
Chavonne N. Trevillion*

Despite freedom of speech being a long-established, fundamental liberty, government employees risk termination in retaliation for speaking freely on issues concerning their employment.¹ In Alves v. The Bd. of Regents of Univ. Sys. of Ga.,² the United States Court of Appeals for the Eleventh Circuit assessed whether five clinical psychologists' written memorandum qualified as constitutionally protected speech.³ The court reasoned the psychologists' speech addressed matters of private concern, rendering the speech unprotected and their terminations constitutional.⁴ The case

---

* J.D. Candidate, Suffolk University Law School, 2017. Ms. Trevillion can be contacted at ctrevillion@suffolk.edu.

¹ See U.S. CONST. amend. I. The Constitutions states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id. See also Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989) (reaffirming that public employee's right first amendment speech is not absolute). “Although the law is well-established that state may not demote or discharge a public employee in retaliation for speech protected by the First Amendment, a public employee's right to freedom of speech is not absolute.” Id.

² Alves v. Bd. of Regents of Univ. Sys. of Ga., 804 F.3d 1149 (11th Cir. 2015).

³ Id. at 1159. The Supreme Court presented this two-part inquiry to guide the interpretation of the constitutional protection afforded to public employees' speech. Id.

⁴ Id. at 1168. The Court found that the speech in question made by the psychologists was made as employees and not as ordinary citizens, and that the speech content involved “...matters related to their employment and not public concern.” Id.
highlights a potentially detrimental instance where employee interests, governmental interests, public interests and the law fail to overlap.5

The five psychologist-appellants (the "Psychologists") were each full-time clinical psychologists at the University of Georgia's campus-counseling center (the "Center") when Dr. Lee-Barber was hired as the new director, in 2009.6 The Center provides a number of mental health and psychological services for the students and faculty at the University of Georgia and is responsible for performing mandatory psychological assessments on students who are identified as "safety concerns."7 The University's "Mandated Safety Program" provides the mandatory assessments and is coordinated by the Center's director and the Office of the Dean of Students.8 The Center also participated in a doctoral training program, which was managed by the Center's staff, and recruits its doctoral candidates through a national "feeder program."9

The five Psychologists shared a variety of critical treatment and coordination roles at the Center.10 On October 25, 2011, the Psychologists submitted a formal, written memorandum ("the Memorandum") to the Vice President of Student Affairs asserting that Dr. Lee-Barber's management and leadership adversely affected client care and jeopardized the reputation of the Center.11 The Memorandum alleged deficiencies

---

5 See Id.
6 See Akes, 804 F.3d at 1154. Dr. Lee Barber served as the liaison between the Dean's office and the Center for the Mandated Safety Assessment Program, while overseeing the Center's programs and managing its operations. Id.
7 See Akes, 804 F.3d at 1154. Students deemed "safety concerns" at the University of Georgia are referred by the Dean of Students to the Center and are individuals believed to have the potential to cause harm to themselves or to others. Id. The Dean of Students and the Center's director collaborate to fulfill the assessment efforts. Id.
8 See Id.
9 See Id.
10 See Akes, 804 F.3d at 1155 (describing the different services the Appellants provided through the Center's programs).
11 Id. at 1155-57. The psychologists claimed they addressed the Memorandum "to those that would appear to have the most need to know, and best opportunity to investigate and correct the
in managing the Center's operations, failure to maintain positive relationships with feeder programs, questionable competence in management of the Center's resources, witness tampering and influence, and differential treatment of staff of color.\textsuperscript{12} According to the Psychologists, the Memorandum was intentionally directed to the Vice President of Student Affairs as a request for an investigation of their stated concerns and to remedy the crisis.\textsuperscript{13} On February 3, 2012, the Vice President of Student Affairs appointed senior staff to investigate the reported allegations; the two senior staff members concluded the criticism stemmed from the Psychologists' desires to use the collaborative clinical services model implemented by the director prior to Dr. Lee-Barber.\textsuperscript{14}

\textsuperscript{12} See \textit{Id.} See Reply Brief for the Appellant at 1155, \textit{Alves} v. Bd. of Regents of Univ. Sys., 804 F.3d 1149 (11th Cir. 2015) (No. 14-14149-BB) [hereinafter Reply Brief for Appellant]. The Psychologists asserted that Dr. Lee Barber's conduct caused "an adverse impact on client care and has jeopardized the reputation of the Center both in the GSU community and with community collaborators." \textit{Id.} at 1172. They also claimed that the conduct "contribute[d] to waste of resources and capital, risk[ed] the safety and well-being of students served by the programs." \textit{Id.} Additionally, the Psychologists raised the issue that the Director's lack of knowledge "directly impact[ed] the development of policies and procedures necessary to create an effective system by which to meet the service demands of the students and the University community." \textit{Id.}

\textsuperscript{13} See \textit{Id.} at 1156-57. To support their claims, Psychologists also emphasized Dr. Lee-Barber's ineffective "dealing with campus collaborators," lacking knowledge "in areas of complex psychopathology," an "inability to advocate for the appropriate use of psychologists' skills in conducting [mandatory student risk] assessments." \textit{Id.} at 1156. The Psychologists alleged that this conduct "significantly compromise[d] the [Center's] ability to effectively manage risk and crisis." \textit{Id.} at 1156. Additionally, they commented on her emotional instability, her poor communication style, inauthenticity, confusion, and her inappropriate comments, which were detrimental to the reputation of the program and its "ability to attract, recruit and retain trainees." \textit{Id.} at 1170.

\textsuperscript{14} \textit{Alves}, 804 F.3d. at 1158 (detailing dissatisfaction with Dr. Lee-Barber and indicating staff desires to implement collaborative clinical services model). Dr. Covey, the Vice President of Student Affairs, appointed the Assistant Vice President for Student Affairs and the Director of Student Affairs to conduct the investigation. \textit{Id.} at 1157.
Days after the investigation, Dr. Lee-Barber unilaterally cancelled the Center's training and intern matching programs.\textsuperscript{15} Between February 10, 2012 and March 2, 2012, Dr. Lee-Barber and the Vice President of Student Affairs implemented a reduction in force, subsequently eliminating and replacing the entire staff of full-time psychologists with lower-cost, outsourced psychologists.\textsuperscript{16} The Psychologists filed a claim under 42 U.S.C. § 1983\textsuperscript{17}, stating their retaliatory terminations were unconstitutional because the Memorandum qualified as citizen speech on a matter of public concern.\textsuperscript{18} The district court granted summary judgment to the University, and on appeal the court affirmed the decision.\textsuperscript{19} The court of appeals reasoned the Psychologists' Memorandum was drafted as employees on matters related to their employment, instead of as citizens on a matter related to public concern.\textsuperscript{20} Subsequently, the court of appeals held that neither the speech nor the terminations were constitutionally protected.\textsuperscript{21}

\textsuperscript{15}\textit{Id.} at 1158. As previously mentioned, the Center participated in a national intern matching and practicum training programs. \textit{Id.}
\textsuperscript{17}See 42 U.S.C. § 1983 (1996). The Civil Action for Deprivation of Rights permits a claimant to assert a claim against any person who deprives them of any right, privilege or immunity secured by the Constitution. \textit{Id.} Section 1983 also provides the remedy for a claim asserting a violation of a constitutional right. \textit{See also} D. Duff McKee, Termination or Demotion of a Public Employee In Retaliation For Speaking Out As a Violation of Right of Free Speech, 22 AM JUR. PROOF OF FACTS 3d. 203 §3 (updated Feb. 2016).
\textsuperscript{18}\textit{Alves}, 804 F.3d at 1153. \textit{See} McKee, \textit{supra} note 17 (quoting Carey v. Maricopa Cty., 602 F.2d 1132 (D. Ariz. 2009) To implicate First Amendment protection when asserting a claim against a public employer, a public employee must show that: (1) he or she engaged in constitutionally protected speech; (2) the employer took adverse employment action against employee; and (3) the employee’s speech was a substantial or motivating factor for the adverse action. \textit{Id.}
\textsuperscript{19}McKee, \textit{supra} note 17. \textit{See} Reply Brief for the Appellant, \textit{supra} note 11, at 9. The United States District Court for the Northern District of Georgia Atlanta Division originally granted summary judgment to the University. \textit{Id.}
\textsuperscript{20}\textit{Alves}, 804 F.3d at 1159-68.
\textsuperscript{21}\textit{Id.} at 1168.
While the civil rights era marked a progressive period for many, it was also the onset of public employee speech regulation.\textsuperscript{22} Beginning in the 1950s, employers demanded that employees disclose their private associations in furtherance of dissuading employees from engaging in potentially subversive political affairs.\textsuperscript{23} First Amendment rights, however, were established to ensure an unfettered interchange of ideas, and the speech regulations' chilling effect undermined this objective.\textsuperscript{24} Employee complaints against those in power have long been unwelcome, and both retaliation and the fear of retaliation have psychological implications that can be used to preserve an institution's

\textsuperscript{22} See Connick v. Myers, 461 U.S. 138, 144 (1983) (discussing history and evolution of public employee speech claims and the law). \textit{Connick} is a landmark case determining whether a former district attorney's termination was constitutional. \textit{Id.} at 140. The Supreme Court held the dismissal constitutional because the First Amendment does not require an employer to tolerate actions believed to be disruptive, undermine management's authority, or ruin close working relationships. \textit{Id.} at 153-54. See \textit{also} McKee, \textit{supra} note 17 (explaining \textsection \textsection 5 U.S.C. \textsection \textsection 7321-7326). "Hatch Act limits the political activities of federal employees in the interests of promoting efficient, merit-based advancement, avoiding the appearance of politically-driven justice, preventing the coercion of government workers to support political positions, and foreclosing use of the civil service to build political machines." McKee, \textit{supra} note 17; Melissa Joy Miller, Before it's Too Late: The Need for a Legally Compliant and Pragmatic Alternative to Mandatory Withdrawal Policies at Postsecondary Institutions, 25 S. CAL. REV. L. & SOC. JUST. 299, 303 (2016). During this period, educational institutions' authority over its students declined as students demanded increased autonomy. \textit{Id.} at 303.; The Jed Foundation, infra note 32, at 7-9 (explaining student rights under FERPA). The Jed Foundation is known as:

[T]he nation's leading organization working to prevent suicide and reduce emotional distress among college students. The organization's programs are changing the way students and parents think about mental health, paving the way for more young people to get the treatment they need, and helping IHEs create safer, healthier campus communities.

\textit{Id.} at 6.

\textsuperscript{23} See McKee, \textit{supra} note 22 and accompanying text.

\textsuperscript{24} See \textit{Connick}, 461 U.S. at 145. \textit{See also} Roth v. United States, 354 U.S. 476, 484 (1957) (reiterating that the First Amendment was tailored to assure unfettered interchange of ideas amongst citizens); Waters v. Churchill, 511 U.S. 661, 674 (1994) (emphasizing that public employees do not renounce citizenship and constitutional rights for employment).
power structure. This trend led the Supreme Court to hold that retaliation was an actionable form of discrimination under antidiscrimination laws in recent years.

In the landmark case *Pickering v. Bd. Ed. Township High Sch. Dist.*, the Supreme Court of the United States determined it necessary to balance the employee’s interest, as members of society, and the State’s interest, as an employer, in promoting efficient public services. The Supreme Court acknowledged the value of promoting employee speech since employees are best suited to determine what impedes organizational

---

25 See Ivan E. Bodensteiner, The Risk of Complaining—Retaliation, 38 J.C. & U.L. 1 (2011) (explaining how complaining employees are labeled “troublemakers” and placed in a vulnerable The increased number of complaints after Pickering compelled the Supreme Court in Connick v. Myers to limit review of employee First Amendment and dismissal complaints to matters fairly considered to involve a political, social or civic concern not expressly prohibit retaliation can be enforced through several anti-discrimination laws. Id. at 1-3.

26 Id. Since a complaint is a form of speech, it implicates the First Amendment. Id. at 29-30. However, the value of speech against government employers when speaking on matters of public concern is limited. Id.

27 *Pickering Bd. of Educ.*, 391 U.S. 563 (1968) (upholding teachers’ right to criticize school funding decisions without fear of retaliation). *Pickering* is considered the original landmark case for constitutionally protected public employee speech. Id. See *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (recognizing public employee speech on matters related to employment dates back to *Pickering*). After submitting a letter to the local newspaper criticizing the school board’s spending, Marvin Pickering was dismissed from his teaching job. *Pickering*, 391 U.S. at 564. The circuit court of Will County affirmed the decision that his speech was detrimental to the school system’s interests. Id. at 565. The Supreme Court, however, reversed the decision reasoning that it is essential for “teachers, who, as a class, are members of [a] community most likely to have informed and definite opinions as to how funds allotted to operation of schools should be spent, be able to speak out freely on such questions without fear of retaliatory dismissal.” Id. at 572. Since the interests of the First Amendment and an orderly school administration were conflicting, the Court deemed it necessary to create guidelines to analyze and determine the controlling interest. Id. at 569. See also *Maples v. Martin*, 858 F.2d 1546, 1554 (holding school’s interest in efficient administration outweighs professors’ speech on matter of public concern); Bodensteiner, supra note 25, at 30 (noting that government employees have limited protection when speaking out in capacity as private citizens). The *Pickering* Court suggests that a public employee’s speech may be limited by consideration of the following factors:

(1) the need to maintain discipline or harmony among coworkers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.

Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972).
efficiency based on the knowledge they acquire through their employment.\textsuperscript{28} The Court, however, provided rare exceptions for protected speech outside of political speech.\textsuperscript{29} This limiting decision was premised on the belief that government employers must maintain a degree of control over their employees.\textsuperscript{30}

Public health law covers a range of complexities, including public health policy, tort liability, social justice and ethics; its infrastructure aims to promote operational efficiency and communication by ensuring a capable public health workforce.\textsuperscript{31} This

\textsuperscript{28}See Pickering, 391 U.S. 572; Lane v. Franks, 134 S.Ct. 2369, 2373 (2014) (stating special value of employees because they gain knowledge of matters of public concern through employment). See also 1 EDUC. LAW § 2:20, Westlaw (March 2016) (discussing the sensitive role that teachers play in the educational process). But see Bodensteiner, supra note 25, at 29 (stating that speech's value has been “discounted substantially” by “insiders” who complain about government institutions”).

\textsuperscript{29}See Connick, 461 U.S. at 151-52 (“[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate”) The increased number of complaints after Pickering compelled the Supreme Court in Connick to limit review of employee First Amendment and dismissal complaints to matters fairly considered to involve a political, social or civic concern. Id. at 154.

\textsuperscript{30}See Id. at 166-67. The dissenting opinion in Connick assessed the relationship between the speaker and the person(s) being criticized to determine whether it would create a disharmonious relationship within the workplace or interfere with the requisite loyalty and confidence of an efficient business. Id.; Pickering, 391 U.S. at 570 n.3 (elaborating on the need for confidentiality and how effectiveness of the working relationship may be undermined); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (supporting government's need to control internal affairs without penalty). The Court stated it is the employer's prerogative to terminate employees that hinder efficient operation, and to do so with dispatch. They continued by stating, “prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.” Id.; Schneider, supra note 28 (discussing Court determining whether the speech would interfere with the relationship between speaker and whom it was directed) Id.

area of law strives to balance the government’s legal duty to ensure conditions for
healthy citizens with the individual rights of liberty, property, and privacy.32 Mental

health services strive ‘to prevent disease, promote health, and prepare for and respond to both
acute (emergency) threats and chronic (ongoing) challenges to health.” Office of Disease
Prevention and Health Promotion, Public Health Infrastructure, HEALTHYPEOPLE.GOV.,
https://www.healthypeople.gov/2020/topics-objectives/topic/public-health-infrastructure (last
visited Oct. 27, 2016). “Infrastructure is the foundation for planning, delivering, evaluating, and
improving public health.” Id. The ten essential public health services are to:

(1) Monitor health status to identify and solve community health problems. (2)
Diagnose and investigate health problem and hazards in the community. (3)
Inform, educate and empower people about health issues. (4) Mobilize
community partnerships and actions to identify and solve health problems. (5)
Develop policies and plans that support individual and community health
efforts. (6) Enforce laws and regulations that protect health and ensure safety.
(7) Link people to needed personal health services and assure the precision of
health care when otherwise unavailable. (8) Ensure competent public and
personal health care workforces. (9) Evaluate effectiveness, accessibility, and
quality of personal and population-based health services. [And] (10) research
for new insights and innovative solutions to health problems.

Id. See also David Ingram, Why is organizational structure important?, CHRON.COM,
27, 2016) (explaining the purpose and significance of organizational structure). “Organizational
structure improves operational efficiency by providing clarity to employees at all levels of a
company.” Id. See generally, Suicide Risk Factors, SUBSTANCE ABUSE AND MENTAL
HEALTH ADMINISTRATION, http://www.suicidepreventionlifeline.org/learn/riskfactors.aspx (last visited
Oct. 27, 2016) (listing risk factors that make suicide likelier and protective factors that make
suicide less likely).

32 See Hoke & Swiburne, supra note 31 (defining scope of public health law). See Valerie Kravets
Cohen, Keeping Students Alive: Mandating on Campus Counseling Saves Suicidal College
Students’ Lives and Limits Liability, 75 FORDHAM L. REV. 3081, 3088 (discussing change in
relationship between colleges and their students). Until the 1960s, colleges and universities had
an “in loco parentis” relationship with students — creating a legal duty for the university to
protect students from harm. Id. at 3088. In 1974, the Family Educational Rights and Privacy Act
(“FERPA”) was enacted and provided college students control of their health, academic and
disciplinary records. Id. Privacy laws such as FERPA (also the Health Insurance Portability and
Accountability Act, “HIPPA”) protect the privacy interests of college students. Id. at 3103.
FERPA only permits disclosure of personal information when there is believed to be a necessary
step to protect the health and safety of the student. Id. at 3103. Public colleges and universities
fear losing federal funding, by violating this discretionary notification provision, which leads
many to believe the provision should be mandated. Id. Additionally, notification is less costly,
than treatment or prevention. Id. See also The Jed Foundation, Student Mental Health and the
https://www.jedfoundation.org/assets/Programs/Program_downloads/StudentMentalHealth_Law_2008.pdf (2008) (emphasizing the need to balance interests of students and those of broader community). The Jed Foundation convened to address decisions about potentially distressed,
suicidal or threatening behaviors. Id. The document introduces the legal complexities faced by
higher education institutions. Id. For example, these institutions have to balance the interests of
Health law, however, adapts to the prominent issues of modern society. The trends of increased stress, anxiety, depression, substance abuse, patterns of sexual assault and suicide correlate with the emerging mental health problems of today’s adolescents and emerging adults. The suicide rate among 15 to 24-year-olds, for instance, has tripled since the 1950s, and in 2015, suicide was the second leading cause of death of American college students. Liability litigation against higher education institutions has increased individual students and employees as well as the interests of the community. Universities must consider appropriate measures in the field as well as what is legally permissible. See Gregg Henriques, The College Student Mental Health Crisis, PSYCHOLOGY TODAY (last visited Feb. 5, 2017) available at https://www.psychologytoday.com/blog/theory-knowledge/201402/the-college-student-mental-health-crisis (discussing potential harm of adolescents adjusting to college life and managing associated stress). See also The Jed Foundation, supra note 32 at 26 (listing good practice tips when addressing mental health issues on college campuses). The Jed Foundation suggests that a counseling center’s policies and procedures should “define the expectations for all professional and student staff named on the policy” in order to foster uniformity and compliance. Id.; Policy Issues, MENTALHEALTHAMERICA.NET, http://www.mentalhealthamerica.net/policy-issues (last visited Oct. 27, 2016) (discussing mental health policies that address recovery for individuals suffering from mental health issues); Partnership for Public Health Law Policy Issues, AMERICANPUBLICHEALTHASSOCIATION.ORG, https://www.apha.org/~media/files/pdf/factsheets/what_is_public_health_law_factsheet.ash x (last visited Oct. 27, 2016) (defining public health law and the focus of the field).

See Cohen, supra note 32, at 3081 (stating suicide statistics). In 2007, ninety percent of undergraduate students who committed suicide had a diagnosable mental illness. Id. at 3084. Contrarily, only twenty percent of students who commit suicide are reported to seek professional help from college counseling centers. Id. See Henriques, supra note 33 (emphasizing the prevalence of mental illness amongst college students). In a nationwide survey performed by the Association for University and College Counseling Directors, ninety-five percent of the directors reported that “the number of students with significant psychological problems” is a growing concern. Id. In 2013, fifty-seven percent of college women and forty percent of college men reported they experienced “overwhelming anxiety.” Id. In 2014, thirty-three percent of college women and twenty-seven percent of college men reported feelings of depression severe enough to interfere with their daily functioning. Id. 696,000 college students between the ages eighteen and twenty-four have been assaulted by another student acting under the influence. Id. Additionally, over 97,000 college students in the same age bracket have reported they were victims of alcohol related date rape or sexual assault. Id. See also Public services, OPEN GOVERNMENT GUIDE.COM, http://www.opengovguide.com/topics/public-services/ (last visited Oct. 24, 2016) (emphasizing the importance of properly delivered public services).

See Cohen, supra note 32, at 3082 (discussing the evolution of tort law at colleges and the school’s duty to protect students). The policies vary between allowing students to voluntarily seek treatment or automatically dismiss students who threaten suicide. Id. Schools that allow students to voluntarily seek counseling neither require students to seek treatment or automatically dismiss the students for medical leave. Id. at 3110. See Henriques, supra note 22 (discussing the college student mental health crisis). Statistics from the American College Health Association show that about nine and a half percent of students contemplated attempted suicide at least one
and compelled administration to review their mental health policies, however there is still no common law duty for public educational institutions to prevent suicide.\textsuperscript{36}

Although the delivery of healthcare services is broadly and inherently regarded as a matter of public concern, which demands a strong and effective infrastructure, courts have ruled inconsistently on whether public healthcare employees’ speech is protected.\textsuperscript{37}

In 2006, the Court in \textit{Garcetti v. Ceballos} held speech related or ordinarily required by the employee’s position is unlikely to be protected.\textsuperscript{38} In 2014, however, the

---

\textsuperscript{36} See Cohen, \textit{supra} note 32 at 3088. Suicide liability claims generally arose under negligence or breach of fiduciary duty. \textit{Id.} Bogust v. Iverson was the one of the first claims asserted by a college student who received mental health treatment and committed suicide to be denied. \textit{Id.} at 3089. Jeannie Bogust’s parents sued her previous therapist for failing to secure psychiatric treatment for Jeannie, failing to alert them of her condition, and for suggesting Jeannie terminate her counseling six weeks prior to her suicide. \textit{Id.} The court reasoned that since the psychiatrist did not have an indication that Jeannie was suicidal, there was no duty for him to contact her parents. \textit{Id.} This case served as a strong precedent case for colleges and universities, and implied that there is no duty for schools to prevent suicide. \textit{Id.} In another case, White v. University of Wyoming, a student’s parents asserted a wrongful death and breach of fiduciary duty claim because the hall director failed to “adequately monitor, treat, counsel, or give notice” about their son’s suicide attempt. Cohen, \textit{supra} note 32 at 3090. The court granted government immunity as a defense since those involved were not health care providers and they had no responsibility to cure, treat or prevent an incident of mental illness. \textit{Id.} See also Facebook Post Highlights Concerns With Mental Health Policy, \textit{STUDLIFE} (last visited Feb. 5, 2017) http://www.studlife.com/news/administration/2013/10/03/facebook-post-highlights-concerns-with-mental-health-policy/ (emphasizing student discussion and concerns about mental health services provided). But see Cohen, \textit{supra} note 32, at 3094 (holding those who treated the student in Shin v. MIT liable).

\textsuperscript{37} See INST. OF MED., \textit{supra} note 31, at 96 (stating the collaborative efforts needed to ensure an effective public health system). The mission of public health is to “fulfill society’s interest in assuring conditions in which people can be healthy.” \textit{Id.} at 98. The government’s three major roles in accomplishing this mission are policy development, assessing health status and needs, and assuring the necessary services are provided. \textit{Id.} Assuring the staff of a workforce is competent is incorporated into providing the necessary services. \textit{Id.} at 99. See also Martin J. McMahon, Annotation, First Amendment Protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. FED. 9 (1992) (accepting public employment does not forego right to freedom of speech); Public Health Infrastructure, OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, https://www.healthypeople.gov/2020/topics-objectives/topic/public-health-infrastructure (providing an overview of the public health infrastructure) (last visited Oct. 26, 2016).

\textsuperscript{38} See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (addressing whether speech made pursuant to an employee’s job duties is protected).
Court in *Lane v. Franks* created an exception protecting speech outside an employee's employment obligations.\footnote{See *Lane*, 134 S. Ct. at 2378. Regarding determining whether the speech in question is of public concern, the Court states, "[r]eal testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." *Id.* See also *Snyder v. Phelps*, 562 U.S. at 453; *Mt. Healthy City Sch. Dist. v. Doyle* 429 U.S. 274, 285 (1977) (determining whether the protected speech was the "motivating factor" in the teacher's dismissal).} Today, determining whether a government employee's speech implicates First Amendment protection requires: (1) determining whether the speech is pursuant to the employee's official job duties; (2) assessing whether the speech is a matter of public concern; and (3) if a matter of public concern, balancing the employee's concern with the government's efficiency interest.\footnote{See *Garrett*, 547 U.S. at 421. "Under the first step of the *Pickering* analysis, if the speech is made pursuant to the employee's ordinary job duties, then the employee is not speaking as a citizen for First Amendment purposes, and the inquiry ends." *Lane v. Franks*, 134 S. Ct. at 2373 (quoting *Garrett*, 547 U.S. at 421). "But if the 'employee spoke as a citizen on a matter of public concern,' the inquiry turns to 'whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.'" *Id.* at 2373 (quoting *Garrett*, 547 U.S. at 418). See *Connick*, 461 U.S. at 147-48 (emphasizing importance of the context in which matter arose). When an employee's speech about an office policy arises from a dispute concerning the policy's application to the employee, as opposed to mere academic interest, more weight must be given to the supervisor's view that the employee is threatening the authority of the employer. *Id.* at 153. See also *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (explaining speech is "public concern" when relating to political, social, or other concern to community); *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 413 (holding that privately expressed speech is protected); *Moss v. City of Pembroke Pines*, 782 F.3d 613, 622 (11th Cir. 2015) (holding plaintiff's speech was made pursuant to official duties and thus not protected); *Abdur–Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) (evaluating whether speech was made pursuant to employment duties); *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1319 (11th Cir. 2005) (finding employees speech involved a matter of public concern); *Mckee*, *supra* note 17 at 227. Speech qualifies as a matter of public concern when it contains (1) controversial speech on issues of public debate, (2) criticism of the agency or its administrators, and (3) whistleblowing. *Mckee*, *supra* note 17 at 227. See also *Lane v. Franks*, 134 S. Ct. at 2380 (2014) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (clarifying the reasoning in *Connick*). The court stated that the critical question under *Garrett* is whether the speech at issue is itself ordinarily within the scope of the employee's duties. *Id.* at 2373. In *Lane*, the United States Supreme Court described speech as a matter of public concern when it can be considered as relating to any matter of political, social or other concern to the community. *Id.* at 2380. See also *Maples v. Martin*, 858 F.2d 1546, 1552 (stating personal grievances and concerns of the education system's internal administration will not be protected). See also *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 917 n. 25 (11th Cir. 1993) (stating that some issues may obviously be of public concern from their subject matter); *Boyce v. Andrew*, 510 F.3d 1333, 1347 (11th Cir. 2009).}
The court in *Alves v. Bd. of Regents* determined that the Psychologists spoke as employees instead of citizens because of the content and context of the Memorandum. Following the standard set forth in *Garcetti*, the court performed a “functional review” of the speech by evaluating the Memorandum and its relation to the Psychologists’ job duties at the Center. Two important findings support the court’s holding. First, the court reasoned that since each complaint in the Memorandum referred to Dr. Lee-Barber’s performance as the Center’s Director, and the adverse effects on the Psychologists’ roles as therapists, committee members, supervisors and coordinators, the speech “owes its existence” to their professional responsibilities. Second, the court reasoned the duty to report conduct that interferes with their customary job duties

---

2007) (holding internal complaints by social services case manager concerning case load unprotected).  
41 *Alves*, 803 F.3d 1149 at 1165. (finding that the appellant’s speech could not be divorced from employment activities). Speech regarding conduct that interferes with an employee’s job may fall within the scope of the employee’s responsibilities. *Id.*  
42 *Id.* at 1159-60. Collectively, the psychologists served as individual, couple and group therapists; they trained interns, doctoral candidates and practicum students; and served as supervisors for trainees, employees and other staff members. *Id.* at 1154. One appellant, Dr. Arranz, helped to develop both the Mandated Safety Program and procedures used to assess at-risk students, while another, Dr. Reid, trained staff and trainees, coordinated clinical services and served as the Interim Director prior to Dr. Lee-Barber being hired. *Id.* at 1154-1155. Dr. *Alves* directed internship training and served on the Center’s executive committee, Dr. Gunter was the Coordinator of Practicum Training and, lastly, Dr. Bosshardt coordinated the Mind-Body programs at the Center. *Id.*  
43 *See Alves*, 804 F.3d at 1165-68 (finding appellants’ speech to be within scope of duties and unrelated to public concern).  
44 *See Alves*, 804 F.3d at 1165. In the memorandum, Drs. Arranz and Reid claimed that Dr. Lee-Barber’s ignorance of requisite knowledge compromised their abilities to manage crisis and risk. *Id.* at 1164. The doctors who led the training programs claimed that limited comprehension of policies and procedures, and that her mismanagement detrimentally affected the Center’s ability to recruit and retain qualified candidates. *Id.* According to the court, each complaint related back to the appellants’ original duties, their ability to perform those duties, and with the goal of correcting the mismanagement issue. *Id.* at 1164-65. *See Garcetti*, 547 U.S. at 422-24 (explaining that activities assumed while performing one’s job are “pursuant to employment responsibilities”).
is implicit in the role of psychologists. Accordingly, the Memorandum did not implicate the First Amendment because the Psychologists spoke as employees.

Despite the Psychologists’ failure to meet the first element for protected speech, the court analyzed whether the speech was a matter of private or public concern. The Psychologists asserted that despite the private nature of the claims, a holistic review of the Memorandum reveals it is rooted in public interest. While the court agreed that concerns of insufficient, on-campus, mental health services warrant a public forum, the references to the compromised student safety were too vague to be considered the “main thrust” of the Memorandum. The majority concluded that the speech was intended to voice employment concerns, and while not dispositive, the private manner in which the Psychologists delivered the Memorandum supported this

45 See Akes, 804 F.3d at 1165. “Implicit in Appellants’ duty to perform their roles as psychologists, committee members, supervisors, and coordinators is the duty to inform, as Appellants put it, ‘those that would appear to have the most need to know and best opportunity to investigate and correct’ the barriers to Appellants’ performance.” Id. The court compared the facts in Akes to those in Boyce, where two caseworkers at the Department of Family and Children Services filed a complaint about their unreasonable caseloads and the effects on their job performance. Id. The caseworkers claimed their onerous caseloads were due to the mismanagement of internal administrative matters. Id. The court held that the caseworkers spoke “pursuant to [their] employment responsibilities,” therefore their speech was not protected by the First Amendment. Id.
46 Id.
47 See Akes, 804 F.3d at 1165.
48 Id. at 1166. The Psychologists asserted that claims questioning the sufficiency of mental health services provided at a university are extremely important to the public and the public’s concerns. Id. at 1166-67. The Psychologists further contended that the Center’s reputation was jeopardized and the quality of services provided suffered as a result of Dr. Lee-Barber’s mismanagement. Id. at 1167.
49 See Akes, 804 F.3d at 1166-67. The court acknowledged the importance of proper mental health treatment, but criticized the drafting of the Memorandum and the manner in which the treatment concerns were addressed. Id. at 1166. The court criticized the failure state specific instances of poor risk management or failure to provide quality care in the Memorandum. Id. at 1167. The court’s analysis continued by assessing the underlying purpose of the speech: to expose wrongdoing on a matter of public interest or private concern. Id. The court concluded the “Appellants’ speech, while ostensibly intertwined with the services provided by the Center, was not intended to address a matter of public concern from the perspective of a citizen.” Id.
Therefore, the court affirmed the lower court’s grant of summary judgment.51

The court in Alves improperly applies the binding Supreme Court standards established in Garcetti and Lane.52 In Lane, the Supreme Court reversed the Eleventh Circuit’s decision and created an exception to the Garcetti standard—the exception protects employee speech outside of an employee’s ordinary job obligations, despite its relation to those obligations.53 The Psychologists acquired valuable information about the operational hazards at the Center through their employment.54 Although related to a psychologist’s role, their critique of Dr. Lee-Barber’s performance, mismanagement, and the subsequently detrimental impacts on the Center, are not ordinarily within the scope

50 Alves, 804 F.3d at 1167 (quoting Maggio v. Sipple, 211 F.3d 1346, 1353 (11th Cir. 2000)). The court did not see the public concerns reflected in the Memorandum. Id. They supported their reasoning by stating, “We have said before that ‘the relevant inquiry is not whether the public would be interested in the topic of the speech at issue,’ it is ‘whether the purpose of [the employee’s] speech was to raise issues of public concern.”’ Id. Despite the inquiry being non-dispositive, the court highlighted the Psychologists’ failure to express their concerns publicly to further support their holding. Id. at 1168.
51 Id.
52 See Garcetti, 547 U.S. at 421 (2006) (precluding protection from speech commissioned job duty); Lane, 134 U.S. 2369 (2014) (protecting employees’ speech when made primarily as a citizen). See Garcetti, 547 U.S. at 421. Garcetti precludes protection from speech pursuant the employee’s job duties. Cf. Alves, 804 F.3d at 1169 (Martin, J., dissenting) (quoting Lane, 134 S. Ct. at 2379). In the dissenting opinion, Honorable Martin stated,

In Lane v. Franks, our Circuit held that Mr. Lane’s sworn testimony was employee speech because he "learned of the subject matter of his testimony in the course of his employment." 134 S. Ct. at 2379. We were wrong. In reversing the judgment of this Court, the Supreme Court told us that "the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." Id. Rather, "[t]he critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

53 See Office of Disease Prevention and Health Promotion, supra note 37 and accompanying text. The public health infrastructure relies on health departments in order to implement programs and policies that threaten health. Id.
of their job obligations. The court’s myopic application of the law overlooks the Psychologists’ broad critique of Dr. Lee-Barber’s mismanagement merely because the information was acquired through their employment. The decision is problematic because it: (1) will likely chill public health employees’ First Amendment rights; (2) reinforces the power of retaliation within institutions; and (3) will subsequently prevent revealing detrimental behavior within organizations.

Despite the personal commentary, the Memorandum reveals how the Director’s mismanagement undermines the University’s Mandated Safety Program, and hinders the Psychologists from identifying at-risk students. The public health approach—

---

55 See Alves, 804 F.3d at 1169 (Martin, J., dissenting). Honorable Martin disagrees with the Memorandum being considered employee speech. Id. He supports his opinion by referring to the Psychologists’ sworn declaration concerning their job duties: “providing counseling services to the GSU population, conducting mandatory risk assessments of students of concern, and supervising and training the individuals within the [Center’s] training and practicum programs.” Id. He then cites Lane, and the First Amendment protection for speech made by an employee, outside of ordinary obligations, despite whether the speech touches those obligations. Id.

56 But see Lane, 134 S. Ct at 2377 (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)). The court is emphasizing that government employees are often best suited to know what is ailing the company at which they work. Id.

57 See Bodensteiner, supra note 25, at 37-39. Members who genuinely care about their work and improving the institution should be encouraged to inquire or report actual or perceived deficiencies. Id. at 41. However, retaliation has significant psychological impacts on employees. Id. at 37-38. The risk of retaliation chills complaints about perceived inequality and mismanagement within an institution. Id. at 39. Discriminatory treatment results from the existing “climate” or environment at an organization. Id. The irony is an “existing climate and structure” that utilizes the threat of retaliation to suppress complaints is entirely inconsistent with the purpose of an institution of higher education.” See Bodensteiner, supra note 41. The paradox of retaliation within institutional hierarchy is,

[s]upervisors can discriminate and retaliate against those below them and can be the victims of discrimination and retaliation at the hands of those above them in the hierarchy. Therefore, the least powerful members of a workforce are most likely to be the victims of illegal discrimination, and as such, the most likely to have reason to complain of discrimination. Of course, when they complain, they are the most vulnerable to retaliatory action.

Id. at 37.

58 See Cohen, supra note 32, at 3126. The University of Georgia’s mandated policy is an appropriate response for several reasons: (1) it actively confronts and seeks to eliminate suicide; (2) it presents the best opportunity to save lives and limit institutional liability; and (3) it is
identifying and managing risk factors including: a history of depression and/or substance abuse, depression, anxiety, personal or family history of suicide, history of sexual abuse, and impulsive or aggressive tendencies, actively confronts suicide risk and provides a critical opportunity to save a life.\textsuperscript{59} The Supreme Court in \textit{Connick} held that when speech can be "fairly considered as relating to any matter of political, social, or other concern to the community," it involves a matter of public concern.\textsuperscript{60} Mental

\textsuperscript{59} See Miller, supra note 22. Much like the flaws of the United States mental health system, campus mental health systems are flawed because of insufficient resources. \textit{Id.} See generally \textit{SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION}, http://www.samhsa.gov/ (last visited Oct. 27, 2016) (providing resources for substance abuse and mental health services). Conversely, protective factors include: access to clinical assistance and intervention, effective clinical care for substance use disorders, community support, ongoing mental health care, developing conflict resolution, and problem solving skills. Suicide Prevention, \textit{NAT'L INST. OF MENTAL HEALTH}, http://www.nimh.nih.gov/health/topics/suicide-prevention/index.shtml (last visited Oct. 27, 2016). Suicidal behavior is a complex and atypical response to stress. Since those with suicidal tendencies tend to respond differently to extreme stress in their thinking, decision-making and reacting, psychotherapy, conflict resolution, and medication serve as helpful treatment components. This is in addition to treating risk factors such as substance abuse, depression and anxiety. Early detection is important and "could be a critical step to reducing the prevalence of depression among older individuals, managing depression more effectively, and preventing negative outcomes." Cohen, \textit{supra} note 32 at 3126.

\textsuperscript{60} See Connick, 461 U.S. at 146. \textit{See also} McKee, supra note 18; McKee v. Peoria Unified Sch. Dist., 963 F. Supp. 2d 911 (D. Ariz. 2013) (elaborating on speech involving a "public concern"). 

"[S]uch speech stands in contrast to 'individual personnel disputes and grievances' that 'would be of no relevance to the public's evaluation of the performance of governmental agencies.'" \textit{Id.} at 925. \textit{See also} The Jed Foundation, \textit{supra} note 32. The Jed Foundation emphasizes the nexus between institution of higher education ("IHE"), the Mandated Assessment Program, the mental health professionals at the Center, and the campus community. \textit{Id.} In addition to legal considerations, there are other issues to consider regarding mandated assessment and treatment, especially if the mental health professional who is assessing or treating a student works for the IHE. Having campus clinicians play the dual role of serving as a resource to students and judging a student's fitness to be on campus or providing mandated treatment could negatively affect students' perceptions of mental health providers and services. This can impact the willingness of students to seek treatment or recommend treatment to their friends. One alternative is for the IHE to rely on off-campus mental health professionals for mandated assessment or mandated treatment. However, transportation or insurance issues may complicate such arrangements.
health and risk management are more than "fairly considered" matters of public concern, particularly when discussing the adverse impact on the quality and delivery of the services to the University community.\textsuperscript{61} The Psychologists appropriately directed the Memorandum according to the University hierarchy and illustrated the potential detriment of Dr. Lee-Barber's conduct.\textsuperscript{62} Further, providing reliable mental health

\textit{Id.} at 17.

\textsuperscript{61} See Peterson, 998 F2d. at 917 (stating "some issues may be obviously of public concern from their subject matter, for instance, an alleged health or safety risk"); Office of Disease Prevention and Health Promotion, \textit{supra} note 31 stating,

While a strong infrastructure depends on many organizations, public health agencies (health departments) are considered primary players. Federal agencies rely on the presence of solid public health infrastructure at all levels to support the implementation of public health programs and policies and to respond to health threats, including those from other countries.

\textit{See e.g.,} Shin v. MIT illustrates the importance of adequate, effective, and efficient treatment. Elizabeth Shin was a sophomore student at Massachusetts Institute of Technology. Elizabeth had been suffering from mental illness since high school. Elizabeth gave permission for the school to share her behavioral history with her parents, and collectively, they agreed for Elizabeth to seek on-campus psychiatric counseling. Elizabeth's condition worsened, and in the spring her parents brought her home. Upon returning, her condition continued to deteriorate and generate discussion between the deans and psychiatrists at MIT. On April 10, 2000, Elizabeth lit her room on fire, causing burns on sixty-five percent of her body, and irreversible brain damage. Four days later her parents terminated her life support. Her parents later filed a $27.65 million wrongful death and breach of duty claim against the medical staff members at the University alleging they failed to uphold their duties asserted in the MIT brochure. The Massachusetts superior court granted MIT summary judgment, but held her psychiatrists 'grossly negligent in their treatment." According to the Superior Court, pursuant to \textsection 314 of the Restatement (second) of Torts, there was a special relationship between the psychiatrists and Elizabeth. Additionally, the imminent probability of a self-inflicted injury was foreseeable, and the medical team failed to develop an immediate plan to respond to her increasing suicide threats. The parties settled for an undisclosed amount before trial.

\textsuperscript{62} See Reply Brief for the Appellant, \textit{supra} note 11, at 9. In their reply brief, the Appellants emphasized that despite the natural effect of the mismanagement, "their concern for the [Center's] ability to properly handle risk and crisis and for delivery of quality services" drove them to submit the Memorandum to the University hierarchy. \textit{Id.} at 1. The purpose of the Memorandum was to highlight the source of dysfunction at the Center and also to "see the matters investigated and resolved ... as well as [its] ability to deliver the highest quality of programs and services to the students and University community..." \textit{Id.} at 9. \textit{See also} Office of Disease Prevention and Health Promotion, \textit{supra} note 31. The goal of the public health infrastructure is to "ensure that Federal, State, Tribal, territorial and local health agencies have the necessary infrastructure to effectively provide essential public health services." \textit{Id.;} Cohen, \textit{supra} note 32, at 3125. The environment of the counseling center with mandatory programs is particularly important. \textit{Id.} at 3132. These centers should encourage privacy, and provide clear
services should be relied upon as an important institutional value for higher education institutions.63

The Court of Appeals for the Eleventh Circuit's holding overlooks the Psychologists' unique qualifications to comment on an inherently critical matter of public concern—deficient mental health services on a university campus. The majority's choice to hold nuanced phrasing paramount to the duty to provide effective services to a vulnerable population is both dangerous and counterproductive. This decision will chill public health employees' First Amendment rights, reinforce the power of retaliation within institutions, and ultimately bar individuals from revealing detrimental behavior within public organizations. The holding undermines the University's goal of providing efficient mental health services, neglects the needs of a modern mental health epidemic, and disregards the precedent established by the Supreme Court of the United States.

guidelines for the evaluation and treatment process. Id. This requires internal coherence amongst employees at the Center, so the University can abide by standardized and publicized procedures during emergencies and times of increased stress. Id.

63 See Facebook Post, supra note 26. The article highlights how quickly a negative treatment experience can spread throughout a campus and hinder a student from seeking the necessary attention. The Senate Representative at a University shared his expectations by stating, "I think when we come here, we expect the University to do all it can to help us ... I think that we have to trust that our administrators are acting in the most helpful way they can at the time and that they are doing their best throughout the process." Id. Another student shared her experience after seeking counseling for her depression during her sophomore year. She claimed, "I don't know if it's a recurring theme that it's more of a place to vent and get everything off of your chest rather than actually receive help, but from my experiences and my friends' experiences, that's what I've heard." Id. This conveys two important points about mental health treatment: 1) students who seek help have expectations about mental health counseling; and 2) students discuss their experiences amongst their friends. Id. Further, citizens' expectations and sense of trust in the government often rely on the proper functioning of public services, such as health care and education, so it is imperative that students with mental health issues trust that campus resources, such as the Center, will provide a healthy, supportive, and helpful environment. Miller, supra note 22, at 37.