

Pennsylvania Supreme Court's Reversal in *Carr v. PennDOT*
Disciplining Public Employees for Social Media Postings
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The United States Supreme Court's *Pickering/Connick* test directs courts analyzing a public employee's First Amendment claim to (1) determine whether the speech addresses matters of public concern by examining its "content, form, and context," *Connick v. Meyers*, 461 U.S. 138, 147–48 (1983); and if it does, (2) to balance the interests of the employee "in commenting upon matters of public concern," and the interest of the public employer "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 568 (1968). When balancing under the *Pickering/Connick* second part, the Pennsylvania Supreme Court requires courts to consider (1) the public importance of the speech; (2) the nature of the injury to the agency; and (3) factors which may mitigate or aggravate the injury to the agency. *Sacks v. Dep't of Pub. Welfare*, 465 A.2d 981, 989 (Pa. 1983).

While basing its decision on the Commonwealth Court's improper *Pickering/Connick* and *Sacks* part two balancing, which was PennDOT's only challenge on appeal, the Majority opinion noted that "there is no present dispute whether Carr's comments touched on a matter of public concern, [because] they were essentially a rant based on her personal observation of a particular bus driver rather than an explanation of safety concerns that she became aware of as a Department employee." A concurring opinion filed by Justice Wecht and joined by Justice Dougherty, however, agreed with PML's *Amicus* argument that the speech at issue did not even pass the first part of *Pickering/Connick* because the Commonwealth Court "overgeneralized Carr's expressions of personal frustration to find a matter of public concern." Because the question of whether the speech addressed a matter of public concern was not before the Court, Justice Wecht warned that "almost any statement can be connected to a matter of public employment if viewed broadly enough."