead, the question now for the Court directly concerns only whether the three sub-elements to a finding of protected speech have been satisfied; this question may be impacted to a degree by the various issues listed immediately above, but none of those issues are for the Court to resolve now.

1. Plaintiff Spoke on a Matter of Public Concern

As noted above, the jury found (by checking the corresponding box) that Plaintiff was terminated for using the term "niggaz" when expressing her views

regarding the outcome of a national election on Facebook. The only reasonable interpretation of the jury's handwritten portion of its answer to special interrogatory No. 6 is that Plaintiff was also terminated because her use of the N-word when expressing her views regarding the outcome of a national election on Facebook was in fact (as charged by Metro) in violation of each of the three Civil Service Rules identified in Plaintiff's termination letter.

The question, then, is what was the speech identified by the jury as a (or the) reason for Plaintiff's termination? Whether it was the reason for termination (a) in and of itself, irrespective of any Civil Service Rules, or (b) because it was in violation of particular Civil Service Rules, the reason for Plaintiff's termination, as determined by the jury, was her "using the term 'niggaz'[8] when expressing her views regarding the outcome of a national election on Facebook."[9]

In a conceivable attempt to minimize the cognizable First Amendment interest in the speech that resulted in Plaintiff's termination, Metro perhaps would seize on the first few words to argue that the jury found that Plaintiff was terminated entirely and exclusively for

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8 Hereinafter, the Court will indulge its strong preference not to use this word and instead use the term "N-word" wherever possible.

9 To the extent that Metro might now wish to assert that Plaintiff's termination was the result simply of policy violations and not of any speech, such argument would fail, for two reasons. First, the jury's answer identifies as the policy violations Plaintiff's speech; it equates the policy violations with Plaintiff's speech. Moreover, Metro's position has never been that Plaintiff's termination resulted from policy violations independent from speech, and in its closing argument it unequivocally identified three reasons for Plaintiff's termination, one of which was her use of the N-word.

use of the N-word, irrespective of any context. Any such argument, if accepted, would aid Metro by diminishing the First Amendment value of the speech at issue, since a single word by itself (be it the N-word or some other word) obviously has much less expressive content than a short message (such as Plaintiff's Facebook message of three short sentences) or even a short phrase. The Court could not accept any such argument, however. By its terms, the jury's answer identifies the reason for Plaintiff's termination: the use of the N-word when expressing her views regarding the outcome of a national election on Facebook. In other words, the reason was Plaintiff's use of the N-word in a particular context, *i.e.*, a discussion of the outcome of a national election.

This interpretation is supported not only by the words of the jury's answer, but also by the evidence in this case. In the Court's view, multiple witnesses presented by Metro opined that the use of the N-word was always offensive, at least when the user was not African-American; indeed, the Court perceived this to be the view of Metro's exclusive ultimate decisionmaker as to Plaintiff's termination (Michelle Donnegan). But no witness asserted that the use of the N-word, by itself and irrespective of context, was a fireable offense or was the reason for Plaintiff's termination. If Metro wished to make such assertion(s), it needed to support it with, at a minimum, testimony to that effect from a relevant witness. For this reason, and also because any such assertion is inherently suspect,[10] the Court would not accept any such assertion now.

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[10] The Court perceives Plaintiff's counsel to have been alluding to the unlikeliness of the mere use of the N-word always being grounds for termination, irrespective of context, when he asked

What evidence that does exist on this point indicates that Metro's concern was with Plaintiff's Facebook comment as a whole, and not just with her use of the N-word *per se*. For example, Bruce Sanschargrin's investigative report of November 10, 2016 began its "Allegation" Section, "Current and previous employees found a posting on Danyelle Bennett's Facebook page that they felt was offensive and racially charged." (Def. Ex. 1) Thereafter, his report repeatedly referenced concerns over the "post" (or "posting") without ever once referencing a concern with something narrower than the post as a whole, such as the stand-alone fact that the N-word was used. Likewise, the "Summary" in the December 28, 2016 charge letter to Plaintiff began, "On November 9, 2016, while off duty, you posted comments on your personal Facebook that were derogatory and offensive towards the Caucasian and African-American races." (Def. Ex. 13). It was that specific letter upon which disciplinary action was taken against Plaintiff, as Plaintiff's termination letter noted at its very outset. (Pl. Ex. 19). In addition, the provision

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certain witnesses on cross-examination whether they thought it would be grounds for discipline to quote language from Dr. Martin Luther King, Jr. or former President Obama wherein each used the N-word. Mr. Sanschargrin's response (given without any reference to applicable authority) was that so doing would be "unacceptable" for a self-identified Metro employee, but he did not say that it would be grounds for discipline (with or even without a sufficient disclaimer). Given the prevailing lack of evidence to the contrary, the Court is loath to believe, and will not conclude, that Metro would treat such use of the N-word as an offense worthy of discipline. The Court likewise cannot conclude that it would be grounds for discipline if, for example, a Metro employee on Facebook (making a sufficient disclaimer) denounced the bigoted use of the N-word and, in so doing, happened to use the N-word itself.

of Metro's Information Security policy that (according to Metro) Plaintiff violated by not posting a disclaimer specifically requires a disclaimer only as to an employee's "expressed views," a term that does not reasonably cover the mere use of a single word devoid of context. In sum, the evidence plainly indicates that Metro's concern was with Plaintiff's post as a whole, and not merely the N-word that comprised only a (concededly significant and troubling) part thereof.

Thus, the Court considers the entire Facebook comment as the speech for which Plaintiff was terminated. This approach is supported not only by the jury's answer and the evidence (and lack of evidence) at trial, but by the general notion that the plaintiff's statement as a whole, rather than a single isolated word therein, should be analyzed in determining whether the plaintiff enjoys First Amendment protection for the statement. *See Devlin v. Kalm*, 630 F. App'x 534, 540 (6th Cir. 2015) (explaining that the plaintiff's use of the word "deadbeat" was "part and parcel of his critique of his public employer" and the court saw "no reason to analyze this single word separately from the entirety of [the plaintiff's] statement").

Relatedly, "[a] public employer may not divorce a statement made by an employee from its context[.] . . . Such a tactic could [result in] a statement which, out of context, may not warrant the same level of First Amendment protection it merited when originally made." *Rankin v. McPherson*, 483 U.S. 378, 386 n.10 (1987). In other words, it is not just what the plaintiff said, it is the context in which it was said. So as a general principle, which has not been shown to be inapplicable here, it is not just that Plaintiff said the N-word word, it is the context in which she said it. In

other words, it is her Facebook comment as a whole that is the speech at issue.

As indicated by the jury's answer, the comment related to the outcome of a national election. From the words of the comment itself, it related to voting patterns, and who voted for one of the candidates, in the 2016 presidential election. Without question, her comment was on a matter of public concern. Speech touches on a matter of public concern if it relates "to any matter of political, social, or other concern to the community." *Dye*, 702 F.3d at 295 (quoting *Connick*, 461 U.S. at 146). Speech relating to a major election clearly qualifies. *See id.* at 297 (noting that gubernatorial election is a matter of public concern); *Henry v. Roane Cnty., Tenn.*, No. 3:16-CV-689, 2018 WL 2422744, at *3 (E.D. Tenn. May 29, 2018) ("Supporting a candidate for an election touches on a matter of public concern.") (citing *Dye*, 702 F.3d at 297).

As stated in *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-CV-2873-JPM-DKV, 2019 WL 2484091, at *7 (W.D. Tenn. June 14, 2019), "[w]hile [the plaintiff's] statements on Facebook may have been offensive, he expressed opinions on matters of public concern, including race[.]" *See Connick*, 461 U.S. at 146; *Rankin*, 483 U.S. at 387 ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

2 Plaintiff Spoke as a Private Citizen

The second element of the inquiry asks whether the employee spoke as a private citizen or as a public employee. In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as

citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. But as noted above, Metro effectively conceded that Plaintiff spoke as a private citizen—and with good reason. There was no evidence at trial that Plaintiff was, or could reasonably be construed to be, authorized to speak on Metro's behalf regarding anything remotely related to the topic of her Facebook comment; indeed, at trial there was no evidence or even suggestion that any employee or other representative of Metro was or ever would be authorized to speak on Metro's behalf about any topics along these lines—topics which hardly are the stuff of municipal governance.

Finally, the entire crux of Plaintiff's violation of Metro's Information Security policy was that she did not make clear the fact that in posting her comment she was not speaking on behalf of Metro.

Thus, like the first sub-element, the second sub-element of constitutional protection for Plaintiff's speech has been satisfied.

3. Pickering Balancing

Finally, with the first two sub-elements satisfied, the Court must balance the employee's rights and the employer's interest in the efficiency of public services. *Miller v. City of Canton*, 319 F. App'x 411, 417 (6th Cir. 2009) (applying *Pickering*, 391 U.S. at 568); *Dye*, 702 F.3d at 295 ("When speech does relate to a matter of public concern, the court must then apply the *Pickering* balancing test 'to determine if the employee's free speech interests outweigh the efficiency interests of the government as an employer.'" (quoting *Scarbrough v. Morgan County Bd. Of Educ.*, 470 F.3d 250, 255 (6th

Cir. 2006) (internal quotation marks omitted) (relying on *Pickering*))).

In *Rankin*, the Supreme Court recognized the following considerations as relevant to *Pickering* balancing: whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or reasonably likely to undermine the mission of the enterprise. 483 U.S. at 388. Also relevant in the *Pickering* analysis are "the manner, time, and place of the employee's expression, as well as the context in which the dispute arose." *Rodgers v. Banks*, 344 F.3d 587, 601 (6th Cir. 2003) (quoting *Rankin*, 486 U.S. at 388) (internal quotation marks omitted).

The burden is on the governmental agency to justify the discharge on legitimate grounds. *Rankin*, 483 U.S. at 388.[11] In other words, the burden is on the governmental agency to show that its "legitimate interest in regulating employee speech to maintain an efficient workplace outweighed [the plaintiff's] First Amendment rights," *Kelly v. Warren Cnty. Bd. of*

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11 As indicated elsewhere, the Court had the jury answer five "yes or no" factual questions related to the *Pickering* balancing. On each question, Metro manifestly desired a "yes' answer and Plaintiff manifestly desired a "no" answer. The Court did not instruct the jury that Metro (or, for that matter, Plaintiff) bore the burden of establishing the correctness of its preferred choice. Thus, the Court did not treat Metro's burden of showing that the *Pickering* balancing cuts in its favor as entailing a burden to establish the jury-determined facts that would advantage it in the *Pickering* balancing.

Comm'rs, 396 F. App'x 246, 250 (6th Cir. 2010) (citing *Connick*, 461 U.S. at 150). *See also Ellison v. Knox Cnty.*, 157 F. Supp. 3d 718, 724 (E.D. Tenn. 2016) (holding that in that case, "defendants have not met their burden with regard to the *Pickering* analysis."). "The government must make a particularly strong showing where the speech substantially involves matters of public concern." *Miller*, 319 F. App'x at 417 (citing *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1053 (6th Cir. 2001) (internal quotation marks and alterations omitted).

Pickering balancing is notoriously fact-specific and difficult. *See Connick*, 461 U.S. at 151; *Garcetti*, 547 U.S. at 418. The *Pickering* balancing test is a "'somewhat imprecise standard.'" *Williams v. Commonwealth of Ky.*, 24 F.3d 1526, 1537 (6th Cir. 1994) (quoting *Meyers v. City of Cincinnati*, 934 F.2d 728, 729 (6th Cir. 1991)). Nonetheless, courts are called to undertake the daunting task of applying this subjective test, "reach[ing] the most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 151.

The Court will do so here, in the particular context of a dispute that is fraught with great meaning for each party. In so doing, the Court does not balance the factors as some sort of academic exercise, unmoored to an actual standard. Nor does it merely tally the number of factors aligning on the parties' respective sides, as if keeping score in some sort of game. Instead, though acknowledging and analyzing the factors and circumstances individually, the Court balances them as a whole with an eye toward the overarching question the factors are supposed to help answer: does the balance favor "the interests of the [employee], as a citizen, in commenting upon matters of public concern

[or] the interests of the [municipality], as an employer, in promoting the efficiency of the public services it performs through its employees[?]" *Pickering*, 391 U.S. at 568. Throughout its analysis, the Court should keep in mind the "overarching objectives" in this area of the law. *Garcetti*, 547 U.S. at 418. If the plaintiff's comments are regarding matters of great public interest, and they had only minimal effect on the efficiency of the office, then the *Pickering* balancing clearly goes against the public employer. *Williams*, 24 F.3d at 1537.

Upon application, the test reveals to the Court that Metro has not met its burden as required to prevail under the *Pickering* test. Metro has shown, and proven to the jury, some effect on the effective functioning of the office, but it is too minimal to override Plaintiff's free speech rights.

a. Circumstances Favoring Plaintiff in the *Pickering* Balancing

i. Plaintiff's Facebook Comment Involved Speech that Substantially Involved a Matter of Public Concern

Here, as discussed above, the jury has unanimously concluded that Plaintiff was terminated for using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook. That is, the reason for her termination was her use of the N-word in a particular context, *i.e.*, a discussion of the outcome of a national election.

"Expression on public issues has always 'rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S.

455, 467 (1980)); *see also Connick*, 461 U.S. at 150 (explaining that the greater the extent to which the speech involves matters of public concern, the stronger the employer's showing must be). Plaintiff's Facebook comment occupies this highest rung. The Court finds substantial merit in these recent observations from another district court:

> On the employee side of the scale, courts examine how closely the employee's speech comes to the core of the First Amendment. "The more tightly the First Amendment embraces the speech the more vigorous a showing" the government must make to justify curtailing that speech. *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 426 (9th Cir. 1995).

Sabatini v. Las Vegas Metro. Police Dep't, 369 F. Supp. 3d 1066, 1085-86 (D. Nev. 2019). For these reasons, Metro's showing must be particularly strong.

ii. Plaintiff's Facebook Comment Was Made Not Privately, But Rather in a Public Forum, Accessible to a Wide Swath of the Public

The same district court also observed, "Similarly, the more an employee directs his speech at the public or the media—rather than a smaller, private audience—the more the First Amendment is implicated." *Id.* This cogent observation poses a conundrum for Metro. In justifying its termination of Plaintiff, Metro has relied upon the fact that her Facebook message was public, thus greatly heightening the size of her audience (and potential audience) and thus the potential harm. Fair enough. But there is a flip side to this coin: for precisely

this reason, Plaintiff's Facebook post has greater countervailing First Amendment value.

iii. Plaintiff's Facebook Comment Was Unrelated to, and Made Outside of, Work at ECC

Plaintiff's post occurred outside of work and did not relate to the ECC. This fact cuts against Metro. *See Scarbrough*, 470 F.3d at 257-58 ("Speech and conduct that occur outside the office walls and that do not relate to work interfere less with office efficiency than conduct that occurs inside the office or that relates to the employee's work." (citing *Connick*, 461 U.S. at 153)); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994) ("The less [a plaintiff's] speech has to do with the office, the less justification the office is likely to have to regulate it.").

iv. Jury Findings Favoring Plaintiff as to Specific Pickering Factors

As indicated above, the jury answered each of the following three questions in the negative:

> Was Plaintiff's Facebook comment reasonably likely to impair discipline by superiors at the Emergency Communication Center?
>
> Was Plaintiff's Facebook comment reasonably likely to impede the performance of Plaintiff's duties at the Emergency Communication Center?
>
> Was Plaintiff's Facebook comment reasonably likely to interfere with the orderly operation of the Emergency Communication Center?

Each of these findings indicates the actual absence of an important alleged aspect of disruption upon which Metro relies. These jury findings thus constitute significant blows to Metro's prospects for meeting its burden as to *Pickering* balancing.

b. Circumstances Favoring Metro in the *Pickering* Balancing

i. Jury Findings Favoring Metro as to Specific *Pickering* Factors

As indicated above, the jury answered each of the following two questions in the affirmative:

> Was Plaintiff's Facebook comment reasonably likely to have a detrimental impact on close working relationships at the Emergency Communication Center?
>
> Was Plaintiff's Facebook comment reasonably likely to undermine the mission of the Emergency Communication Center?

These answers are certainly points in Metro's favor. However, these are not especially strong points, as revealed by a closer inspection of each one in turn.

Consistent with the jury's answer, there was evidence at trial to support the notion that Plaintiff's Facebook comment would have a detrimental impact on close working relationships. However, in the Court's view, there was no evidence whatsoever of any detrimental impact on <u>any</u> working relationships at the ECC other than Plaintiff's working relationships with whoever might be upset with her, or lose respect for or confidence in her, based upon her Facebook comment. As for all employees at the ECC other than

Plaintiff, to the extent the evidence revealed anything, it was that they were, if anything, brought closer together by the emotions, and ameliorative response from ECC leadership, provoked by Plaintiff's Facebook comment. The evidence revealed neither the fact, nor even the risk, of anyone aligning with Plaintiff in a manner that would create the kind of office schism that so often is at issue in cases like *Pickering* and its progeny.

The Court realizes that disharmony can count in the defendant's favor even where, as here, the disharmony is only between the plaintiff alone on one side and various other employees on the other side, and even if the disharmony has nothing to do with the plaintiff's employment or the defendant's office. But such disharmony counts not nearly as much as the kind of actual or threatened disharmony in cases like *Connick,* where the disharmony at issue concerns the possibility of the office being split in two, with employees divided into opposing camps with respect to the running of the defendant's office. *Connick*, 461 U.S. at 152-153. In short, the Court believes that disharmony counts far less in the defendant's favor when it takes the form, as here based on Metro's own evidence, of seemingly everyone else with an opinion deeming the plaintiff's conduct beyond the pale and treating her as something of a pariah.

Relatedly, the disharmony is far less in a case like the present, where Plaintiff's comments were not directed at any co-workers or supervisors, and did not reflect or seek to create any dispute with her employer

or co-workers.[12] This serves to distinguish this case from many others, like *Connick*. In *Connick*, the plaintiff had circulated within the office a questionnaire asking, inter alia, whether recipient employees had confidence in and relied on the word of five named supervisors. As the Supreme Court noted, such a question "is a statement that carries the potential for undermining office relations." 461 U.S. at 152. The Court noted that the plaintiff's efforts constituted what the plaintiff's superiors deemed "'a mini-insurrection . . . an act of insubordination which interfered with working relationships." *Id.* at 151. Plaintiff's case involves nothing of the sort.

To the extent that the relative importance of close working relationships is relevant to *Pickering* balancing, the Court recognizes the importance of close working relationships at the ECC. The Court noted in its order denying summary judgment to Defendant that the ECC is not precisely akin to a police or fire department and does not have quite the same enormous need for, among other things, harmonious relations

The Court finds that the Department's need

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[12] The Court realizes that many of Plaintiff's co-workers fell within a group (African Americans) that might understandably feel very offended by her use of the N-word. But that does not mean that she directed her Facebook comment, or her use of the N-word, at any of them. Still less does it mean that her Facebook message, had only the N-word been replaced with "African Americans" would have been some kind of insult directed at any African American co-workers; the content of the message seemingly was to praise African Americans for their voting choices in the 2016 presidential election and to claim that African Americans were with her—included—in a particular political movement, rather than excluded as some sort of group of distrusted "others" who should be marginalized.

> to control its dispatchers is not as substantial as the need of a police department or fire department to control its personnel. As even young children well know, many employees of fire and police departments (typically but not always uniformed) regularly make vital decisions out in the streets and buildings of our community—decisions which all-too-regularly have life-and-death consequences for those employees and their on-the-job partners. Moreover, such employees well know that on any given day, they may need to rely on each other to quite literally and physically save the lives of each other or other member of the community. In addition, such employees typically work in a regimented command structure involving formal ranks, such as "captain." In this context, the need for loyalty, discipline, and workplace harmony—among such employees but also other employees with less harrowing duties but the same overall mission—is greatly heightened.
>
> No such heightened need has been shown for the Department. Undeniably, the Department performs vital work that can involve teamwork and the saving of lives telephonically, and thus discipline and esprit de corps certainly matter to some extent. But elements such as command structure, and potential reliance on a work partner to save one's life, are simply missing from the Department's equation.

Thus, the Court notes that Defendant's need to have strong control over its internal affairs is somewhat

less than the need of a police department or fire department to do so.

After submission of all evidence at trial, the Court comes down in the same place. Metro elicited a good deal of testimony as to the importance of harmonious relationships in the vital work ECC does. The testimony illuminated how ECC call-takers receive calls from members of the public, then have to communicate quickly and accurately with dispatchers to send the right help to the right place without any undue delay, and in the process naturally work closely with police and fire fighters; via this testimony, Metro seemingly sought to portray ECC almost as sort of an arm of the police and fire services. The Court respects this work and sees the importance of harmonious relationships in ECC's efforts to save lives and avert disasters. But the Court adheres to its view that there is a significant difference: police and fire departments have command and control structures that the ECC does not, and personnel who assume they may someday need to save each others' lives. In this sense, harmonious relations at the ECC do not have quite the same importance.

Finally, the Court is underwhelmed by the indications of disharmony that actually were available to Metro's decisionmaker, Michelle Donnegan, at the time she took adverse action against Plaintiff.[13] It appears

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13 As Metro's decisionmaker, Ms. Donnegan's personal perception of relevant information, to the extent reasonable, is key in this analysis. "We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act

that of the 120-125 employees working at the time at the ECC in the same telecommunicator position as Plaintiff,[14] Ms. Donnegan, according even to a generous view of her testimony, was aware of no more than roughly a half dozen complaints from ECC employees, *i.e.*, complainants whose working relationship with Plaintiff might be impaired. That number counts for something in Metro's favor, to be sure, but it is not very suggestive of actual or even likely impairment of "the efficiency of the public services it performs through its employees," which is what the *Pickering* test ultimately aims to assess with respect to the employer's side. *Pickering*, 391 U.S. at 568. In *Williams*, the Sixth Circuit held that no reasonable official could conclude that disruption of the working relationship between the plaintiff and two co-workers outweighed the interest of the plaintiff in speaking on political matters. *Williams*, 24 F.3d at 1537. The Court does not see how the disharmony established by Metro between Plaintiff and several co-workers gets Metro much further than the disharmony got the defendants in *Williams*.

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based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay." *Waters v. Churchill*, 511 U.S. 661, 677 (1994). Thus, the Court will focus substantially on what Ms. Donnegan believed, to the extent such belief was reasonable under all of the circumstances, including the easy availability of additional information that could confirm or refute a particular belief she held.

[14] Ms. Donnegan provided this figure in her testimony.

And it is not just the known quantity of complaints that is less than striking; it is also the known "quality"—the seriousness and resulting consequences—of the complaints. It is entirely clear to the undersigned that Ms. Donnegan was not very informed as to the seriousness, and actual existing or likely effects, of the complaints. The "investigation," if one can call it that, of Mr. Sanschargrin was entirely inadequate to inform her on these matters,[15] and she made the decision uninformed. Metro is free to conduct an "investigation" this limited if it chooses to do so, but it must bear the consequences here: its decision maker lacked sufficient objective facts that otherwise could boost Metro's performance under the *Pickering* factors, including impairment of close working relationships. At trial, Metro elicited testimony from a few witnesses conveying details as to the views of themselves, and/or some other ECC employees, as to the effect on working relationships. With few exceptions, however, there is no indication that Ms. Donnegan knew such particulars regarding these employees' feelings in this regard. To the contrary, the Court infers from the following testimony that Ms. Donnegan knew of only a single employee whose working relationship with Plaintiff was impacted to the extent that working together with Plaintiff might be an issue:

> Q: And the only person, the only person who has ever told you that they would have a problem working alongside [Plaintiff] would

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[15] Ms. Donnegan testified that she received from Mr. Sanschargrin only his November 10, 2016 investigation report (Def. Ex. 1)—which is notably sparse in content—and never thereafter received anything from him in writing on this matter.

be Alisa Franklin?

A: She did state that, yes, sir.

In short, Ms. Donnegan knew of some complaints, but not much about them, and not much to indicate that there likely would be a problem for employees to work together with Plaintiff.

In more general terms, the Court notes that the investigation (conducted by Mr. Sanschargrin) was not intended to, and did not, gather more than minimal information regarding actual or even likely disruption within the office. As Mr. Sanschargrin testified, "My investigation was regarding [Plaintiff's] actions and containing that, it was not surrounding the other employees or I didn't know how far the post went . . . " For example, Mr. Sanschargrin did not conduct a single interview of a complainant. He did not even know how many complainants there were; when asked on cross-examination to confirm that only five employees complained, he replied, "Actually I do not know how many did because they didn't come to me." When Ms. Donnegan was asked the same thing, she was able to answer only, "I do not know that number to be correct."

While the lack of investigation into disruption is not fatal to a finding of disruption to enable Metro to prevail on the *Pickering* balancing, it certainly does not help Metro. *See Rankin*, 483 U.S. at 389 (noting that the petitioner "did not even inquire into whether the [respondent-employee's] remark had disrupted the work of the office."); *Goza*, 2019 WL 2484091, at *10 (noting public employer's lack of investigation into the extent of disruption, including the absence of any interviews of complainant-customers of public employer to determine whether they would boycott the services

of the public employer or refuse to allow the plaintiff to service them).

The Court next considers the import of the jury's finding that Plaintiff's Facebook comment impaired the mission of the ECC. From the evidence and argument at trial, the Court concludes that the jury must have had in mind one or both of two forms of undermining the ECC's mission. The first possible form is precisely what the Court just reviewed—namely, that the "mission" of the ECC was undermined by impairing to a degree the harmonious relations among ECC's various call-takers and dispatchers that are, in a sense, a part of ECC's mission.[16] But such impairment, whether or not considered an undermining of ECC's mission, does not get Metro very far, for the reasons set forth above.

The second possible form of undermining is the effect of Plaintiff's Facebook comment upon public perception of the ECC, More specifically, the ECC's mission is to help all citizens, regardless of race (and surely, other personal characteristics), and Plaintiff's Facebook comment threatens both to cast doubt in the public mind that ECC employees will provide race-neutral emergency service and to discourage African Americans, due to such doubt, from calling 9-1-1 to reach the ECC in the first place

The Court recognizes that the jury almost surely found this particular form of undermining of the ECC's

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16 On the other hand, harmonious working relationships are probably more appropriately considered a means of accomplishing, rather than a component of, the ECC's "mission," but the Court is viewing the jury's finding as broadly as it conceivably can so that Metro is not short-changed in the *Pickering* balancing.

mission. This does count as weight on Metro's side in the *Pickering* balancing. Still, the Court believes that the weight is relatively slight, for several reasons. First, although there is an articulable connection—as just stated—between ECC's mission and Plaintiff's personal comments made outside of work regarding non-ECC matters, this is far from the closest "relationship between the speaker's expression and employment," *Garcetti*, 547 U.S. at 418, a relationship to which the Supreme Court has specifically attached importance. *Id.* In short, the Court understands Metro's concerns here; they are neither irrational, insignificant, or frivolous. But they are attenuated. Like the concerns of the public employer in *Rankin*, "[a]t some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." 483 U.S. at 391. The Court believes that that point has been reached in this case due to the fairly remote connection between Metro's concerns and the "effective functioning of" the ECC.

Second, at trial Metro introduced evidence of only a single member of the public expressing concern over the possibility that Plaintiff would not provide equal service to African Americans. Moreover, the Court did not discern any evidence at all that by the time Plaintiff was terminated on January 10, 2017, Ms. Donnegan had some basis to believe that other members of the community likely would have the same concern.

To the extent that Metro does rely on fears still existing on the day of Plaintiff's termination (January 10, 2017) that her Facebook post might still "go viral," unexpectedly or unpredictability bringing in a wave of new complainants or general discontent from the

public, the likelihood of this actually happening was not established at trial. And in any event:

> The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public—or, worse, based on a government official's speculation as to the public's eventual reaction. *See George S. Scoville III, Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age*, 97 Or. L. Rev. 477, 528 (2019) (positing that a "gap in free-speech jurisprudence" that has not yet fully adapted to the social media age "incentivizes municipal employers to . . . punish employees on the basis of the content of their speech . . . or censor a particular viewpoint.") "The advent of social media does not . . . provide a pretext for shutting off meaningful discussion of larger public issues in this new public sphere." *Liverman v. City of Petersburg*, 844 F.3d 400, 414 (4th Cir. 2016).

See Goza, 2019 WL 2484091, at *10.

Third, the Court views it as highly speculative that even if an African American were familiar with Plaintiff's Facebook comment and was offended by it, such African American would be deterred from calling in an emergency. The Court can well envision such a potential caller being motivated to call 9-1-1 in any event, disinclined to believe that he or she is likely to get a call-taker biased against African Americans, and disinclined to believe that any such biased call-taker

would necessarily recognize an African American caller as African American anyway.[17] Depending on the caller involved, anything in this regard is possible—but nothing in this regard is reasonably likely.

Fourth, and related to the fact that Plaintiff is only a single call-taker, who well might not be credited by African American callers to determine who is and is not American African, is the fact that she is a call-taker. That is not say, while she does serve an (anonymous, as far as the Court can tell) public-contact role with ECC, she serves no confidential or policymaking role—a fact which serves to minimize the disruption (and damage to the mission) she can cause to her office based on the public-contact role that she does have. *See Rankin*, 483 U.S. at 390-91.

Fifth, the Court is hesitant to place too much stock in public perception, which by itself cannot justify a restriction on free speech. *See Goza*, 2019 WL 2484091, at *1.

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[17] In the Court's view, Metro did nothing to dispel the Court of this vision. Among other things, it did nothing to explain why a racially-biased call-taker would actually know—or be suspected by a caller of knowing—whether a caller was African American. For its part, the Court is loath to assume that what the Court gathers would be the only available data points from which such knowledge could be gained—the address provided by the caller and the sound of the caller's voice—would necessarily reveal (or be assumed by the caller to be capable of revealing) whether the caller is African American.

CONCLUSION

The ultimate issue at this stage of this case is not the extent to which use of the N-word generally, or Plaintiff's use of the N-word, is offensive. Nor is the issue the extent to which complainants who saw Plaintiff's Facebook comment were justified in feeling offended and hurt. Nor is the issue the extent to which Plaintiff's superiors were justifiably concerned when they learned of Plaintiff's Facebook comment. These issues have present relevance to the extent indicated above. But the overarching issue at present is whether Plaintiff's Facebook comment was constitutionally protected speech.

For the reasons set forth above, the Court finds that it was. Plaintiff made what the Court concludes was an "ill-considered—but protected—comment." *Rankin*, 483 U.S. at 394. Although the goal of ECC leadership to head off possible racial tension from Plaintiff's comment was laudable, its primary tool for achieving that goal was to terminate Plaintiff for protected speech. At heart, this case is like *Meyers*, where the evidence was "straightforward": the plaintiff suffered an adverse action simply because several of his co-workers did not like what he had to say, and thus left the public employer far short of trumping the employee's rights to free speech. 934 F.2d at 730. In the instant case, it is understandable that Plaintiff's co-workers did not at all like what she had to say, but that does not make it any less protected under the First Amendment. And the factors Metro otherwise relies on to show that what she had to say is unprotected fail to make that showing.

Accordingly, the jury has been instructed, and required to deliberate, regarding what the Court has referred to as "Phase II," wherein the jury's responsibility is to determine whether Metro is liable for First Amendment retaliation and, if so, in what amount.

IT IS SO ORDERED.

/s/ Eli Richardson
United States District Judge

JUDGMENT IN A CIVIL CASE
(JUNE 25, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANYELLE BENNETT,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant.

No. 3:17-cv-00630

Before: Eli RICHARDSON,
United States District Judge.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury returned its verdict.

IT IS ORDERED AND ADJUDGED that the jury found in favor of Plaintiff on her First Amendment retaliation claim. The jury awarded Plaintiff $6,500 in back pay and $18,750 for humiliation and embarrassment. Accordingly, judgment is entered in favor of Plaintiff in the amount of $25,250.

Kirk Davies, Clerk

By: /s/ Julie Jackson
Deputy Clerk

DATE: June 25, 2019

VERDICT FORM
(JUNE 24, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANYELLE BENNETT,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant.

No. 3:17-cv-00630

Before: Eli RICHARDSON,
United States District Judge.

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1. Do you find that the Plaintiff has proven by a preponderance of the evidence that an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in constitutionally protected conduct (*i.e.,* using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook)?

__√__ Yes ____ No

2. Do you find that the Plaintiff has proven by a preponderance of the evidence that the adverse action was motivated at least in part by her constitutionally protected conduct (i.e., using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook)?

__√__ Yes ____ No

(If your answer is "NO," proceed to the end of this Verdict Form, sign and date the form, and notify the Court Security Officer that you have reached a verdict. If your answer is "YES," proceed to the next question.)

3. Under the law as given to you in these instructions, do you find that the Plaintiff is to be awarded damages?

__√__ Yes ____ No

4. If the Plaintiff is to be awarded damages, what amount of damages, if any, did Plaintiff prove by a preponderance of evidence:

Back pay: $6500.00 (Six thousand five hundred dollars) Humiliation and Embarrassment: $18725.00 (Eighteen thousand seven hundred twenty-five dollars)

SIGN AND DATE THE VERDICT FORM

[redacted]
Foreperson

Date 6/24/19

SPECIAL VERDICT FORM
(JUNE 24, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANYELLE BENNETT,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant.

No. 3:17-cv-00630

Before: Eli RICHARDSON,
United States District Judge.

We, the jury, find as follows:

1. Was Plaintiff's Facebook comment reasonably likely to impair discipline by superiors at the Emergency Communication Center?

____ Yes ___√__ No

2. Was Plaintiff's Facebook comment reasonably likely to have a detrimental impact on close working relationships at the Emergency Communication Center?

__√__ Yes ____ No

3. Was Plaintiff's Facebook comment reasonably likely to impede the performance of Plaintiff's duties at the Emergency Communication Center?

____ Yes __√__ No

4. Was Plaintiff's Facebook comment reasonably likely to interfere with the orderly operation of the Emergency Communication Center?

____ Yes __√__ No

5. Was Plaintiff's Facebook comment reasonably likely to undermine the mission of the Emergency Communication Center?

__√__ Yes ____ No

6. For what reason or reasons did Defendant terminate Plaintiff? (Check ALL that apply. If you conclude that Defendant had any additional reason or reasons for Plaintiff's termination, please indicate those reasons in the portion marked "Other.").

____ For expressing her views regarding the outcome of a national election on Facebook

_√__ For using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook

____ For lack of accountability. If so, please describe what it was for which Metro claims Plaintiff was not accountable:

_____

____ For the workplace disruption her Facebook comment caused

Other: Because the box we checked above violated Charge 1, 2, and 3 of Plaintiff's termination letter.

SIGN AND DATE THE VERDICT FORM

[redacted]_____
Foreperson

June 24, 2019

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (NOVEMBER 6, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANYELLE E. BENNETT,

Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE,

Defendant-Appellant.

No. 19-5818

Before: DAUGHTREY, GIBBONS, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered By Order of the Court

/s/ Deborah S. Hunt
Clerk