Legal Issues Concerning Academic Freedom

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CORE PRINCIPLES OF LAW THAT DEFINE AND LIMIT THE RIGHT TO ACADEMIC FREEDOM

- As a general rule, public employers, including colleges and universities, cannot punish their employees for engaging in constitutionally-protected free speech activities. But there are exceptions. (Pickering 1968)

- The government has far greater authority to restrict the free speech rights of its employees than to restrict the free speech rights of (nonemployee) citizens. (Pickering 1968)

- The speech of public employees, including college professors, is constitutionally-protected only if they are speaking as *citizens* on matters of *public concern.* (Connick 1983)

- If they are speaking as employees on matters of merely *personal concern* (e.g., workplace gripes), then their speech is not constitutionally-protected and can be the basis for permissible employer retaliation. (Connick 1983)

- In addition, under the Pickering balancing test, if college or university officials reasonably believe that the professor's speech might be disruptive of the workplace, impair harmony among co-workers, strain relationships with supervisors, or interfere with a student's ability to get an education, then it is not constitutionally-protected, even if it touches on a matter of public concern. (Waters 1994 and Pickering 1968)

- Where the facts show that a professor has been punished just because he/she has voiced controversial or unpopular ideas and there is no evidence that the professor's speech has been disruptive of the school environment, the courts have found a First Amendment violation. (*Compare* Levin (1992) with Jefferies (1995))

- When a public employee is speaking as a part of his "official duties," *i.e.*, is just doing his job, then the employee's speech is entitled to no First Amendment protection at all and can be the basis for discipline or discharge. The Court added, however, that this rule may not necessarily apply to teachers performing their official duties of "classroom instruction" and "academic scholarship" and explicitly reserved that question for a later date. (Garcetti 2006)

I. The Supreme's Greatest Hits:

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943): If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Sweezy v. State of New Hampshire, 354 U.S. 234 (1957): The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation ... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Keyeshian v. Board of Regents, 385 U.S. 589 (1967): Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' ... The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968): [I]t cannot be gainsaid that 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. The problem in any case is to arrive at a balance between the interests of the teacher, 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…. The employee's speech is not protected under the First Amendment if it impede[s] the teacher's proper performance of his daily duties in the classroom or … interfere[s] with the regular operation of the schools generally.

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969): It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Board of Education of Island Trees Union Free School Dist. v. Pico, 457 U.S. 853 (1982) (plurality opinion): Our Constitution does not permit the official suppression of ideas. … In brief, we hold that local school boards may not remove books from school library

shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

Connick v. Myers, 461 U.S. 138 (1983): [When a public employee speaks as a citizen on a matter of public concern, his/her speech is constitutionally protected. Employee complaints about office policy or personal working conditions are not protected.]

Rust v. Sullivan, 500 U.S. 173 (1991): [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the function of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

Waters v. Churchill, 511 U.S. 661 (1994): It is permissible for a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

II. Significant Lower Court Decisions Involving "Academic Freedom"

A. **Grading. The First Amendment does not protect the right of teachers to decide what grade to assign to their students**.

Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986) (professor claimed he was nonrenewed because "he refused to inflate his grades or lower his expectations and teaching standards." The court found no First Amendment violation: A university can decide to serve the best and the brightest or a mere average population. "[M]atters such as course content, homework load, and grading policy are core university concerns." To cede that authority to individual professors would "constrict the university in defining and performing its educational mission." There is a distinction between refusing to conform to university standards and publicly complaining about low standards. The latter is constitutionally protected; the former is not.)

Brown v. Armenti, 247 F.3d 69 (3rd Cir. 2001) (university professor has no First Amendment right to refuse the university president's order to change a student's grade; here the "government" is the speaker, and it is free "to regulate the content of what is or is not expressed … when it enlists private entities to convey its own message")

Wozniak v. Conry, 236 F.3d 888 (7th Cir. 2001) (rejecting First Amendment and due process claims of university professor stripped of teaching and research responsibilities

for refusing to follow university's grading policies; professor has no "right to grade as he pleases…, [rather] each university may decide for itself how the authority to assign grades is allocated within its faculty")

B. Curricular Matters. The First Amendment does not protect the right of teachers to decide matters relating to the curriculum.

Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) (it is not a violation of the First Amendment to nonrenew college professor for refusing to fully cover the assigned text and the course syllabus. Disputes with the administration about course content involved plaintiff's speech as a teacher and not as a citizen, and thus were not "matters of public concern" under Pickering)

Edwards v. California University of Pennsylvania, 156 F.3d 488 (3rd Cir. 1998) ("a public university professor does not have a First Amendment right to decide what will be taught in the classroom. … [N]o court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates. … Therefore, although Edwards has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom. …. [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.... Since the University's actions in the instant case concerned the "content of the education it provides, we find that the University was acting as speaker and was entitled to make content-based choices in restricting Edwards's syllabus. … In sum, caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University's dictates.")

Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (university order prohibiting professor from interjecting his personal religious beliefs into classroom discussion and directing him to stop holding optional classes where the subject matter of his course (physiology) is taught from a "'Christian perspective" does not violate the professor's right to academic freedom. When a professor and a university "disagree about a matter of content in the courses he teachers, [then] the university must have the final say in such a dispute."

California Teachers Association v. Davis, 271 F.3d 1141 (9th Cir. 2001) (California's Proposition 227, which requires that non-English speaking students be taught only in English and which authorizes parental lawsuits for damages and attorneys' fees against teachers who "willfully and repeatedly" violate the requirement, does not violate the First Amendment; applying Hazelwood analysis and giving the statute a narrow construction, court holds that statute is not unconstitutionally vague on its face)

Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995) (The court held that "[a]n instructor's choice of teaching methods does not rise to the level of protected expression" under the First Amendment.)

C. Mandatory Use of Student Evaluations. The First Amendment does not protect the right of teachers to refuse to use student evaluations.

Wirsing v. Board of Regents of the University of Colorado, 739 F.Supp. 551 (D. Colo. 1990) (requiring university professor to use standardized forms for student evaluation of teachers does not violate professor's right to academic freedom, even though she teaches that learning and teaching cannot be evaluated by any standardized approach. To hold otherwise would violate the academic freedom of the *university.*)

Yarcheski v. Reiner, 669 N.W.2d 487 (S.D. 2003) (use of student surveys in evaluating professor's performance did not violate his right to academic freedom)

D. The Connick "Public Concern" Test

Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) (university did not violate a professor's right to academic freedom by demoting him and reducing his pay because he sent insulting letters to a former student demanding a "proper" apology for comments she made in class and subsequently assigned her a grade of "F" for what he deemed to be her inadequate compliance; such speech did not touch on matters of public concern under Connick)

Keating v. University of South Dakota, 386 F.Supp.2d 1096 (D.S.D. 2005) (state university professor's statement in e-mail to department chair that his supervisor was a "lying backstabbing sneak" did not touch on a "matter of public concern," for purposes of professor's claim that nonrenewal of his employment contract due to "lack of civility" on basis of that statement violated his First Amendment speech rights; he also loses under Pickering)

E. The Pickering Balancing Test

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2000) (upholding suspension of college English professor for using vulgar words in the classroom and for disseminating student's sexual harassment complaint and professor's sarcastic response; the professor's interest in free speech was outweighed under Pickering by college's interests in maintaining a learning environment free of sexual harassment and protecting student confidentiality; also profane speech in the classroom is not constitutionally protected)

Piggee v. Carl Sandburg College, 464 F.3d 667 (7th Cir. 2006) (community college teacher was nonrenewed after she gave gay student several pamphlets promoting the views that homosexuality is sinful and urging that homosexuals reform their ways and

communicated the same sentiments to him verbally; student filed a sexual harassment complaint claiming that her comments and pamphlets made him dread class, feel unsafe and unhappy, and avoid the teacher "like the plague"; the court held that the teacher's speech "disrupted" the student's education and impaired her ability to teach and therefore was not protected under Pickering)

Schrier v. University of Colorado, 427 F.3d 1253 (10th Cir. 2005) (upholding termination of university professor for criticizing proposed relocation of medical school campus; his speech impaired harmony among co-workers and injured working relationships; the court explicitly refused to recognize that "professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees."

III. Speech Involving Controversial or Disfavored Ideas

Jeffries v. Harleston, 52 F.3d 9 (2nd Cir. 1995) (university professor's off-campus speech, which was hateful and repugnant to Jews, was not protected speech under Pickering because university officials reasonably believed that it was disruptive to the workplace, accordingly his removal as department chair is affirmed. The court held, "In the district court, the jury's central finding was that all 15 defendants were 'motivated' to demote Jeffries by a 'reasonable expectation' that the Albany speech would harm CUNY. This jury finding establishes that because the defendants were motivated by a reasonable prediction of disruption, they did not demote him for an improper retaliatory motive. Moreover, we hold that, as a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the Albany speech might have had.")

Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001) (it is a violation of the First Amendment for college to nonrenew contract of nontenured adjunct instructor in retaliation for using terms "nigger" and "bitch" during classroom lecture on "language and social deconstructionism" (examining how language is used to marginalize minorities); instructor was speaking on matter of public concern under Connick and his speech did not interfere with the performance of his duties under Pickering)

Dube v. State Univ. of N.Y., 900 F.2d 587 (2d Cir. 1990) (Dube taught a course that identified three forms of racism: Nazism, Apartheid and "Zionism in Israel." A Jewish professor complained, and the media publicized the controversy. Jewish organizations and various legislators called for Dube's termination. University president issued press release condemning Dube's views, and the course was later removed from the curriculum. Faculty Committee recommended that Dube receive tenure, but tenure was denied by the administration. Dube sued claiming that he was denied tenure in violation of the First Amendment "based on his discussion of controversial topics in his classroom." On an interlocutory appeal, the court held that Dube can prevail if he can show that he was denied tenure because of "the content of his classroom discourse," relying on Keyeshian's

holding that the First Amendment does not permit "a pall of orthodoxy" over the free exchange of ideas in the classroom.)

Levin v. Harleston, 966 F.2d 85 (2nd Cir.1992) (Levin is a college professor who has published several controversial writings suggesting that "the average black is significantly less intelligent than the average white" and opposing affirmative action. On several occasions, his classes were disrupted by angry demonstrators chanting "Levin is a racist. Levin must not teach here." In response, the administration provided a security guard for Levin, but also created "shadow sections" of Levin's course taught by other professors to allow students the opportunity to avoid being taught by Levin. In addition, the administration appointed a faculty committee to determine whether Levin's views affected his teaching ability. Levin sued, and the court of appeals held that his speech was constitutionally protected because there was no evidence that his expression of racially denigrating theories harmed students or the educational process within the classroom. The school's action of creating alternative classes for professor's students to transfer into, with intent and consequence of stigmatizing Levin because of his politically-incorrect expression of ideas, violated his free speech rights.)

Chiras v. Miller, 432 F.3d 606 (5th Cir. 2005) (rejecting challenge to Texas State Board of Education decision refusing to place science textbook on the approved list for use in the state's schools; plaintiffs claimed that the textbook was targeted by right wing groups because it was not sympathetic to the oil and gas industry and over emphasized environmental protections; the court held that textbooks constitute "government speech," and in deciding on its own message, the government is free to engage in viewpoint discrimination and can "promote policies and values of its own choosing")

IV. Garcetti v. Ceballos (2006): Can colleges and universities require professors to "read from a script" and prohibit professors from sharing their personal views in the classroom or while performing any other "official" business?

A. In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), the Supreme Court held that when a public employee is speaking as a part of his "official duties," *i.e.*, is just doing his job, then the employee's speech is entitled to no First Amendment protection at all, and can be the basis for discipline or discharge. The Court added, however, that this rule may not apply to higher education faculty performing their official duties of teaching and research and explicitly reserved that question for a later date.

In his dissenting opinion in Garcetti, Justice Souter wrote: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to

official duties.'" 126 S.Ct. at 1969. In response, Justice Kennedy wrote (for the majority):

> Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. 126 S.Ct. at 1962.

B. Mayer v. Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2007) (under Garcetti, K – 12 teachers do not have the constitutional right to determine what they say in the classroom; they are merely 'hired speakers" who "must stick to the prescribed curriculum" and refrain from expressing their "own views" on the subject under discussion; accordingly, the district did not violate teacher's First Amendment rights by nonrenewing her in retaliation for expressing her personal opposition to the War in Iraq in class)

C. Pagani v. Meriden Bd. of Educ., 2006 WL 3791405 (D.Conn. 2006) (since teachers are mandatory reporters of suspected child abuse under state law, teacher's report of suspected abuse to the Department of Children and Families was made pursuant to his "official duties" and thus was entitled to no First Amendment protection);

D. Political Buttons in the Classroom. The First Amendment probably does not protect the right of teachers to wear political buttons in the classroom, at least at the K – 12 level.

California Teachers Assn. v. Governing Board of San Diego Unified Sch. Dist., 45 Cal. App. 4th 1383, 109 Ed. Law Rpt. 1335 (1996) (upholding ban on teachers wearing political buttons while "engaged in curricular activities" or in "instructional settings"; a school has the right to disassociate itself from "any position other than neutrality on matters of political controversy"; in the classroom, the teacher bears the imprimatur of the school)

Green Township Educ. Assn. v. Rowe, 746 F.2d 499, 142 Ed. Law Rptr. 418 (N.J. Super. A.D. 2000) (upholding ban on teachers wearing buttons proclaiming: "NJEA SETTLE NOW" (during contract negotiations) in the presence of students while on school premises)

Communications Workers of America v. Ector County Hosp. Dist., 467 F.3d 427 (5th Cir. 2006) (upholding public hospital's ban on wearing all buttons (including "union yes" button) in the workplace)

V. Academic Freedom Model Contract Language

A. Sample contract language from NEA higher education affiliates is collected in a document entitled "Academic Freedom in Collective Bargaining Agreements -- Summary and Analysis" from the NEA Higher Education Contract Analysis System (HECAS) (dated August, 2006), available from NEA Higher Education.

B. Here are examples of some of the provisions that should be included in a "good" academic freedom contract provision:

1. Academic Freedom. Academic freedom shall be guaranteed to teachers, and no special limitations shall be placed upon study, investigation, presenting and interpreting facts and ideas concerning human society, the physical and biological world and other branches of learning subject to accepted standards of professional responsibility. The right to academic freedom herein established shall include the right to support or oppose political causes and issues outside of the normal classroom activities.

2. Classroom Presentation and Discussion. As a vital component of academic freedom, teachers shall be solely responsible for decisions regarding the methods and materials used for the instruction of students. Accordingly, employees shall be guaranteed full freedom in classroom presentations and discussions and may introduce issues which have economic, political, scientific or social significance, or otherwise controversial material relevant to course content.

3. Personal Expression. No teacher shall be prevented from wearing pins or other identification or symbolism in expression of membership in the association, religious orders, political systems, or sympathy with social causes or traditions in or outside the classroom. In performing teaching functions, teachers shall have reasonable freedom to express their opinions on all matters relevant to the course content in an objective manner. A teacher, however, shall not utilize her/his position to indoctrinate students with her/his own personal, political and/or religious views.

4. Nondiscrimination. No teacher will be subject to discrimination or harassment in any terms or conditions of employment because of her/his personal opinion or scholarly, literary or artistic endeavors.

5. Personal Life. The personal life of a teacher is not an appropriate concern of the Board for purposes of evaluation or disciplinary action unless it prevents the teacher from performing her/his duties.

6. Censorship. Employees shall not be censored or restrained in the performance of their teaching functions solely on the ground that the material discussed and/or opinions expressed are distasteful or embarrassing to the school administration or to the school's public relations.

7. Alteration of Grades. Grades given a student by a teacher shall be final and not subject to alteration unless fraud, bad faith, incompetency or mistake can be shown on the part of said employee.

8. Monitoring and Observation of Teacher. All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher. The use of eavesdropping, public address, audio systems, and similar surveillance devices shall be strictly prohibited. No mechanical or electronic device shall be installed in any classroom or brought in on a temporary basis which would allow a person to be able to listen or record the procedures in any class.

9. Internet Usage. Academic freedom, subject to accepted standards of professional responsibility, will be guaranteed to bargaining unit members, and no special limitations will be placed upon study, investigation, presentation and interpretation of facts and ideas, including email and Internet usage**.**

10. Teacher Assessment. The Board and the Association recognize that the ability of pupils to progress and mature academically is a combined result of school, home, economic and social environment and that teachers alone cannot be held accountable for aspects of the academic achievement of the pupil in the classroom. Test results of academic progress of students shall not be used in any way as evaluative or the quality of a teacher's service or fitness for retention.