

Election Battles and Their Impact on the Public Employer

Paul R. Koster*

I. Introduction

WHILE ALL ELECTIONS HAVE THE ABILITY TO POLARIZE COMMUNITIES, the stakes are even greater when an election pits a current public employee against his or her boss. Indeed, these elections pose unique challenges for local governments, placing the employee's purported right to seek public office against the government's interest in preserving order, discipline, and efficiency in the workplace.

In weighing these competing interests, many local governments have chosen to layoff or discharge public employees seeking political office in the hopes of preventing conflicts in the workplace, misuse of sensitive information, and disruption of operations from these election battles. In turn, public employees have filed a variety of lawsuits against their local government employers, challenging the adverse actions taken against them because of their political candidacies.

This article addresses the potential ramifications for taking adverse actions against public employees because of their political candidacies, examining two of the most common "candidacy-related" claims: (1) First Amendment retaliation claims and (2) due process claims. This article will then provide tips that local governments can employ to prevent these candidacy-related claims.

II. First Amendment Concerns

Challenges to adverse actions taken against public employees based on their decisions to run for public office usually allege violations of one of two types of First Amendment rights: (1) freedom of speech and (2) freedom of association.

To better understand the specific decisions addressing candidacy-related claims by public employees under the First Amendment, a

*Paul R. Koster is managing partner of the Atlanta law firm of Daley, Koster & LaVallee, LLC, where he focuses his practice on the areas of governmental liability, governmental relations, employment law, and appellate litigation.

brief overview of how the Supreme Court has generally dealt with free speech and free association claims in the public employment context is helpful.

A. *Overview of Supreme Court's Free Speech and Free Association Decisions in the Public Employment Context*

1. FREE SPEECH CLAIMS

It is well-accepted that public employees cannot be subjected to adverse action simply for exercising their constitutional rights. A public employee's right to freedom of speech, nevertheless, is not absolute because "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."¹

In cases where a public employee has suffered an "adverse action" in retaliation for speaking on "a matter of public concern," the Supreme Court has evaluated the constitutionality of the action by applying a balancing test first enunciated in *Pickering v. Board of Education*.² As the preceding sentence suggests, before the balancing test is applied, a public employee plaintiff must make two threshold showings:

1. that he or she suffered an "adverse action," such as a termination, demotion, punitive transfer, refusal to promote, or reprimand;³ and
2. that his or her speech can be "fairly characterized as constituting speech on a matter of public concern."⁴ Absent extraordinary circumstances, First Amendment protection is unavailable "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest."⁵

Once these two threshold requirements are met, the *Pickering* test requires balancing "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."⁶

1. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

2. *Id.*

3. *See Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000); *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995).

4. *Connick v. Myers*, 461 U.S. 138, 146 (1983); *McCabe v. Sharrett*, 12 F.3d 1558, 1565 n.3 (11th Cir. 1994).

5. *Connick*, 461 U.S. at 147.

6. *Pickering*, 391 U.S. at 568.

In applying the *Pickering* balancing test, “the ultimate question is whether the employee’s right to speak is outweighed by the public employer’s interest in the effective operation of the workplace.”⁷

Factors utilized by courts to assess whether the interests of the government in regulating the speech outweigh the employee’s interest, as a citizen, to speak on matters of a public concern include: “(1) whether the speech at issue impedes the government’s ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made.”⁸

2. FREE ASSOCIATION CLAIMS

Free association claims in the public employment context typically involve plaintiffs who allege a government actor took some adverse action against them because of their political beliefs, affiliation, or association with a particular political party.

Since 1976, the U.S. Supreme Court has steadily expanded First Amendment protection to public employees from adverse action on the basis of partisan politics or political patronage. Specifically, in *Elrod v. Burns*, the Court held that several Republican non-civil service employees of a sheriff’s office could not be discharged for political reasons when a Democrat was elected to replace a Republican sheriff.⁹ Similarly, in *Branti v. Finkel*, the Court held that two county public defenders, both members of the Republican party, could not be discharged solely because they were not affiliated with or sponsored by the Democratic party.¹⁰

Pursuant to these decisions, a categorical approach is utilized for determining the parameters of a government actor’s right to take adverse action against a public employee on the basis of political affiliation or association. In particular, the relevant inquiry is whether the public employer “can demonstrate that party affiliation is an appropriate requirement for the effective performance of the” job at issue.¹¹

B. *First Amendment Candidacy-Related Claims*

Brought by Public Employees

A growing body of cases exists addressing First Amendment challenges to government actions taken in response to a public employee’s decision to run for political office. These decisions show the following.

7. *McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997).

8. *Chesser v. Sparks*, 248 F.3d 1117, 1124 (11th Cir. 2001) (citing *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989)).

9. 427 U.S. 347, 350, 372–73 (1976).

10. 445 U.S. 507, 509, 519 (1980).

11. *Branti*, 445 U.S. at 518.

1. THE MERE ACT OF ANNOUNCING A CANDIDACY
FOR PUBLIC OFFICE MAY NOT EVEN IMPLICATE THE
FIRST AMENDMENT

Although courts throughout the country appear split on the issue, a number of courts, including the U.S. Courts of Appeals for the Sixth and Seventh Circuits, have held that a public employee's mere announcement of a candidacy does not implicate First Amendment protections.¹² Thus, in certain jurisdictions, an adverse action, such as a layoff or discharge, in response to a public employee's decision to run for office will not even trigger the employee's First Amendment rights.

Note, however, these decisions are limited to situations where the adverse action was prompted *solely* by the public employee's announcement of his or her candidacy. If evidence exists that something else is involved—such as treating that particular employee different than other employees who have decided to run for office, or if the adverse action is taken because of the employee's platform or party affiliation—then even these courts would find the employee's First Amendment rights implicated.¹³

12. See *Carver v. Dennis*, 104 F.3d 847, 848, 850, 853 (6th Cir. 1997) (concluding discharge of deputy clerk because she announced her candidacy to run against her boss in upcoming election was “neutral in terms of the First Amendment” because discharge was not premised on plaintiff’s political beliefs, expression, or affiliations or “based on politics at all,” but rather simply “for announcing her intention to take her boss’ office”); *Bart v. Telford*, 677 F.2d 622, 623–24 (7th Cir. 1982) (rejecting First Amendment claim of city employee who was required to take leave of absence after she announced her intent to run for mayor and noting “the only right specifically alleged [by plaintiff] is the right to run for public office. The First Amendment does not in terms confer a right to run for public office, and this court has held that it does not do so by implication either.”); *Burelson v. Colbert County-Nw. Ala. Healthcare Auth.*, 221 F. Supp. 2d 1265, 1275 (N.D. Ala. 2002) (announcement of public employee’s candidacy to run for County Commission, “standing alone (*i.e.*, with no evidence of partisanship or opposition to [defendant’s] candidacy or his platform), does not . . . qualif[y] as protected speech under the First Amendment.”).

13. See *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977) (First Amendment implicated by firing of deputy city attorney after announcement of deputy’s candidacy for Congress because the complaint “implicate[d] interests which are broader than a *per se* right to candidacy. . . . Instead, it is a case where the plaintiff’s candidacy was burdened because a state official wished to discourage *that candidacy in particular.*”) (emphasis added). *Cf. Carver*, 104 F.3d at 850 (“[T]he plaintiff’s complaint does not allege, nor does the record contain any evidence whatsoever, that she lost her position because of her political beliefs. The complaint alleges and the record demonstrates only that [the defendant] fired her because of her rival *candidacy*, which is a different matter. The constitutionality of dismissing [plaintiff], a government employee, for her political beliefs, her expression of those beliefs, or her political affiliations is not before us.”); *Bart*, 677 F.2d at 624 (“something more than [a restriction on candidacy] ha[s] to be shown to bring the First Amendment into play”; “so long as there is no allegation . . . that [the defendant] singled [plaintiff] out because he did not like her views” or “that he would have let another employee in her position continue on the job while running for mayor” the restriction was neutral in terms of the First Amendment).

As indicated above, the rule that mere announcement of a candidacy does not implicate the First Amendment has not been uniformly adopted by the courts. Specifically, a number of federal courts, including the Fifth and Tenth Circuits, have determined that a public employee's announcement of a candidacy constitutes speech on a matter of public concern, thereby giving rise to a viable free speech claim under the First Amendment.¹⁴ These courts, therefore, have applied the *Pickering* balancing test to assess whether the employee's First Amendment rights have, in fact, been violated.

2. EVEN WHERE FIRST AMENDMENT RIGHTS
ARE IMPLICATED BY THE PUBLIC EMPLOYEE'S
CANDIDACY, A DISCHARGE OR LAYOFF BECAUSE
OF THAT CANDIDACY WILL NOT VIOLATE THE FIRST
AMENDMENT IF IT WOULD FURTHER THE EFFICIENT
WORKINGS OF GOVERNMENT

As discussed above, courts are split as to whether the mere act of running for office implicates First Amendment protections. In any event, even where First Amendment protections are triggered by the public employee's candidacy or other related conduct, the government's firing or laying off of the public employee in response has been commonly upheld. In these situations, courts have typically applied the *Pickering* balancing test and concluded the government's interest in efficient workplace operations outweighs the employee's right to speech.

14. See *Kent v. Martin*, 252 F.3d 1141, 1144 (10th Cir. 2001) ("an employee's candidacy for political office undoubtedly relates to matters of public concern") (internal quotations omitted); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) (sheriff deputy's conduct in running for sheriff addressed matters of public concern); *Flores v. Sanchez*, No. EP-04-CA-056-PRM, 2005 U.S. Dist. LEXIS 15417, at *18 (W.D. Tex. Jul. 29, 2005) ("[T]he act of a public employee running for office, even if running against his present employer, falls within the protection of the First Amendment."); *Deemer v. Durell*, 110 F. Supp. 2d 1177, 1181 (S.D. Iowa 1999), *aff'd*, 230 F.3d 1362 (8th Cir. 2000) (deputy county recorder's announcement of candidacy for county recorder position "addressed a matter of public concern"); *Zellner v. Ham*, 735 F. Supp. 1052, 1054 (M.D. Ga. 1990) (Monroe County deputy clerk's announcement of her intent to run against the incumbent in upcoming election addressed a matter of public concern). *Cf.* *Wilbur v. Mahan*, 3 F.3d 214, 215, 217-19 (7th Cir. 1993) (analyzing sheriff's policy of requiring employee who runs for sheriff to be placed on administrative leave as "hybrid" issue implicating free speech and free association concerns and upholding policy insofar as it applied to employees holding confidential or policymaking positions given "the effects on the operations of government of forcing a public official to . . . retain, in a confidential or policymaking job, persons who are not his political friends and may be his political enemies.").

In reaching the conclusion that the government's interest outweighs the employee's right to speech, the courts have focused on a number of factors, including:

1. the size of the office in which the public employee candidate works;¹⁵
2. whether the public employee candidate holds a position of trust and confidence to the incumbent;¹⁶
3. whether the public employee candidate is running for a position in which he or she would replace or become superior to his or her current supervisor;¹⁷ and
4. the nature of the relationship between the public employee candidate and the incumbent and the degree of contact they have with one another.¹⁸

Another significant factor considered by the courts in determining the validity of a discharge or layoff because of a candidacy is the timing of the adverse action. For example, in *Kent v. Martin*, the plaintiff, a deputy clerk, was fired six months after her unsuccessful campaign to unseat the incumbent as the county clerk.¹⁹ In considering the deputy's claim under the First Amendment, the Tenth Circuit distinguished situations

15. See *Warren v. Gaston*, 55 F. Supp. 2d 1230, 1236 (D. Kan. 1999) (even assuming employee of clerk's office had First Amendment right to run for clerk position, termination did not violate the First Amendment because "the county's interest in avoiding conflict in the small-office environment of the clerk's office" outweighed employee's protected interest in her candidacy).

16. See *Wilbur*, 3 F.3d at 218 ("If . . . the candidate occupies a confidential or policymaking position under the boss, the political enmity that the candidacy is certain to engender entitles the boss to fire him."); *Zellner*, 735 F. Supp. at 1055 (discharge due to candidacy upheld where the employee running for office "had access to all of the papers and records for which her employer was responsible.").

17. See *Bart*, 677 F.2d at 624-25 ("Discipline is impossible to maintain when a subordinate is running for a position in which he would be the boss of his present superiors, so it is reasonable to ask him to take a leave of absence during the campaign. . . . The impairment of free speech brought about by the leave-of-absence requirement is indirect and probably very slight; the benefits in preserving order, discipline, and efficiency in public employment strike us as much greater than the cost to First Amendment interests.").

18. See *Zellner*, 735 F. Supp. at 1056 ("Due to the close working relationship between plaintiff and defendant, and the great potential for actual or threatened disruption of the fulfillment of the responsibilities and duties of the office of clerk, the court finds that the defendant employer was justified in terminating the plaintiff employee who was challenging her for the position currently held by the defendant."); *Deemer*, 110 F. Supp. 2d at 1178 ("The county recorder cannot be forced to retain a deputy recorder vying for her job, especially one whom she thought was her best friend. The lack of trust between the employees would clearly impede the efficient performance of duties in the recorder's office.").

19. 252 F.3d 1141, 1142 (10th Cir. 2001).

where a public employee is discharged shortly after the announcement of his or her candidacy versus situations where the discharge occurs several months after the candidacy is announced. Specifically, in the former situation, the public employer merely has to come forward with “evidence of a prediction of disruption” to substantiate its interest in maintaining an efficient workplace under the *Pickering* balancing test. In the latter scenario, however, the public employer will have to make a greater showing of “actual disruption” by the employee to outweigh the employee’s interest in his or her speech under *Pickering*.²⁰

Finally, though courts commonly uphold the discharge or layoff of a public employee as a result of the employee’s candidacy, this does not mean the government can take any and all retaliatory acts against the employee because of the candidacy. In *Wallace v. Benware*, the Seventh Circuit held that while the elected county sheriff could discharge or demote the deputy who ran against him without violating the First Amendment, the sheriff could not retain the deputy and engage in retaliatory harassment against him because of that candidacy.²¹ Indeed, such retaliatory harassment obviously could not be viewed as promoting efficient and effective government, and it would make little sense to permit the government to perpetrate such disruptive conduct.²²

3. AN ADVERSE EMPLOYMENT ACTION IN RESPONSE
TO A CANDIDACY WILL BE UPHeld IF THE
GOVERNMENT WOULD HAVE TAKEN THE SAME
ACTION REGARDLESS OF THE CANDIDACY

Governments possess an affirmative defense to First Amendment claims whenever they can demonstrate they would have taken the same action regardless of the plaintiffs’ constitutionally protected conduct. In particular, pursuant to this “mixed motive” defense, even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability if it can show by a preponderance of the evidence that it would have made the same decision absent the forbidden consideration.²³

Thus, for example, even if a public employee is able to demonstrate that his or her candidacy or related conduct was a substantial or motivating

20. *See id.* at 1144–45.

21. 67 F.3d 655, 661 (7th Cir. 1995).

22. *See id.* at 662 (“Although we presume that a deputy’s dismissal is aimed at serving the public interest in efficient and effective government, it would be illogical to apply the same presumption to harassment designed specifically to hinder or to disrupt a deputy in the performance of his duties.”).

23. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977); *McCabe v. Sharrett*, 12 F.3d 1558, 1565 n.5 (11th Cir. 1994).

factor for the challenged action and even if the challenged action would be otherwise impermissible, the government will nonetheless prevail if it can show that it would have taken the same action absent the public employee's candidacy, such as because of the public employee's insubordination.²⁴

III. Due Process Concerns

Public employees also may challenge adverse actions taken against them because of their candidacies based on the Due Process Clause of the Fourteenth Amendment.

In these situations, public employees will likely assert they have a protected property interest in their employment, and thus they cannot be discharged, laid off, or subjected to other adverse employment actions without being afforded due process.

While the Due Process Clause provides two different kinds of constitutional protection—substantive due process and procedural due process—challenges to adverse employment actions do not typically implicate substantive due process concerns.²⁵ Thus, due process challenges to adverse employment actions stemming from a public employee's candidacy are usually based on procedural due process.

24. See *Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992) (while “balancing clearly tip[ped] in favor of the plaintiffs” [two sheriff's deputies] on claim they were transferred to less desirable positions because of their decision to run for sheriff, government could nevertheless avoid liability if it could show it would have transferred plaintiffs regardless of their candidacy).

25. See *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000) (holding that plaintiff's tenured public employment is not a fundamental property interest entitled to substantive due process protection, “thereby join[ing] the great majority of courts of appeals that have addressed this issue”); *Singleton v. Cecil*, 176 F.3d 419, 425–26 (8th Cir. 1999) (en banc) (“a public employee's interest in continued employment with a governmental employer is not so ‘fundamental’ as to be protected by substantive due process”); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) (en banc) (“employment rights are not ‘fundamental’ rights created by the Constitution”); *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1350 (6th Cir. 1992) (“plaintiffs’ state-created right to tenured employment lacks substantive due process protection”); *Huang v. Bd. of Gov. of Univ. of N.C.*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (professor's interest in position in university department “is essentially a state law contract right, not a fundamental interest embodied in *the Constitution*”); see also *Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington*, 31 F.3d 1191, 1196 (2d Cir. 1994) (“We do not think, however, that simple, state-law contractual rights, without more, are worthy of substantive due process protection.”); *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) (finding “no clearly established constitutional right to substantive due process protection of continued public employment” in Ninth Circuit as of 1984); *Kauth v. Hartford Ins. Co. of Ill.*, 852 F.2d 951, 958 (7th Cir. 1988) (“In cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest . . . the plaintiff has not stated a substantive due process claim.”). *But see Newman v. Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1989) (“school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation”).

Assessing a public employee's procedural due process claim requires a two-step inquiry. First, it must be determined whether due process even applies. And if so, it must then be determined whether the public employee was afforded adequate procedural safeguards before his or her rights were infringed.²⁶

In regard to the first step, a public employee must show he or she has a protected property interest in his or her employment.²⁷ Generally speaking, "[s]tate law determines whether a public employee has a property interest in his or her job."²⁸

Second, if a public employee has a protected property interest in his or her employment, the next step of the procedural due process inquiry analyzes whether the employee was afforded adequate procedural safeguards before he or she was deprived of his or her property rights.

Typically, a public employee receives adequate procedural safeguards if there is notice and an opportunity to respond to the charges before his or her termination and if post-termination administrative review procedures are available.²⁹ Notably, the pre-termination process need not be elaborate, especially if there are meaningful post-deprivation procedures.³⁰ Moreover, the Supreme Court "has recognized, on many occasions, that where [the government] must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."³¹

IV. Tips for Preventing Candidacy-Related Claims

The following tips can help public employers prevent liability from candidacy-related claims.

A. *Consider Establishing a Leave of Absence Requirement to Run for Political Office*

One way local governments can avoid exposure to candidacy-related claims is to establish a formal policy requiring public employees to take a leave of absence in order to run for political office. Indeed, certain federal, state, and local employees are already subject to this

26. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

27. See *Brett v. Jefferson County*, 123 F.3d 1429, 1433 (11th Cir. 1997).

28. *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991).

29. See *Graning v. Sherburne County*, 172 F.3d 611, 616 (8th Cir. 1999) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-47 (1985)).

30. See *Graning*, 172 F.3d at 616.

31. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

requirement pursuant to the Hatch Act,³² which provides, among other things, that covered employees “may not . . . run for the nomination or as a candidate for election to a partisan political office.”³³ Public employees subject to this provision of the Hatch Act include all federal executive branch and civil service employees except the President and Vice President;³⁴ District of Columbia employees except the mayor, recorder of deeds, and members of the city council;³⁵ and executive branch state and local employees who “‘as a normal and foreseeable incident to [their] principal position[s] or job[s], . . . performs duties in connection with an activity financed in whole or part by federal funds.’”³⁶

Notably, the Supreme Court has upheld the constitutionality of the Hatch Act,³⁷ as well as local versions of the Hatch Act (“baby Hatch Acts”)³⁸ and “resign to run” policies applied by local governments.³⁹ For a leave of absence or resign-to-run policy to be valid, however, it must be applied evenhandedly and not simply upon one set of candidates as opposed to another.⁴⁰

While policies establishing a leave of absence to run for political office requirement have been upheld, each local government must make its own determination as to whether such a policy is in its particular best interest. If a local government’s goal is to attract the best candidates for office, a leave of absence requirement may not fit its needs.

32. For a thorough discussion of the history and provisions of the Hatch Act, see Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. Pa. J. Lab. & Emp. L. 225 (2005).

33. 5 U.S.C. § 7323(a)(3); see Bloch, *supra* note 32, at 238.

34. 5 U.S.C. § 7322(1)(A); see Bloch, *supra* note 32, at 238.

35. 5 U.S.C. § 7322(1)(C); see Bloch, *supra* note 32, at 251.

36. *Williams v. U.S. Merit Sys. Protection Bd.*, 55 F.3d 917, 920 (4th Cir. 1995) (quoting *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990) (citing 5 U.S.C. § 1501(4))).

37. See *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 556 (1973) (“[N]either the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.”).

38. See *Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973) (upholding Oklahoma “baby Hatch Act,” which, among other things, forbade state civil servants from becoming candidates for any paid public office).

39. See *Clements v. Fashing*, 457 U.S. 957, 960, 971 (1982) (upholding “resign to run” provision of Texas constitution, which provided for the automatic resignation of certain state and county officials who announced their candidacies for political office).

40. See *Broadrick*, 413 U.S. at 616 (noting challenged statute “seeks to regulate political activity in an even-handed and neutral manner”); *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir. 2003) (“A municipality with a local version of the Hatch Act or a resign-to-run policy must implement that rule evenhandedly; it may not require Democrats to resign while allowing Republicans to keep their civil-service positions as fallbacks.”).

For example, who better to run for office against the sheriff than his chief deputy for twenty-five years. Thus, local governments should weigh both the benefits and burdens of such policies before they are implemented.

1. DON'T DO IT, UNLESS YOU WOULD BE WILLING
TO TAKE THE SAME ACTION AGAINST YOUR
BEST EMPLOYEE

An obvious way for local governments to avoid liability for retaliation claims in general and candidacy-related claims in particular is by never taking an adverse action against their employees. If an employee misses work for a month straight without calling and without offering any explanation, no problem—let it go.

Of course, that is not realistic. But local governments must be careful to make sure they have valid, fair-minded justifications for every action taken. This will not only ensure an effective workplace and public confidence in the government, but will enable them to validly assert the mixed motive affirmative defense in response to a First Amendment retaliation claim.

To assist in ensuring that valid reasons exist for an adverse action, local governments should consider the following questions before taking an adverse action against an employee:

- Would the local government's best employee be treated in the same manner?
- Would an outsider view the action as reasonable?
- Is the action supported by appropriate documentation?

If the answers to these questions are yes, local governments can have some confidence that an adverse action is justified under the circumstances.

2. ESTABLISH A UNIFORM POLICY OF DOCUMENTING
PROBLEMS WITH ALL EMPLOYEES

As explained above, under the mixed motive defense, local governments can defeat liability by demonstrating they would have made the same decision absent the forbidden consideration.⁴¹ To take advantage of this defense, local governments should establish a *uniform* policy of documenting problems with *all* employees. This practice may assist local governments in meeting their burden of proving their adverse action was, in fact, premised on permissible criterion.

41. *Mt. Healthy City Bd. of Educ.*, 429 U.S. at 287; *McCabe*, 12 F.3d at 1565 n.5.

That said, local governments must make sure this policy is clearly laid out, uniformly adopted, and applied with respect to all employees. Otherwise, rather than insulating a local government from liability, a public employee may be able to point to excessive documentation in his or her file as evidence that the local government has a vendetta against him or her.

3. IF YOU ARE GOING TO TAKE AN ACTION, DO IT
RIGHT AWAY

As noted, the longer a local government waits to take an adverse action following the announcement of a candidacy, the greater the evidence needed to substantiate its position.⁴² As such, if a local government is going to take an adverse action against a public employee in response to an announced candidacy, the action should be taken as soon after the announced candidacy as practical.

4. IF YOU ARE GOING TO TAKE AN ACTION, TAKE THE
LEAST RESTRICTIVE ACTION POSSIBLE

On a pragmatic level, the less severe the action taken by a local government in response to an announced candidacy, the less likely a public employee will bring a legal challenge to the action. For example, it is doubtful a clerk in the local tax assessor's office would sue if she was placed on paid administrative leave with full benefits in response to her announcement that she is running for the tax assessor position in the upcoming election.

V. Conclusion

Elections pitting a current public employee versus his or her boss have the potential to cause great disruption to local governments. As such, local government employers have routinely laid off and discharged public employees running for political office in the hopes of preventing conflicts in the workplace, misuse of sensitive information, and disruption of operations from these election battles.

Courts have commonly upheld these government actions in the face of First Amendment challenges where the local government has made some showing that the actions further its interest in efficient workplace operations. Likewise, adverse employment actions will withstand procedural due process challenges where state law provides that the public

42. See *supra* notes 18–19 and accompanying text.

employee has no protected property interest in his or her employment, or—if the public employee possesses such a property interest—adequate notice and a hearing are provided.

Finally, local governments can implement specific measures to prevent exposure to candidacy-related claims, including establishing policies requiring employees to take a leave of absence to run for political office; refraining from taking any adverse action unless they would be willing to do the same for their best employees; establishing uniform policies of documenting problems with all employees; taking their adverse action as soon after the announced candidacy as practical; and taking the least restrictive action possible against the public employee.

