## **TNACUA** Webinar





# Can You Hear Me Now? Hot Topics in the World of Faculty Free Speech and Academic Freedom

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# Agenda

- Relevant Policies and Laws
- Legal Overview
- Hot Topics in the Faculty World
- Social Media Use
- Impact on External Stakeholders
- Practical Suggestions for Managing These Issues on Campus
- Audience Q&A



## **Relevant Policies and Laws – Free Speech and Academic Freedom**





# **Freedom of Speech**

- First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- Applies to all **public** colleges and universities.
- Many private colleges and universities may have similar policies.



# **Public Employees**

• Garcetti v. Ceballos, 547 U.S. 410 (2006). "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."



# ...But does the Garcetti opinion apply to scholarship or teaching?





# **Speech as a Private Citizen**

Is the speech a matter of public or private concern?





# Speech as a Private Citizen Cont.

- Snyder v. Phelps, 562 U.S. 443, 453 (2011). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community; OR subject of legitimate news interests; that is, a subject of general subject of general interest and of value and concern to the public."
- Courts evaluate "content, form, and context of [the] speech as revealed by the whole record" when deciding whether speech is of public or private concern.



# **Balancing Test**

(1) Did the employee speak on a matter of public concern?

(2) If yes, "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."





### **The Balancing Test on Campus**

Did the speech create an adverse impact on university operations?

Other state laws may help define adverse impact or disruption.



# **Examples of Speech NOT of Public Concern**

**Criticisms of internal management decisions** 

Public employee complaints about the structure of purely internal administrative bodies

Internal budgetary allocations within a college

Management practice or decisions allocating management responsibility to certain individuals

See Gardetto v. Mason, 100 F.3d 803, 813-14 (10th Cir. 1996); Clinger v. New Mexico Highlands Univ., 215 F.3d 1162, 1166-67 (10th Cir. 2000).



# **Relevant Case Law**

- *Pickering v. Board of Education*, **391 U.S. 563 (1968)**. "[A] teacher's exercise of his rights to speak on issues of *public importance* may not furnish the basis for his dismissal from public employment."
- Connick v. Myers, 461 U.S. 138 (1983). "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."
- Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022). The coach's prayer was private speech, not within the scope of his official duties, and did not seek to convey a government-created message.



#### **What About Private Universities?**

Contracts: Usually handbooks, bylaws, or policies Tenure Rights: Basis for discipline and discharge



# **Relevant Case Law**

#### • McAdams v. Marquette University, 914 N.W.2d 708 (Wis. 2018).

- Wisconsin Court adopted the AAUP standard
- Arguably much higher burden than the First Amendment, at least for statements outside the classroom or administrative context.
- But see...
  - Crenshaw v. Erskine College, 850 S.E.2d 1 (S.C. 2020). "Rather, this is an ordinary breach of contract case in which the terms of the contract are set forth in The College Faculty Manual"
  - Wang v. University of Pittsburgh et al., No. 2:20-cv-1952 (W.D. Pa. Dec. 21, 2021). "The actual malice standard holds a high constitutional bar under the First Amendment, and Dr. Wang cannot satisfy this burden based on the allegations in the Amended Complaint."



# **Other Laws That May Impact Speech**

State laws that apply free speech principles (e.g., CA's Leonard Law)

State and federal anti-discrimination laws

Public policy laws (usually focused on discharge)

State laws regulating curriculum, subjects, or other aspects of educational decisions



#### **Other Laws That May Impact Speech**

Whistleblower Statutes: These statutes generally prohibit employers from taking action against an employee for making complaints or reporting conduct that is unlawful.





## **Other Laws That May Impact Speech**

- National Labor Relations Act
  - Only applies to statutory "employees" as defined in the Act.
  - National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980). Employers may not punish covered employees for engaging in concerted activity. BUT this may not cover faculty, who may instead be seen as managerial.



# **University Employee Speech**





# What is Academic Freedom?

"Academic freedom is the freedom of a teacher or researcher in higher education to investigate and discuss the issues in his or her academic field, and to teach and publish findings without interference from administrators, boards of trustees, political figures, donors, or other entities. Academic freedom also protects the right of a faculty member to speak freely when participating in institutional governance, as well as to speak freely as a citizen."

Definition taken from AAUP (https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom)



#### **Academic Freedom vs. First Amendment**

#### Academic Freedom

#### First Amendment



# **Academic Freedom: Relevant Case Law**

- Garcetti v. Ceballos, 547 U.S. 410 (2006). Public employees do not have a First Amendment protection for speech issued as part of their official duties.
- Sweezy v. New Hampshire, 354 U.S. 234 (1957). The Supreme Court recognized the significance and protections of academic freedom
  - Justice Frankfurter's concurrence noted that "a free society [depends] on free universities" and that institutions were shielded, in part, from the intervention of governmental authorities, which would be deleterious to the "intellectual life" of the university. He concluded "[i]n the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority."



#### AAUP Statement of Principles of Academic Freedom and Tenure (1940)

- 1. Teachers are entitled to **full freedom in research and in the publication of the results**, **subject to the adequate performance of their other academic duties**; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- 2. Teachers are entitled to **freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject**. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
- 3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.



#### **Where Do Academic Freedom Guidelines Live?**

An Institution's Faculty Handbook

University Policies and Procedures AAUP Statement and Principles of Academic Freedom and Tenure



## Hot Topics in the Faculty World

This is a rapidly changing area....



- Objections to recent executive orders:
  - (1) Ending Illegal Discrimination and Restoring Merit-Based Opportunity
  - (2) Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- There are carve outs for academic institutions, but they are limited:
  - The executive order on Ending Illegal Discrimination and Restoring Merit-Based Opportunity states that it "does not prevent...institutions of higher education from engaging in First Amendment-protected speech" and also does not "prohibit persons teaching at a Federally funded institution of higher education as part of a larger course of academic instruction from advocating for, endorsing, or promoting the unlawful employment or contracting practices prohibited by this order."



- Gaza related speech
  - Faculty joined students last year in Gaza related protests.
  - Faculty also joined encampments and were arrested as part of those protests.
- In general, expect faculty to support student protests for many topics.



- Protesting protest rules
  - Following last year's encampments, many schools put in place new policies governing protests on campus.
  - Even when they generally followed permissible time place and manner restrictions, students and faculty took issue, calling the restrictions a limitation on expression.
  - Faculty and students have intentionally violated these restrictions
    - For example, participating in silent protests lasting just a bit longer than the time they were supposed to end.



#### State laws

- Certain state bills and laws have sought to exert oversight over curricula.
- Several states have passed laws that prevent or limit teaching about diversity, equity, and including (DEI) or gender identity.



- On the other hand, several states have protections for freedom of speech in academic settings:
  - Adams v. Trustees of the University of North Carolina at Wilmington, 640 F.3d 550 (10th Cir. 2011).
  - Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).
  - Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).
  - Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001).



#### Ties to labor

- AAUP has issued statements and resources on this topic.
- Faculty have generally expressed concern that the increased use of non-tenured positions – lecturers, adjuncts – allow administrators to lean on them to curtain academic freedom, change curricula, and generally comply with the Administration's orders.



- Immigration
  - President Trump rescinded a decades-old policy that designated colleges as "sensitive" areas not subject to deportation activities except in rare cases.
  - Immigration experts do not expect to see sweeping raids on campuses, but some institutions have changed policies – or have articulated existing policies.
  - Some faculty groups have hosted "Know Your Rights" sessions.



# Where is This Speech Going to Take Place?

In the Classroom

On Departmental Pages (Sanctioned by the University or Not)

On Departmental Social Media (Sanctioned by the University or Not)

On Personal Social Media

Faculty Senate or the Link – Administrative Roles on Campus

Statements to the Media Protests (Potentially Alongside Students)



# For All These Locations...

- Was the speech made pursuant to official university duties/as an employee? If not, speech should be labeled as such.
- In certain disciplines, there could be impacts on research.
- Also consider how it comports with faculty handbook, codes of conduct, etc. – could have a contract claim if there's a violation.
- Likely to elicit union support, as well as outside organization support (e.g., FIRE).



# **Social Media Use by Faculty**





## **Social Media Use by Faculty Cont.**

For Faculty Use Outside of Class

Is the site hosted by the university or the faculty member? Is the site used for faculty to describe or promote his or her research or scholarship



# **Social Media Use by Faculty Cont.**





### Who are the External Stakeholders?





#### What Impact Could External Stakeholders Have?

- Significant impact on funding
- Faculty speech has triggered the withdrawal of considerable bequests, especially as related to the ongoing conflict in Gaza
- Reputational harm, including impacts on recruiting, admissions, and athletics
- Potential labor charges

### How Do You Balance These Concerns?

#### Communication

Be guided by institutional values and mission

Understand risk tolerance

Communicate to the "reasonable person" audience



#### How Do You Balance These Concerns?

- Socialize changes
- Give external stakeholders the what you're doing, the why, and the how especially concerning legal restrictions
  - "No comment" is not an option
- Leverage senior administrators



# **Practical Suggestions for Managing These Issues on Campus**

- Know the law comply with it strictly
- Look for Department of Education guidance
- There's a lot at stake here especially with executive orders and impending administrative enforcement activity
  - Be open with faculty, socialize challenges that you're facing
  - Make faculty feel you're on the same team
  - Litigation, investigations, etc. aren't good for anyone



# **Practical Suggestions for Managing These Issues on Campus**

- Be reasonable about time, place, and manner restrictions
- But also balance harassment claims
- Restrict impact not content
- Take it day by day



# Questions?



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