YOU'RE FIRED! *BISHOP V. WOOD*: WHEN DOES A LETTER IN A FORMER PUBLIC EMPLOYEE'S PERSONNEL FILE DENY A DUE PROCESS LIBERTY RIGHT?

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INTRODUCTION

You are the owner of a large company that provides security services to inner-city private schools. As owner of the company, you take pride in hiring employees who have the necessary skills and experience to perform their jobs well in a highly sensitive atmosphere. Your clients know your company well and depend on you to provide a safe environment for their students, staff, and teachers. You pay your employees well, provide good benefits, and expect them to perform their jobs in an honest and loyal fashion.

Tom Baker is a new employee who works as a security guard at an elementary school. During the first two months of Mr. Baker's employment, he blatantly ignores his supervisor's orders and has poor attendance at mandatory security training sessions. Additionally, his actions and presence cause general low morale within his department. A month later, one of Mr. Baker's supervisors comes to you with appalling news. The employee tells you that she observed Mr. Baker shooting rounds of ammunition behind one of the schools during his break, while the children were at recess.

Without any further discussion, you fire Mr. Baker. You place a memorandum in Mr. Baker's personnel file that explains the allegations, put Mr. Baker's file in your former employee records, and feel fortunate that no one was injured. In the future, potential employers of Mr. Baker call you because he listed your company as his last place of employment. You answer any questions the employers have about Mr. Baker's job performance honestly and you legitimately withhold your personal recommendation.[1]

Now imagine that instead of owning a private security business, you are the Chief of Police in a large city. You are now responsible for ensuring the safety of many schools, hospitals, community centers, and thousands of homes and businesses, not to mention the personal well-being of the hun-

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[1] *See* 50 Am. Jur. 2D *Libel and Slander* § 249 (2006) (stating that the truth of a potentially harmful statement is an absolute defense to a private defamation claim).

dreds of thousands of people who live in your city. The citizens' tax dollars pay your salary, and they expect your best judgment to keep them safe.

This time you hire John Smith as a probationary officer. Mr. Smith demonstrates the same inability to follow orders as Mr. Baker. He does not attend mandatory police training classes and causes low morale within the department. A fellow employee eventually sees him firing ammunition behind a local elementary school, just like Mr. Baker. As any supervisor would do, you terminate Mr. Smith's employment. You place a memorandum in Mr. Smith's personnel file that details his insubordination and misdeeds. You go home at the end of the day and feel like you have done a good job for yourself, your family, and the citizens of your city. However, you come into work the next day and you have a phone call from Mr. Smith's lawyer.

The lawyer tells you that you have violated the law by placing a memorandum of Mr. Smith's alleged misconduct in his personnel file. You have not told anyone outside of your chain of command about the incident. You have not spoken to a single person who might potentially employ Mr. Smith in the future. Mr. Smith has not even applied for a new job. However, he plans to file a lawsuit against you, the mayor, and the state for violating his Fourteenth Amendment due process rights. You make a call to inform the lawyer for the police department about the forthcoming suit. You are sure that there is nothing to worry about; Mr. Smith is just a disgruntled former employee suing his former employer. Or is he?

Surprisingly, in many federal courts today, Mr. Smith would have a valid suit for a violation of a Fourteenth Amendment due process liberty interest.[2] As a public employee, the law treats Mr. Smith differently than Mr. Baker. One of these differences is that a public employer must provide a public employee "due process of law" as the Fifth and Fourteenth Amendments require.[3] In *Bishop v. Wood*,[4] the United States Supreme Court held that an employer must make an allegedly stigmatizing document, such as the report about Mr. Smith's actions, "public" before the document can deny a former public employee due process of law.[5] However, a plurality of circuits that have examined the *Bishop* case and the due process interest in employment have reinterpreted the publication requirement set out in *Bishop*.[6] The Second, Fourth, and Fifth Circuits created a "likely publication" standard, which allows an employee to establish a due process claim by merely demonstrating that the allegations in the employ-

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2 The Second, Fourth, and Fifth Circuits would allow Mr. Smith a cause of action. *See infra* Part III.A.

3 U.S. CONST. amend. V; U.S. CONST. amend. XIV.

4 426 U.S. 341 (1976).

5 *Id.* at 348.

6 The Second, Fourth, and Fifth Circuits make up the plurality. *See infra* Part III.A.

ment memorandum are likely to be made public.[7] Contrary to this plurality, the First and Seventh Circuits apply an "actual publication" standard.[8] Under the actual publication standard, an employee must demonstrate that an employer actually published the allegedly stigmatizing documents before the employee can establish a due process violation.[9]

This Comment argues that all federal courts should adopt the actual publication standard. Part I provides a brief discussion of the occupational property and liberty interests protected by the Fifth and Fourteenth Amendments. Part II discusses the Supreme Court's decision in *Bishop v. Wood*. Part III outlines the two-way circuit split that surrounds the interpretation of *Bishop* and the public disclosure requirement of the due process occupational liberty claim. Part IV analyzes the *Bishop* decision and argues that the Supreme Court created an actual publication standard. Finally, Part V tests the two approaches to the publication requirement and argues that even if the Supreme Court did not unequivocally establish an actual publication standard in *Bishop*, federal courts should adopt the actual publication standard because the standard satisfies the two aims for public employment handed down in *Bishop*, where the likely publication standard fails.

I. AN INTRODUCTION TO DUE PROCESS OCCUPATIONAL RIGHTS

The Fifth and Fourteenth Amendments provide that the federal government and the states shall not deprive any person of "life, liberty, or property without due process of law"[10]—collectively termed the Due Process Clause.[11] In interpreting the meaning of the Due Process Clause, the Supreme Court has developed an expansive reading of the terms liberty and property in the context of public employment.[12] This Part briefly outlines the due process occupational rights protected by the Fifth and Fourteenth Amendments.

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7 *See infra* Part III.A.

8 *See infra* Part III.B.

9 *See* Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 74 (1st Cir. 1990); Johnson v. Martin, 943 F.2d 15, 17 (7th Cir. 1991).

10 U.S. CONST. amend. V; U.S. CONST. amend. XIV.

11 *See* BLACK'S LAW DICTIONARY 539 (8th ed. 2004).

12 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972) (noting that in an employment context, "'[l]iberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposefully left to gather meaning from experience'" (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (alteration in original))).

A. *Occupational Due Process Rights: "Liberty, or Property"?*

The Constitution protects two primary due process rights of public employees. The first is the due process property right in employment, and the second is the due process occupational liberty interest.[13] Many plaintiff-employees will bring both a property right and a liberty interest claim in the same suit.[14] Two significant differences exist, however, between an occupational property right and an occupational liberty interest.

The first difference between an occupational liberty interest and an occupational property right stems from the creation and definition of the right or interest. The Fifth and Fourteenth Amendments to the Constitution created the occupational liberty interest[15] and the interest is defined by judicial interpretation of the term "liberty" in the due process clause.[16] In contrast, state laws and independent contracts create and define occupational property rights.[17]

The second difference is the practical application of the two claims. As established above, a court must inquire into two separate and distinct sources of law when evaluating the two claims. When a court interprets a due process occupational liberty interest claim, it must inquire into the actual meaning of "liberty" in the Constitution as courts have defined the term.[18] However, when a court interprets a due process occupational property right claim, it must look to state and local laws and ordinances, and employment concepts in the applicable jurisdiction.[19] Thus, due process property rights will vary by jurisdiction, but due process liberty interests should be uniform across the United States.

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13 *See Bishop*, 426 U.S. at 343 (breaking the plaintiff's due process employment claim into a "property interest" and an "interest in liberty"); *Roth*, 408 U.S. at 572, 577 (dividing the plaintiff's due process employment claim into a "property interest in a benefit" and a liberty interest "to engage in any of the common occupations of life").

14 *See Bishop*, 426 U.S. at 343; *Roth*, 408 U.S. at 571-72.

15 *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, *liberty*, or property without due process of law." (emphasis added)); U.S. CONST. amend. XIV ("[N]or shall any state deprive any person of life, *liberty*, or property without due process of law." (emphasis added)).

16 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

17 *See Roth*, 408 U.S. at 577; Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

18 *See Roth*, 408 U.S. at 572 (analyzing the meaning of "liberty" in the Fourteenth Amendment to determine if the plaintiff has a valid due process occupational liberty claim).

19 *See id.* at 577; *Perry*, 408 U.S. at 601-02; Whiting v. Univ. of S. Miss., 451 F.3d 339, 344 (5th Cir. 2006); Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 73 (1st Cir. 1990).

B. *When Does an Employee Have a Property Right in His or Her Occupation?*

The Constitution lists a due process property right,[20] but independent sources of law create and define due process occupational property rights.[21] These sources are predominately individual state laws or written and implied employment agreements.[22] Thus, interpretation of a due process occupational property right claim requires that courts examine the applicable statutes and employment concepts in the jurisdiction in which the plaintiff files suit.[23] Accordingly, an employee's occupational property right will vary by jurisdiction. However, the common law employment at-will doctrine provides a helpful standard for understanding the most common employer-employee relationship: that of an at-will employee.

The employment at-will doctrine holds that all employers and employees without an employment contract for a finite term can terminate their relationship with or without cause at any time.[24] Although this common law doctrine has come under attack recently in some states,[25] the cases referenced in this Comment follow the employment at-will doctrine.[26] When a court determines that an employee is "at-will," there is a presumption that the employee does not have a due process occupational property right to continued employment.[27] The employee can, however, rebut the presumption by establishing that another source of law, such as a statute or public policy, creates a property right in employment.[28] If an employee establishes a due process occupational property right, the employer must afford the employee due process of law.[29] Those employees who fail to prove that

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20 U.S. CONST. amend. V; U.S. CONST. amend. XIV.

21 *See Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601-02.

22 *See Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601-02.

23 *See Roth*, 408 U.S. at 566-67.

24 Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R. 4th 544, 548-50 (1982).

25 *See id.* at 552-55.

26 *See* Bishop v. Wood, 426 U.S. 341, 345 (1976) (noting that the plaintiff "held his position at the will and pleasure of the city"); *Roth*, 408 U.S. at 566 n.2; Whiting v. Univ. of S. Miss., 451 F.3d 339, 345-46 (5th Cir. 2006); Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 72 (1st Cir. 1990) (stating that since the plaintiff was an "irregular employee . . . he was subject to termination at any time that his services were no longer needed").

27 *Bishop*, 426 U.S. at 345-46; *see also Roth*, 408 U.S. at 566.

28 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2008).

29 *See* Paul v. Davis, 424 U.S. 693, 710-11 (1976); *Roth*, 408 U.S. at 569-70 ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

they have a due process occupational property right in their employment can still establish that they have a liberty interest in their employment.[30]

C. *When Does an Employee Have a Liberty Interest in His or Her Occupation?*

As explained above, the Fifth Amendment created the due process liberty claim and the Fourteenth extended it to the states.[31] The Supreme Court has slowly advanced and defined the concept of a liberty interest since its inception.[32] Over one hundred and thirty years after the states ratified the Fifth Amendment in the Bill of Rights, the Supreme Court recognized an occupational liberty interest.[33]

The Supreme Court first acknowledged that the term "liberty" in the Fifth and Fourteenth Amendments includes an interest in one's occupation in *Meyer v. State of Nebraska*.[34] However, it would take the Supreme Court over fifty years to establish the full extent of the occupational liberty interest. In 1952, in *Wieman v. Updegraff*,[35] the Supreme Court found that where the government attaches "a badge of infamy" to the citizen, such as the reputation of being a Communist during the Cold War, the government denies a due process liberty interest.[36] The Supreme Court elaborated upon the "badge of infamy" concept in *Wisconsin v. Constantineau*,[37] expanding the liberty interest to include protection of a citizen's "good name, reputation, honor, or integrity" against actions by the government.[38] A year after *Constantineau*, the Supreme Court revisited the occupational liberty interest created in *Meyer* and combined it with the "badge of infamy" concept from *Constantineau*.[39]

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30 *See Bishop*, 426 U.S. at 343; *Whiting*, 451 F.3d at 344; *Ortega-Rosario*, 917 F.2d at 74 (suggesting that even though the plaintiff failed to prove a property right claim, he might be able to establish a liberty interest claim).

31 U.S. CONST. amend. V; U.S. CONST. amend. XIV.

32 *See Roth*, 408 U.S. at 572 ("While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated." (alteration in original) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

33 *See Meyer*, 262 U.S. at 399.

34 *Id.* ("Without doubt, . . . [liberty in the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life.").

35 344 U.S. 183 (1952).

36 *Id.* at 191.

37 400 U.S. 433 (1971).

38 *Id.* at 437 ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

39 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572-73 (1972).

In *Board of Regents of State Colleges v. Roth*, the Supreme Court merged the concept of liberty in employment and the reputational interest to create the liberty interest in one's employment as we understand it today.[40] The *Roth* Court held that the due process occupational liberty interest prevents an employer from terminating a public employee based on charges that might "seriously damage his standing and associations in his community" or impose upon him "a stigma . . . that foreclosed his freedom to take advantage of other employment opportunities" without due process of law.[41] Furthermore, mere proof that termination might make an employee less attractive to future employers does not equate to a deprivation of an employee's occupational liberty interest.[42] Two months prior to the decision in *Bishop*, the Supreme Court solidified the holding in *Roth* in *Paul v. Davis*[43] by finding that a plaintiff must demonstrate: (1) a stigma or reputational harm that is (2) coupled with a tangible interest, such as termination or a demotion, in order to implicate a due process liberty interest.[44]

II. THE SUPREME COURT'S DECISION IN *BISHOP*

Building upon the *Roth* line of cases, in the 1976 *Bishop v. Wood* opinion, the Supreme Court advanced the due process liberty interest by holding that an employer must make any stigmatizing allegations "public" before an employee can establish a due process occupational liberty claim.[45] Plaintiff Bishop was a policeman employed by the city of Marion, North Carolina.[46] Bishop's supervisor, the chief of police, recommended that the city manager fire Bishop because Bishop had failed to follow orders, shown poor attendance at police training classes, caused low morale within the department, and acted in ways "unsuited to an officer."[47] Based on the chief of police's recommendation, the city manager chose to terminate Bishop's employment.[48] In a private conversation, the city manager willingly told Bishop of the allegations against him.[49]

Following his termination, Bishop filed suit against the chief of police, the city manager, and the city of Marion.[50] Bishop asserted that the chief of police's allegations were false, and that the defendants violated his due

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40 *Id.*
41 *Id.* at 573.
42 *Id.* at 574 n.13.
43 424 U.S. 693 (1976).
44 *Id.* at 701.
45 Bishop v. Wood, 426 U.S. 341, 348 (1976).
46 *Id.* at 342.
47 *Id.* at 342-43.
48 *Id.* at 342.
49 *Id.* at 348.
50 *Id.* at 343 n.1.

process rights under the Fourteenth Amendment.[51] Specifically, Bishop claimed that he was denied a property right[52] and a liberty interest in his continued employment.[53]

At the trial level, the district court granted summary judgment to defendants on both of Bishop's claims.[54] The case was affirmed on appeal and the Supreme Court granted certiorari.[55] In delivering the opinion for the Court, Justice Stevens divided the legal issues of the case into two distinct questions: (1) "whether petitioner's employment status was a property interest protected by the Due Process Clause," and (2) "assuming that the explanation for his discharge was false, whether that false explanation deprived him of an interest in liberty protected by that Clause."[56]

A. *A Property Right in Continued Employment*

The Court found that the city of Marion first employed Bishop as a probationary police officer,[57] and that he became a permanent employee after six months with the city.[58] Dismissed after his probationary period,[59] Bishop claimed that as a permanent employee he had either an express or implied property right to continued employment.[60] However, a city ordinance provided that a permanent employee may be discharged if he "fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties."[61]

Noting that a property interest in employment can be created through a public ordinance or an implied contract,[62] the Court stated that under North Carolina law, an employee's expectation of continued employment would only be enforced when the employer has granted "some form of guarantee"

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51 *Bishop*, 426 U.S. at 343.

52 *Id.*

53 *Id.* at 347.

54 *Id.* at 343.

55 *Id.*

56 *Id.*

57 *Bishop*, 426 U.S. at 343.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 344 n.5 ("Article II, § 6, of the Personnel Ordinance of the city of Marion, reads as follows: 'Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.'").

62 *Id.* at 344.

of continued employment.[63] The Court determined that Bishop was employed at the will of the city under the ordinance.[64] Furthermore, the city ordinance did not require an employer to give an employee notice or a hearing before dismissal.[65] The Court held that Bishop did not possess a property right in his employment.[66]

B. *A Liberty Interest in One's Reputation*

Bishop also made a due process liberty interest claim.[67] Bishop asserted that the chief of police's allegations, which led to Bishop's termination, constituted a stigma that could "severely damage his reputation in the community."[68] Bishop also claimed that the allegations were false.[69]

The Court invoked its decision in *Board of Regents of State Colleges v. Roth* to decide the liberty interest claim.[70] The *Roth* decision acknowledged that the non-retention of an employee could make that employee less attractive to other employers.[71] However, the *Roth* Court concluded that it "stretches the concept [of due process liberty] too far to suggest that a person is deprived of 'liberty' when he simply is not rehired to one job but remains as free as before to seek another."[72] Relying on *Roth*, the Court held that an employer does not deny the liberty interest of an at-will public employee "when there is *no public disclosure* of the reasons for the discharge."[73] The city manager told Bishop the allegations against him orally in a private conversation.[74] As such, this communication was not "made public" and could not form the basis of a valid due process liberty claim.[75]

In addition to the discussion of precedent, the Court asserted two public policy aims that supported the publication requirement.[76] First, the Court expressed a desire to avoid penalizing "forthright and truthful communication" between employers and employees.[77] Second, the Court stated that judicial efficiency demanded that the federal courts not become reviewers

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63 *Bishop*, 426 U.S. at 345.
64 *Id.*
65 *Id.* at 346.
66 *Id.* at 347.
67 *Id.*
68 *Id.*
69 *Bishop*, 426 U.S. at 347.
70 *Id.* at 348.
71 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 574 (1972).
72 *Id.* at 575 (citing Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895-96 (1961)).
73 *Bishop*, 426 U.S. at 348 (emphasis added).
74 *Id.*
75 *Id.*
76 *Id.* at 349.
77 *Id.*

of daily personnel decisions made by public agencies.[78] Rather, the ultimate control of state personnel decisions should remain with the states.[79] In light of these considerations, the Supreme Court affirmed the court of appeals' holding that Bishop did not establish a property right or liberty interest claim in his employment.[80]

III. THE CIRCUIT SPLIT: DUE PROCESS, DISSEMINATION, AND PUBLIC DISCLOSURE

Federal circuit courts have inconsistently interpreted the publication requirement the Supreme Court handed down in *Bishop v. Wood*. The circuit courts have developed two main approaches to determining whether an employer has made a communication "public." The first section of this Part analyzes the plurality standard of likely publication that the Second, Fourth, and Fifth Circuits developed.[81] The second section analyzes the minority approach of actual publication, which the First and Seventh Circuits advocate.[82]

A. *The Likely Publication Standard*

The Second, Fourth, and Fifth Circuits created the first approach developed by the federal circuit courts to determine whether a document has been made public.[83] These circuits have developed a likely publication standard, which requires only that a plaintiff demonstrate a likelihood that the stigmatizing document will be published.[84]

The Second Circuit was one of the first circuits to use the likely publication standard, doing so in *Brandt v. Board of Cooperative Educational Services*.[85] The plaintiff, Brandt, was a substitute teacher at a public school.[86] Brandt's supervisors approached him about acts of sexual miscon-

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78 *Id.* ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.").

79 *Bishop*, 426 U.S. at 349 n.14.

80 *Id.* at 350.

81 *See* Sciolino v. City of Newport News, 480 F.3d 642, 650 (4th Cir. 2007); Whiting v. Univ. of S. Miss., 451 F.3d 339, 347 (5th Cir. 2006); Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 45 (2d Cir. 1987).

82 *See* Johnson v. Martin, 943 F.2d 15, 17 (7th Cir. 1991); Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 74 (1st Cir. 1990).

83 *See Sciolino*, 480 F.3d at 650; *Whiting*, 451 F.3d at 347; *Brandt*, 820 F.2d at 45.

84 *Sciolino*, 480 F.3d at 650; *Whiting*, 451 F.3d at 347; *Brandt*, 820 F.2d at 45.

85 *Brandt*, 820 F.2d at 45.

86 *Id.* at 42.

duct involving his handicapped students.[87] After the confrontation, the school terminated Brandt and placed a document containing the allegation of sexual misconduct in his personnel file.[88] The district court applied a strict actual publication standard and granted summary judgment against Brandt; he appealed.[89]

At the court of appeals, Brandt claimed that the mere presence of the charges in his personnel files satisfied the public disclosure requirement because future employers would want to know about his qualifications and would likely gain access to his personnel file.[90] The court of appeals addressed the *Bishop* decision and interpreted the "made public" language in *Bishop* to mean that allegations "have been or are *likely to be disseminated* widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities."[91]

In 2007, the Fourth Circuit dealt with the publication requirement for the first time, deciding to follow the likely publication standard.[92] In *Sciolino v. City of Newport News*, the Newport News Police Department hired plaintiff Sciolino as a police officer for a probationary period.[93] During the probationary period, Sciolino's supervisors suspected that he forwarded the odometer on his police cruiser ten thousand miles to get a new vehicle sooner.[94] The police department asserted that the chief of police met with Sciolino to provide him an opportunity to respond to the allegations.[95] Sciolino denied the existence of the meeting and the validity of the charges against him.[96] The chief of police terminated Sciolino and placed a letter outlining the allegations of misconduct in Sciolino's personnel file.[97] The Fourth Circuit applied the likely publication standard and held that Sciolino must only allege and prove a *likelihood* that prospective employers or the public at large will inspect the file.[98]

In *Whiting v. University of Southern Mississippi*,[99] the Fifth Circuit applied a variation of the likely publication standard.[100] A non-tenured professor, Whiting, sued for deprivation of her due process liberty interests

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87 *Id.*
88 *Id.* at 43.
89 *Id.*
90 *Id.* at 44.
91 *Brandt*, 820 F.2d at 44 (emphasis added).
92 Sciolino v. City of Newport News, 480 F.3d 642, 649 (4th Cir. 2007).
93 *Id.* at 645.
94 *Id.*
95 *Id.* at 646 n.1.
96 *Id.* at 645, 646 n.1.
97 *Id.* at 645.
98 *Sciolino*, 480 F.3d at 650.
99 451 F.3d 339, 347 (5th Cir. 2006).
100 *Id.*

when the university denied her tenure.[101] When Whiting applied for tenure, two members of the tenure board accused her of academic fraud.[102] The board voted to deny tenure, and it placed a summary of its findings in Whiting's personnel file.[103]

To meet the publication requirement, the court of appeals held that Whiting must show that her employer "has made or is likely to make the . . . stigmatizing charges public 'in any official or intentional manner, other than in connection with the defense of [the related legal] action.'"[104] The court found that Whiting had not met the dissemination requirement because the board confined the information to the hearings for tenure and Whiting did not present any evidence of a way in which the defendants had or would likely publish the information to others outside of the tenure hearing.[105]

B. *The Actual Publication Standard*

The First and Seventh Circuits apply the second approach developed by the federal circuit courts to determine whether a document has been made public. These circuits adhered to the *Bishop* decision and adopted an actual publication standard, which requires that a plaintiff demonstrate that an employer actually made the allegedly stigmatizing document public.

The First Circuit rejected the speculative likely publication standard for the actual publication standard in *Ortega-Rosario v. Alvarado-Ortiz*.[106] Plaintiff, Ortega-Rosario, was an irregular employee for the Commonwealth of Puerto Rico who could be terminated at any time.[107] An unidentified individual stole equipment from a warehouse where Ortega-Rosario worked.[108] The warehouse supervisor discussed the incident with the employees and concluded that Ortega-Rosario was involved in the theft.[109] To document the events, the supervisor wrote a memorandum expressing his lack of trust in Ortega-Rosario and placed a copy of the memorandum in

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101 *Id.* at 340.

102 *Id.* at 342.

103 *Id.* at 348.

104 *Id.* at 347 (alteration in original) (citing Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 255 (5th Cir. 1984)).

105 *Whiting*, 451 F.3d at 348. The court did not indicate whether Ms. Whiting's failure to prove likely publication was a result of poor lawyering or a more onerous likely publication standard.

106 917 F.2d 71, 74 (1st Cir. 1990).

107 *Id.* at 72 (stating that under Puerto Rican employment law, an irregular employee was "subject to termination at any time that his services were no longer required").

108 *Id.*

109 *Id.*

Ortega-Rosario's personnel file.[110] The Commonwealth terminated Ortega-Rosario soon after the incident.[111]

A month after his termination, Ortega-Rosario started looking for a new job.[112] He applied for three jobs for which he listed his previous employer as a reference; none of the potential employers contacted him.[113] Ortega-Rosario, however, was able to find another job.[114] Additionally, the defendants eventually apprehended the individuals responsible for the theft and rehired Ortega-Rosario as a warehouse chief, a more senior position than the job he held previously.[115]

Ortega-Rosario filed suit claiming that the employer denied his due process occupational liberty interest by firing him without a "pretermination hearing," and placing a memorandum of his alleged wrongs in his personnel file.[116] In a summation of the actual publication standard, the court stated, "the due process requirement . . . is triggered only if the dismissal is based upon false and defamatory charges that are disseminated by the employer and stigmatize the employee so that the employee's freedom to obtain alternative employment is significantly impaired."[117]

The court found that the employer did not disseminate the memorandum because the employer had only placed the memorandum in Ortega-Rosario's personnel file, and simply placing the memorandum in the file did not constitute making the document public.[118] Ortega-Rosario suggested that the lack of response from the three potential employers supported an inference that the employer had disclosed the memorandum.[119] However, the court expressly rejected Ortega-Rosario's argument, stating that it would be "pure speculation" to suggest that the lack of interest from the employers was a result of any information in Ortega-Rosario's personnel file.[120] The court concluded that Ortega-Rosario's occupational liberty interest claim failed.[121]

A year after the decision in *Ortega-Rosario*, the Seventh Circuit Court of Appeals weighed in on the publication requirement in *Johnson v. Martin*.[122] In that case, plaintiff Johnson, a probationary police officer employed by the Chicago Police Department, was required to undergo random drug

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110 *Id.*
111 *Id.*
112 *Ortega-Rosario*, 917 F.2d at 72.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at 74.
118 *Ortega-Rosario*, 917 F.2d at 74.
119 *Id.*
120 *Id.*
121 *Id.* at 74-75.
122 943 F.2d 15 (7th Cir. 1991).

screening tests as a condition of his employment.[123] The results of one of Johnson's tests indicated the presence of two illegal substances, morphine and codeine.[124] The police department started disciplinary proceedings against Johnson, during which he denied using drugs.[125] Following the conclusion of the proceedings, the department discharged Johnson.[126]

Two years after his discharge, Johnson filed suit claiming that his former employer denied his occupational liberty interest.[127] Johnson stated that the positive results of his drug test were placed in his personnel file and this damaged his reputation in the community.[128] Johnson conceded that the drug test results had not yet been disseminated to any potential employers; however, he claimed that the mere presence of the letter affected his ability to gain future employment.[129] The court likened this argument to the Second Circuit's likelihood of publication standard created in *Brandt*.[130]

The *Johnson* court rejected the Second Circuit's opinion in *Brandt* as unfaithful to the Supreme Court's precedent in *Bishop*, explaining that an occupational liberty claim is not established until the reasons for the discharge are publicly disclosed.[131] After rejecting the likely publication standard as inconsistent with Supreme Court precedent, the court determined that the police department had not disseminated the potentially defamatory statements outside of the department.[132] In a strong concluding remark, the court held: "[t]he plain fact is that the mere existence of damaging information in Johnson's personnel file cannot give rise to a due process challenge."[133]

IV. *BISHOP V. WOOD*: CREATION OF AN ACTUAL PUBLICATION STANDARD

The Supreme Court's decision in *Bishop v. Wood* outlined the requirement of publication in a due process occupational liberty claim.[134] The Supreme Court held that a communication must be "made public" to "properly form the basis for a claim that petitioner's interest in his 'good name,

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123 *Id*. at 16.

124 *Id*.

125 *Id*.

126 *Id*.

127 *Id*.

128 *Johnson*, 943 F.2d at 16.

129 *Id*.

130 *Id*. See *supra* Part III.A for a detailed discussion of the *Brandt* case.

131 *Johnson*, 943 F.2d at 16-17 ("Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace.").

132 *Id*. at 17.

133 *Id*.

134 Bishop v. Wood, 426 U.S. 341, 347-50 (1976).

reputation, honor, or integrity' was thereby impaired."[135] Section A of this Part analyzes the precise language of *Bishop* and argues that the Supreme Court established an actual publication standard. Section B analyzes *Codd v. Velger*,[136] a Supreme Court case decided less than a year after *Bishop*, and argues that the *Codd* decision reaffirmed the actual publication standard.

A. *What Does "Public" Mean?*

As a starting point, this analysis begins with the authoritative source of the public dissemination requirement: the text of *Bishop v. Wood*. In *Bishop*, the Supreme Court stated that the due process occupational liberty interest only extends where there is "public disclosure of the reasons for the discharge."[137] The Court found that a private conversation between only a supervisor and an employee did not constitute public disclosure.[138] The Court again asserted that a communication must be "made public" in order to implicate a due process occupational liberty interest.[139] But what does it mean for a communication to be "made public?"

Perhaps the best place to start when defining a word is the dictionary.[140] In the context of the *Bishop* decision, "public" is an adjective modifying the word "disclosure." The Oxford English Dictionary defines the adjective "public" as "the opposite of private"[141] and that which "may or must be shared by, all members of the community; not restricted to the private use of any person or persons."[142] Black's Law Dictionary defines "public" as "relating or belonging to an entire community, state, or nation," and "open or available for all to use, share, or enjoy."[143] These definitions coincide with the ordinary understanding of "public" and indicate that a document must be accessible and available to members of the community before it can be considered "public."

This definition of the word "public" is consistent with the wording of the *Bishop* decision. In *Bishop*, the Court provided a concrete example of a

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135 *Id.* at 348.

136 429 U.S. 624 (1977).

137 *Bishop*, 426 U.S. at 348.

138 *Id.*

139 *Id.*

140 *See* Smith v. United States, 508 U.S. 223, 228-29 (1993) (stating that the Supreme Court normally construes words "in accord with [their] ordinary or natural meaning," which the Court then derived from a dictionary definition); Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (citing Webster's Second New International Dictionary for the ordinary meaning of the word "representatives").

141 12 THE OXFORD ENGLISH DICTIONARY 778 (2d ed. 1989).

142 *Id.* at 780.

143 BLACK'S LAW DICTIONARY 1264 (8th ed. 2004).

communication that is not "public"—an oral conversation between only a supervisor and an employee.[144] The record established that no other employees witnessed the oral conversation between Bishop and the city manager, nor was the text of the conversation made available for others to read.[145] Accordingly, because no one else knew the context of the conversation or the allegations, Bishop's good name and reputation in the community could not be impaired.[146] This understanding of the term "publication" is further supported by the law of defamation.[147]

A defamation claim is similar to the due process occupational liberty claim, but defamation is a state common law tort.[148] For example, an employee in the private sector whose former employer gives a negative employment reference based on false information might bring a defamation claim against the former employer.[149] In the context of employment law, defamation, like the due process occupational liberty, is designed to protect an employee's interest in his or her reputation.[150] The law of defamation provides that a wrongdoer must publish a defamatory statement in order for a cause of action to lie.[151] This requires that "[t]he defamatory words . . . be communicated to someone other than the plaintiff."[152] Defamation law is based on the concept that a communication that is "neither heard nor seen by another" cannot harm an employee's reputation.[153] Accordingly, the publication requirement ensures that a reputational harm has actually occurred before a plaintiff files a claim.[154]

Similarly, in the due process occupational liberty context, placing a memorandum in a personnel file without making the file available to others does not constitute publication.[155] To establish an occupational liberty interest claim, an employee must show that he or she experienced serious damage to his "standing or association in his community."[156] When an employer simply places a document in a private personnel file, no one besides the

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144 *Bishop*, 426 U.S. at 348.

145 *Id.*

146 *See* Frank J. Cavico, *Defamation in the Private Sector: The Libelous and Slanderous Employer*, 24 U. DAYTON L. REV. 405, 430 (1999).

147 *See* 50 AM. JUR. 2D *Libel and Slander* § 220 (2006) ("The publication requirement for a defamation claim is based on the assumption that a statement, neither seen nor heard by a third party, cannot cause harm to one's reputation.").

148 *See* 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 12 (2005).

149 *See* Cavico, *supra* note 146, at 408.

150 RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977); Cavico, *supra* note 146, at 430.

151 50 AM. JUR. 2D *Libel and Slander* § 220 (2006).

152 Cavico, *supra* note 146, at 429.

153 *Id.* at 430.

154 *Id*.

155 *See id.*

156 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972).

author and his or her immediate supervisors reads the document.[157] The author has made his or her communication, and the document is then placed in a personnel file for safe keeping.[158] As with the case of a private conversation, the statements and allegations are not known by anyone except the communicator and the recipient.

The document and the allegations contained within a personnel file must at least be known to some third party, outside of an employee's immediate chain of command, before the document can impair an employee's good name and reputation.[159] Because third parties do not have access to a memorandum placed in a former employee's personnel file without some positive action to obtain the information, a third party cannot know the statements or communications made by the former employer in the memorandum. Without knowledge of the statements made in the memorandum, an employee's reputation cannot be harmed.[160] Any suggestion that the allegations might potentially stigmatize an employee's reputation in the future is unknown and unrealized speculation.[161] Accordingly, simply placing a memorandum in a former employee's personnel file does not make the information "public."

B. Codd v. Velger*: Creation and Dissemination Are Required*

The Supreme Court affirmed the *Bishop* actual publication standard eight months later in *Codd v. Velger*.[162] The Supreme Court, in *Codd*, heard a case with facts remarkably similar to *Bishop*.[163] A probationary police officer, Velger, brought charges against the police department because the

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157 *See* Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 72 (1st Cir. 1990) (noting that the parties agreed that the document in the plaintiff's personnel file was not published to any third party outside of the chain of command).

158 Sciolino v. City of Newport News, 480 F.3d 642, 659 (4th Cir. 2007) (Wilkinson, J., dissenting) (stating that employers must keep such personnel documents in order to defend themselves if a former employee files a dismissal claim "based upon race, sex, or some other impermissible consideration").

159 *See* Cavico, *supra* note 146, at 430.

160 Johnson v. Martin, 943 F.2d 15, 17 (7th Cir. 1991) (finding that a plaintiff cannot sustain an injury to his or her reputation until the allegedly stigmatizing information contained in a personnel file is viewed by a person outside of the employer's proper "chain of command").

161 Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 74 (1st Cir. 1990) ("[I]t would be pure speculation to attribute the lack of interest displayed by the companies in question to any information contained in Ortega's personnel file.").

162 429 U.S. 624, 628 (1977).

163 *Compare* Bishop v. Wood, 426 U.S. 341, 343-44 (1976) (stating that the plaintiff police officer filed a claim for violation of his due process rights when the police department dismissed him and a memorandum of the reasons for his dismissal were placed in his personnel file), *with Codd*, 429 U.S. at 624-26 (stating that a plaintiff police officer filed a claim for violation of his due process rights when the police department terminated his employment and placed a memorandum detailing the reasons for his termination in his personnel file, which the plaintiff released to potential employers).

department placed a memorandum in his personnel file that contained allegations of an attempted suicide while on the job.[164] In revisiting the *Bishop* standard, the Court held that an employee is only entitled to a due process hearing when the employer both "*creates* and *disseminates*" a stigmatizing impression about the employee.[165]

This decision, made only eight months after the *Bishop* ruling, delineates two separate steps that are required to establish publication in a due process occupational liberty claim. First, the employer must "create" the allegedly false allegations.[166] This step could be satisfied, for example, when an employer creates a memorandum that details the allegations against an employee. However, the employer must still "disseminate" that document,[167] and placing a document in a file folder does not disseminate an impression.[168] This second prong is not met until an employer actually makes a third party privy to the impressions and information contained in the termination memorandum.[169] The *Codd* decision, based on facts strikingly similar to *Bishop*, further demonstrates that the Supreme Court created an actual publication standard in *Bishop*.

V. THE TWO GOALS OF *BISHOP*: TESTING THE STANDARDS

As argued in Part IV, the Supreme Court created an actual publication standard in *Bishop v. Wood*. However, one scholar has argued that *Bishop* can be read to allow for a likely publication standard.[170] This Part argues that even if *Bishop* did not unequivocally establish an actual publication standard, the actual publication standard is preferable to the likely publication standard because it meets the two main tenets for public employment the Supreme Court set out in *Bishop*, where the likely publication standard fails. By suggesting that *Bishop*'s "made public" requirement may be satisfied by the mere possibility of likely publication, the federal courts that

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164 *Codd*, 429 U.S. at 625-26.

165 *Id.* at 628 (emphasis added) (citing Bishop v. Wood, 426 U.S. 341 (1976); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)).

166 *Id.*

167 *Id.*

168 *See supra* Part IV.A.

169 *See Codd*, 429 U.S. at 628.

170 *See* Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 U. KAN. L. REV. 171 (1998). Brannan espouses a different reading of the "made public" language and suggests that the federal courts should adopt a likely publication standard because it allows more freedom for lower state and federal courts to tailor the due process occupational liberty claim to individual employees. *See id.* at 199-02. Brannan also argues that an employee's reputational interest and standing in the community is harmed as soon as a potentially stigmatizing document is placed in an employee's personnel file. *See id.* at 200.

apply the likely publication standard have undermined the Supreme Court's decision in *Bishop*.

A. *The Court Should Not Penalize Forthright and Truthful Communication Between Public Employers and Public Employees*

The first tenet set out by the Supreme Court in the *Bishop* decision is that the due process occupational liberty interest should not discourage or punish direct and honest communication between employers and employees.[171] The Court stated that a decision contrary to the holding in *Bishop* would "penalize forthright and truthful communication between employer and employee."[172]

1. The Likely Publication Standard Penalizes Honest Communication Between Employers and Employees

In *Sciolino v. City of Newport News*, Judge Wilkinson wrote a strong dissent that outlined the flaws and problems created by the likely publication standard.[173] Judge Wilkinson stated that under the likely publication standard, employers who may face potential and inconsistent liability for their records and personnel files will no longer give at-will employees reasons for their termination.[174] As the Second Circuit, a likely publication standard circuit, recognized in *Russell v. Hodges*,[175] an employee benefits from knowing the reasons for his or her termination.[176]

The likely publication standard not only discourages honest and forthright communication, but it also potentially penalizes both employers and employees.[177] Employers who inform employees of the reasons for their termination will subject themselves to the potential threat of long and tedious litigation.[178] Accordingly, this potential penalty will keep employers

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171 Bishop v. Wood, 426 U.S. 341, 349 (1976).

172 *Id.*

173 *See* Sciolino v. City of Newport News, 480 F.3d 642, 653-62 (4th Cir. 2007) (Wilkinson, J., dissenting).

174 *Id*. at 659.

175 470 F.2d 212 (2d Cir. 1972).

176 *Id.* at 217 ("[T]he state would merely opt to give no reasons [for the termination] and the employee would lose the benefit of knowing what might profit him in the future.").

177 *Sciolino*, 480 F.3d at 659 (Wilkinson, J., dissenting) (suggesting that under a likely publication regime employers will incur greater costs to monitor the performance of employees and establish an adequate system of documentation to avoid lawsuits, and employees will lose the benefit of knowing the reasons for their termination).

178 *Id.*

from openly communicating this information to employees.[179] Employees are then penalized because they lose the benefit of knowing why they were terminated.[180] This information could prove useful to employees in improving their performance in the future and finding subsequent employment.[181] Contrary to the Court's stated intentions in *Bishop*, use of the likely publication standard has the potential to penalize both employers and employees.

2. The Actual Publication Standard Encourages Free and Honest Communication Between Employers and Employees

The actual publication standard allows employers and employees to communicate fully and honestly without the fear of unnecessary litigation. For example, in *Ortega-Rosario*, the First Circuit's application of the actual publication standard allowed for full and honest communication between Ortega-Rosario and his supervisors.[182] Ortega-Rosario's supervisor was able to openly discuss the alleged theft with all of the employees at the warehouse without fearing litigation.[183] Furthermore, when the defendants apprehended the individuals who were actually responsible for the theft, the Commonwealth was able to explain the misunderstanding to Ortega-Rosario and rehire him in a more advanced position.[184] Similarly, the Chicago Police Department, in *Johnson*, openly communicated with Johnson about his drug test during his disciplinary hearing.[185] The department made Johnson fully aware of the reasons for his termination.[186] It is clear that these actual publication jurisdictions not only avoid penalizing truthful and blunt communication, but they actually encourage full, frank, and honest communication between employers and employees—the first goal of the *Bishop* decision.

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179 *Id.* ("But when courts open governments to liability because they provide such reasons [for termination], government employers will simply stop giving them . . . .").

180 *Russell*, 470 F.2d at 217 (stating that an "employee would lose the benefit of knowing what might profit him in the future").

181 *Id.* ("[T]he state would merely opt to give no reasons [for the termination] and the employee would lose the benefit of knowing what might profit him in the future.").

182 *See* Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 72 (1st Cir. 1990).

183 *Id.*

184 *Id.*

185 *See* Johnson v. Martin, 943 F.2d 15, 16 (7th Cir. 1991).

186 *Id.*

B. *Ultimate Control of Personnel Decisions Should Remain with State and Public Agencies*

The second tenet handed down in the *Bishop* decision is that state and public agencies should maintain ultimate control of personnel decisions, not the federal courts.[187] The Supreme Court recognized that public employers will make mistakes in the day-to-day administration of affairs, including employment decisions.[188] However, the Court explained that such mistakes should be corrected through the proper personnel channels without implicating the due process clause.[189]

1. The Likely Publication Standard Does Not Allow State and Public Agencies to Maintain Control of Personnel Matters

States and public agencies cannot maintain control of personnel matters under the likely publication standard. First, the likely publication standard does not provide an adequate framework to determine when publication is likely, which leads to more litigation.[190] Second, the inconsistent interpretation of the likely publication standard has led to increased uncertainty and a need for frequent federal appellate court review.

Part III.A of this Comment outlined three recent circuit court cases applying the likely publication standard. In each of these cases, the court defined the standard in a different way.[191] The Second Circuit, in *Brandt*, held that an employee could establish an occupational liberty interest claim when an employer placed a document in the employee's personnel file and the document is never seen by a potential employer.[192] The Fourth Circuit, in *Sciolino*, held that an employee must demonstrate a likelihood that prospective employers or the public will actually inspect his or her personnel file and view the allegedly stigmatizing document.[193] The Fifth Circuit, in *Whiting*, concluded that an employer must make or be likely to make the allegedly stigmatizing information public in an "official or intentional man-

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187 Bishop v. Wood, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."); *id.* at 349 n.14 ("[U]nless we were to adopt [the dissent's view] . . . the ultimate control of state personnel relationships is, and will remain, with the states.").

188 *Bishop*, 426 U.S. at 350.

189 *Id.*

190 *See* Sciolino v. City of Newport News, 480 F.3d 642, 660 (4th Cir. 2007) (Wilkinson, J., dissenting).

191 *See supra* Part III.A.

192 Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 45 (2d Cir. 1987) (stating that the government is denying an employee's due process right even if the employee actively chooses to deny a potential employer access to his personnel file).

193 *See Sciolino*, 480 F.3d at 650.

ner."[194] Under these inconsistent standards, state actors cannot be certain when they must provide a due process hearing to employees.[195] In the three cases above, there was no indication that any of the employers were purposefully acting to deny employees their constitutionally protected rights, and the Supreme Court stated in *Bishop* that these types of cases should be corrected in ways other than requiring federal judicial review.[196] However, without a clear standard to follow, public employers are potentially running afoul of the Constitution without any way of avoiding the transgression.

With such wide and varying precedents, it is not surprising that state employers, public agencies, and employees are unclear about their obligations and rights under the likely publication standard.[197] As legal theorists have suggested, when litigants are unsure of their rights, for example because of an unclear or inefficient rule of law, the litigants and society will experience increased costs.[198] Due to the sheer number of state employees, public employers could not possibly provide a due process hearing every time an employee is terminated.[199] However, employers must still keep personnel records of their reasons for terminating employees in order to defend themselves against potential employment discrimination claims.[200] Nevertheless, if an employer keeps all of the records necessary to defend the agency against discrimination claims, the employee has a valid claim for deprivation of his or her occupational liberty interest under the likely publication standard.[201] Ultimately, employers are stuck in a no-win situation where they cannot solve personnel problems within the agency. Under the likely publication standard, employers will either be faced with discrimina-

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194 Whiting v. Univ. of S. Miss., 451 F.3d 339, 347 (5th Cir. 2006) (citing Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 255 (5th Cir. 1984)).

195 *See Sciolino*, 480 F.3d at 659 (Wilkinson, J., dissenting) ("The . . . [majority's likely publication standard] imposes an amorphous overlay upon an area of the law where balancing tests already leave state and local governments uncertain about the nature of their obligations.").

196 Bishop v. Wood, 426 U.S. 341, 350 (1976) ("In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected [employment] rights, we must presume that official action was regular, and if erroneous, *can best be corrected in other ways*." (emphasis added)).

197 *See Sciolino*, 480 F.3d at 659 (Wilkinson, J., dissenting) ("The . . . [majority's likely publication standard] imposes an amorphous overlay upon an area of the law where balancing tests already leave state and local governments uncertain about the nature of their obligations.").

198 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (suggesting that when property rights are not well defined under a rule of law, society and the parties incur greater transaction costs).

199 *See* U.S. CENSUS BUREAU, STATE GOVERNMENT EMPLOYMENT DATA: MARCH 2006 (2006), http://ftp2.census.gov/govs/apes/06stus.txt (stating that the state governments of the United States employed 5,127,796 total employees in March, 2006).

200 *Sciolino*, 480 F.3d at 659 (Wilkinson, J., dissenting) (stating that employers have to keep personnel records on former employees in order to protect themselves from potential discrimination claims).

201 *See id.*; Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 45 (2d Cir. 1987).

tion claims that they cannot adequately defend or due process liberty claims that they cannot win. Either way, the likely publication standard leads to increased litigation, and federal courts are forced to bear the burden.[202]

2. The Actual Publication Standard Provides a Clear Bright-Line Rule for State Agencies and Employees to Follow

The bright-line actual publication standard does not suffer from the same debilitating defects as the likely publication standard. In *Johnson*, the Seventh Circuit clearly defined the actual publication test: the allegedly defamatory statement must "actually be made public."[203] *Ortega-Rosario* provides the same bright-line rule: the document must be "disseminated by the employer."[204]

The bright-line actual publication test provides clear guidelines for state employees and employers. An employer must provide a due process hearing only if he or she will actually make the allegedly defamatory information public.[205] Employees who believe that their employer has violated their due process occupational liberty interest must allege in the pleadings and ultimately prove that the employer actually made the allegedly stigmatizing documents available to a potential employer or the public at large.[206] Under this clear test, public agencies, state employers, and state employees can easily determine when an employer or supervisor has acted erroneously.[207] As such, employers will more easily be able to control their own actions and monitor the activities of their in-house actors.[208] Federal courts will only be called upon to handle the most extreme and difficult cases where expertise and judgment are needed.

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202 The federal courts have original jurisdiction over due process liberty right claims and discrimination claims because these rights are protected by the Constitution. *See* 28 U.S.C. § 1331 (2000). While employee-plaintiffs could choose to bring their claims in state court, these types of claims are often removed to a federal court. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 390 (1992) (stating that discrimination claims, and 42 U.S.C. § 1983 cases, which include due process liberty claims, are frequently removed to federal court).

203 Johnson v. Martin, 943 F.2d 15, 17 (7th Cir. 1991).

204 Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 74 (1st Cir. 1990).

205 *Johnson*, 943 F.2d at 17; *Ortega-Rosario*, 917 F.2d at 74.

206 *Johnson*, 943 F.2d at 17; *Ortega-Rosario*, 917 F.2d at 74.

207 *Johnson*, 943 F.2d at 17 (finding that while plaintiffs have likened charges in a personnel file to "a time bomb waiting to explode," it is clear that the "time bomb . . . has yet to detonate").

208 *See Ortega-Rosario*, 917 F.2d at 72, 75 (showing that the Commonwealth was able to correct its own inaccurate employment decision and the harm done to the plaintiff by rehiring the plaintiff in a more prestigious position than the one he previously held).

CONCLUSION

The Second, Fourth, and Fifth Circuits' likely publication standard, which allows employees to satisfy the publication requirement of the due process occupational liberty claim by suggesting that a document is likely to be made public, is a misapplication of the Supreme Court's decision in *Bishop v. Wood*. In *Bishop*, the Supreme Court created an actual publication standard for the due process occupational liberty interest. The federal circuits that have adopted a likely publication standard are disregarding the intent of the Supreme Court's decision in *Bishop*. Moreover, these circuits have created a standard that fails to meet either of the two aims of the occupational liberty interest that the Supreme Court defined in *Bishop*. Thus, the federal courts should adopt the actual publication standard for due process occupational liberty claims, which holds that an employee may satisfy the publication requirement only upon demonstrating that an employer actually made a document available to third parties.