NACUA

Spring 2020 CLE Webinar Series

April 22, 2020

“I Can Yell 'Fire,' Right?:” The Practicalities of Implementing the Laws and Policies Governing Employee and Faculty Speech on Campus

Contents

NACUA WEBINAR SERIES

Wednesday, April 22, 2020

"I CAN YELL 'FIRE,' RIGHT?": THE PRACTICALITIES OF IMPLEMENTING THE LAWS AND POLICIES GOVERNING EMPLOYEE FACULTY SPEECH ON CAMPUS.

SPEAKER BIOGRAPHIES

Charles Barber graduated from Howard University School of Law and clerked for the Hon. Gabrielle K. McDonald, U.S. District Court, Southern District of Texas in 1979 – 81. He later worked as an associate with Debevoise & Plimpton in New York City before returning to the District of Columbia to work as university in-house counsel at Howard University. In 1996, Mr. Barber transferred to the Office of the General Counsel at George Washington University, and has been serving as its Deputy General Counsel since 2007. Mr. Barber has taught Higher Education Law in both the George Washington School of Law and the GW Graduate School of Education and Human Development for the past seven years. He also served on the NACUA board of directors from 2012 – 2016.

Christina Riggs is vice chair of Saul Ewing Arnstein & Lehr's Higher Education Practice. In this role, Christina partners with higher education clients in their day-to-day operations by providing advice on student affairs issues, campus safety, the Clery Act, FERPA, state and federal discrimination laws, Title IX, and Title IV. As a litigator, Christina draws on her experience to assist institutions in proactively managing high-profile exposure, minimizing risks, creating policies and procedures to protect against those risks, and identifying escalating issues. She approaches projects with the goal of providing strategic and practical advice. Relevant to the topic of Christina's NACUA session, she routinely serves as an external investigator on a variety of issues, including, but not limited to, sexual- and gender-based harassment and Clery Act compliance. Christina also regularly leads schools through governmental investigations brought by the U.S. Department of Education and has successfully defended multiple sex- and race-based complaints before OCR to results of "insufficient evidence to support the claims." Christina holds a B.S. in Biology, magna cum laude, from Lehigh University, and J.D. magna cum laude from Villanova University School of Law. Outside of work, Christina is an avid runner and triathlete.

Destinee Waiters is the General Counsel and Associate Vice President of Compliance at Texas Woman's University and has been a NACUA member since 2009. Prior to assuming this position, she served as the Associate General Counsel of the Houston Community College System and has worked intimately with both elected and appointed boards in the public higher education arena. Ms. Waiters is a member of the Board of Directors of the National Association of College and University Attorneys (NACUA). She currently serves as a member of the NACUA Legal Education Committee and the Board Advisory Group on the Business of Higher Education. Prior to her university work, she served as Legislative Staff for Texas State Representative Yvonne Davis. Ms. Waiters has served on the NACUANOTES Editorial Board for four years, as well as the Web Page Legal Resources Committee. In addition, she has spoken at NACUA events on the topic of university compliance. She has also served as the Affinity Group Leader for African American Attorneys since 2011. Additionally, she has spoken at the National Hispanic Bar Association's Corporate Counsel Conference, has participated as a member in the Houston Bar Association's Lawyers Against Waste Committee, and held an advisory board member position for Best Buddies of Texas in Houston. Other non-profit service includes acting as a special need running coach for the Houston Fit Marathon and Half Marathon Training Program.

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"I Can Yell 'Fire,' Right?": The Practicalities of Implementing the Laws and Policies Governing Employee and Faculty Speech on Campus

Charles Barber, *Moderator*, Deputy General Counsel, George Washington University

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Destinee Waiters, Associate General Counsel, Suffolk University

Public Employee Speech Doctrine: *Pickering/Connick/Garcetti*

Pickering (1968)

Public EMPLOYEES	Public EMPLOYERS
Retain First Amendment rights to speak out on public issues.	Retain legitimate grounds to exercise authority for employees whose speech crosses the line

==========

The BIG question … Where is the line?

- It depends! It's a balancing act!
- (Yes, we recognize that this is the most annoying answer for any practitioner)

Public Employee Speech Doctrine: *Pickering/Connick/Garcetti*

Connick (1982)

The SPEECH	The EMPLOYEE
Must be a matter of public concern	Must be speaking as a citizen and not as an individual concerned with their own private interests

==========

The BIG question … What constitutes a matter of public concern?

- One that "relat[es] to any matter of political, social, or other concern to the community"
- Determined by the content, form, and context of a given statement

Public Employee Speech Doctrine: *Pickering/Connick/Garcetti*

Garcetti (2006)

Remember this …	*Garcetti* added …
The employee must be speaking as a citizen and not as an individual concerned with their own private interests	"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."

The BIG question … What constitutes official duties?

- The Court left that question open. (Not very helpful!)
- But the Court does say that the inquiry should be a "practical one" and should focus on the duties one is "expected to perform"

Impact of *Garcetti* on Academic Freedom Circuit Split

9th Circuit	3rd, 6th, and 7th Circuits
• Garcetti does **NOT** apply to teaching and academic writing* that is performed pursuant to the official duties of the professor. • *May be broader than traditional scholarship • **So what governs this speech? Pickering balancing test**	• Garcetti **DOES** apply to teaching and academic writing* that is performed pursuant to the official duties of the professor.

Private Institutions Approach to Academic Freedom

Typically, private institutions have policies or statements supporting academic freedom:

- **Here is one example:**

  A faculty member shall enjoy freedom of expression. In the classroom (physical, virtual, and wherever located), a faculty member's exposition shall be guided by the requirements of effective teaching, adherence to scholarly standards, and encouragement of freedom of inquiry among students. In speaking and writing outside the University, a faculty member shall not attribute his or her personal views to the University.

  A faculty member shall enjoy freedom of investigation.

  Consistent with academic freedom, faculty members should show respect for the opinions of others and foster and defend intellectual honesty, freedom of inquiry and instruction, and the free expression of ideas.

Private Institutions Approach to Academic Freedom

Private institutions may also include language limiting or clarifying the scope:

Here is an example:

> In carrying out their duties, faculty members and other members of the University community do not have the right to engage in expression that
>
> 1) violate clearly established law (for example, by making criminal or tortious threats or by engaging in tortious defamation or prohibited sexual harassment as defined by University policy),
>
> (2) constitute a genuine threat to the safety of members of the University community or other persons, or
>
> (3) violate University policies that are viewpoint-neutral and content-neutral and are demonstrably necessary (A) to enable the University to maintain the integrity of scholarly standards of teaching and research, or (B) to regulate the time, place, and manner of expression in order to prevent disruptions of the University's academic and educational functions, or (C) to enable the University to comply with applicable federal and local laws and otherwise fulfill its administrative responsibilities.

Private Institutions
Approach to Academic Freedom

(continued example)

PROFESSIONAL RESPONSIBILITIES

Members of the faculty are responsible for maintaining standards of professional ethics and for the fulfillment of faculty responsibilities.

Termination for Adequate Cause

Adequate cause shall mean unfitness to perform academic duties because of:

a) incompetence;

b) lack of scholarly integrity;

c) persistent neglect of professional responsibilities under this Code; or

d) gross personal misconduct that destroys academic usefulness.

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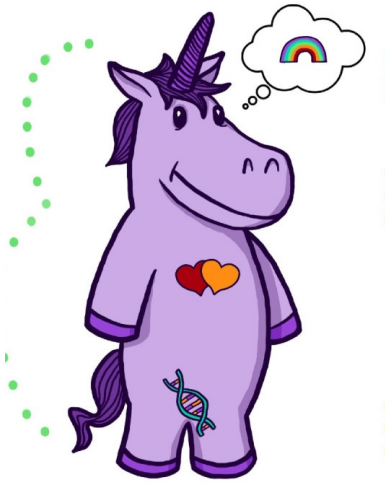
Updated Case Law
2019/2020

- **Pronouns (her, him and they)**
- **Social Media (Facebook, Twitter and Instagram)**
- **Classroom Speech**
- **Whistleblower Retaliation**

Regulating a professor's use of pronouns in the classroom

Kluge v. Brownsburg Community School Corporation
S. D. Ind. Jan. 8. 2020 (Motion to Dismiss)

- Religious Beliefs v. Policy on Gender Affirming Pronoun Usage
  - School may regulate a teacher's interaction with students inside the school and in context of school activities
    - Reasonable Accommodations may be appropriate



Regulating a professor's use of pronouns in the classroom (continued)

Meriwether v. Trustees of Shawnee State University
(S. D. Ohio Sept. 5, 2019) (motion to dismiss)

Issue #1: Plaintiff spoke pursuant to his "official duties" (court considered the following)

1. plaintiff's employment duties (university professor)
2. the setting of plaintiff's speech (a university classroom),
3. the audience (the students in his Political Philosophy class),
4. the impetus for the speech (to address students in a manner that plaintiff considered to be an important pedagogical tool), and
5. the general subject matter of the speech (titles and pronouns for addressing students in his classroom).

Regulating a professor's use of pronouns in the classroom (continued)

Meriwether v. Trustees of Shawnee State University
(S. D. Ohio Sept. 5, 2019) (motion to dismiss)

Issue #2: **Plaintiff's speech did not implicate the broader social concerns surrounding the issue because:**

1. it was limited to titles and pronouns used to address one student in plaintiff's class;
2. the speech was directed to plaintiff and heard only by the student and her fellow students; and
3. absent any further explanation or elaboration, the speech cannot reasonably be construed as having conveyed any beliefs or stated any facts about gender identity

* School gave the professor the option to stop using gender-based titles during class altogether*

Responding to an employee's speech on their personal social media

Wozniak v. Adesida
(7th Cir. 2019) (summary judgment)

Facts: A professor harassing and confronting students for not selecting him for a teaching award:

- Speech which concerns "personal job related matters" is outside the scope of the First Amendment, and although the teaching award was important to the plaintiff; it was not a matter of public concern

Responding to an employee's speech on their personal social media

Higbee v. Eastern Michigan University
(E. D. Mich. 2019) (motion to dismiss)

Facts: A professor's post about the school's official response to an on-campus incident

1. using a public forum to comment on the university's response to recent racial incidents was unlikely to be within a history professor's official duties (private citizen)
2. expressing an opinion that the university administrators have perpetuated racial conflict by failing to adequately address racism on campus (matter of public concern)
3. "in the academic setting dissent is expected, and, accordingly, so is at least some disharmony." (Pickering Balancing Test)

Responding to an employee's speech on their personal social media

Isabell v. Trustees of Indiana University
(N. D. Ind. Jan. 7, 2020) (summary judgment)

Facts: Applicant claims pro-life blog post cost her a full-time position

- Committee members (one in particular) failed to adhere to University Policy regarding asking interview questions from a pre-determined list.

- A jury will hear the First Amendment retaliation claim of the whether the chair of the committee treated plaintiff differently in her interview than other candidates because she had read plaintiff's blog post and asked plaintiff how she would teach controversial topics, when she did not ask that question to any other candidate.

Limitations of In-Class Speech?

Buchanan v. Alexander
(5th Cir. 2019) (summary judgment)

Facts: Associate professor with tenure used profanity and discussed her sex life and the sex lives of her students during her class (Early Childhood Program).

- An internal investigation, and a subsequent faculty hearing, found that Plaintiff's action violated the university's sexual harassment policy and created a hostile learning environment. Plaintiff was dismissed.
- Professors are not permitted to say anything and everything simply because the words are uttered in the classroom context.
- The professor's use of profanity and sex life discussions were not related to the subject matter or purpose of training Pre K–Third grade teachers.

First Amendment and Whistleblowers

Plouffe v. Cevallos:
(3d Cir. June 12, 2019) (summary judgment)

Facts: Plaintiff was on a hiring committee and filed a complaint about hiring an unqualified candidate who was well liked by the other committee members. He was later fired.

- Plaintiff said he was speaking as a "citizen" when he made the report.
- The court disagreed.
- Plaintiff was on the search committee as part of his employment and was only aware of the misconduct he reported because of his role on that committee.
- Plaintiff spoke as an employee, and not as a private citizen.

First Amendment and Whistleblowers

Conte v. Bergeson
(2d Cir. Mar. 13, 2019) (summary judgment)

Facts: Plaintiff complained to the State Board of Pharmacy about a coworker's alleged illegal dispensation of medication. Plaintiff's contract not renewed.

- Plaintiff argued that her grievances were a matter of public concern.
- But the court focused on the fact that this fell within her job duties.
- Her complaint to the Board concerned the pharmacy's failure to abide by applicable rules and regulations, which were squarely part of her job duties.

Hypothetical #1

- Corona University announces significant modifications to its academic program in response to the pandemic emergency, and outlines limited technical support for departments not considered a "core strength." The university had previously decided that its core strength focused on STEM programs at the institution.
- Professor Humanities is incensed that the decisions made undercut the institution's commitment to the arts and humanities. He drafts a "manifesto" criticizing the university's actions, and programs his computer to engage in "Zoombarding," logging onto each class conducted by ZOOM in order to post the manifesto during the first five minutes. In addition, during Faculty Senate meetings conducted by ZOOM, Professor Humanities disrupts the meetings by bombarding the meeting with the manifesto.
- The Provost brings disciplinary charges against Professor Humanities for his actions disrupting classes and the Faculty Senate meeting. His privileges for accessing the university computer and networks are revoked, and he is placed on administrative leave. Members of the professor's department stage a virtual "sit out" in protest of the disciplinary proceedings. Professor Humanities hires counsel threatening legal action unless the disciplinary actions are lifted.

Hypothetical #1

- **The Provost seeks your advice on how to respond.**

- **How would you advise the Provost on the following questions?**
  - Did Professor Humanities engage in protected speech?
  - What consideration should be given to the protest "sit out" by members of the department?
  - What university policies should be considered in evaluating Professor Humanities' actions?

Hypothetical #2

- ***Hey, all you cool cats and kittens.***

- Ocelot University recently started receiving complaints about an online course taught by Joe Exotica, tenured professor in the University's School of Management.

- The Department Chair received the following complaints:
  - Joe repeatedly misgenders trans students while calling on them during the Zoom course and while addressing them in course correspondence, despite the University's Policy requiring faculty to address all students by their chosen pronouns;
  - Joe's in-class and on-camera rants questioning the validity of bisexuality and Joe's detailed discussions of his relationship with his two husbands; and
  - Joe's repeated discussions of his wild game side business coupled with his persistent and visceral tirades about one of his competitors, Carol Basket.

Hypothetical #2 (continued)

- Initially, school officials called Joe to talk about the complaints. As they spoke with Joe about his violation of the school's Chosen Name Policy; he countered that his religious viewpoints prohibit him from acknowledging trans-individuals and that his first amendment rights and academic freedom allow him to address anyone in his classroom how he sees fit.
- Joe and the university settle on a compromise which allows Joe to use gender-neutral greetings during the Zoom class and to address all students by their last name on all course correspondence.
- School officials also admonished Joe for discussing his personal relationships and general sexuality in the classroom. Additionally, they cautioned Joe about his use of his classroom time to advertise his wild game side business.
- Joe responded by rolling his eyes and saying "fine" as he logged off of the Zoom call. At the end of the day, everything seemed fine.……

Hypothetical #2 (continued)

- Was the university approach to the pronoun issue defensible?
- What about the approach to the other complaints?
- Did the university violate Joe's Academic Freedom by admonishing him about the discussions of his relationships and sexuality during the class?

Hypothetical #2 (continued)

- The next day however a student from Joe's management class sends the Dean a few disturbing screenshots and links from Joe's personal social media account; they are friends.
- One of the screenshots includes a posting from Joe from a year ago criticizing the University for being overly politically correct because of the University's response to a bias incident on campus.
- In another post, Joe shared a meme containing hateful comments and opinions about the LGBTQIA+ community.
- There was also a post with a link to a YouTube video that appeared to have been made last night after Joe's meeting with school officials as described above. In the video, Joe can be seen waiving firearms, setting off explosives and ranting that he has the right to say what he wants and that if someone from the University admonishes him again and/or tries to take away his free speech rights; "it will be like another Waco".
- There was also a post from Joe that appears to be a solicitation for the murder of an individual named Carol Basket where he includes his university email and phone number for prospective assailants to contact him.

Hypothetical #2 (continued)

- After an investigation, the Provost recommends terminating Joe's employment for the following reasons:
  - Criticizing the University for being overly politically correct
  - For the hateful meme he shared on his page
  - The Waco comment on the video
  - The post soliciting murder for hire
- **What advice do you give?**

Hypothetical #3

Impacted College, like many other higher education institutions, has moved to online learning. But the campus maintains a skeleton staff of essential employees to perform certain key functions. One of those employees is Jack Security, a member of the college's campus security office.

Jack believes that the College was not complying with a recent Order issued by the Governor, which requires the College to maintain certain specified cleaning protocols in open facilities in order to disinfect high-touch areas. The Order also requires that the College maintain a sufficient number of security employees in each open facility to control access, maintain order, and enforce social distancing of at least 6 feet.

The day after this Order went into effect, Jack was leaving campus at the end of his shift. He lives across the street from campus, so he walks to and from work through the campus each day. This day he noticed that the open facilities did not appear to be under any heightened cleaning protocol. He also did not see any security employees present to enforce social distancing.

Jack reported his "concerns" to the State.

Hypothetical #3 (continued)

- **This report gets the College in hot water with the State.**
- **The President wants Jack fired immediately.**
- **How would you advise the President on the following questions?**
  - Was Jack speaking as a "citizen" when he made the report?
  - What university policies should be considered?
  - What are the PR risks in this Covid-climate?

Questions

???

"I Can Yell 'Fire,' Right….?": The Practicalities of Implementing the Laws and Policies Governing Employee and Faculty Speech on Campus

April 22, 2020

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I. Introduction

In addition to the typical issues that arise on a bustling academic campus, a contentious election season approach. As that season approaches, schools may be experiencing, or may be anticipating, a collision of free speech, academic freedom, and other legal obligations. Balancing these concepts and parsing out an appropriate result can be tricky, particularly when emotions run high. To aid in that effort, this practical, user-friendly manuscript provides digestible summaries for recent (2019-2020) free speech cases (*infra* Section III) following a brief refresher on the applicable legal framework for public employee speech versus private employee speech (*infra* Section II).

II. Legal Framework

In order to assess when, if and how to respond to employee speech, it is vital to recognize what does and does not constitute free speech (and to understand the closely related concept of academic freedom). In the case of public institutions, the starting point for analysis is the First Amendment (for private institutions it is often grounded in policy). To fully understand the current state of public-employee-speech law, it is important to take a step back in time and review three seminal cases, the last of which brought flux into the academic freedom realm.

A. Public Employee Speech Doctrine: *Pickering/Connick/Garcetti*

The seminal case for public employee speech is the 1968 Supreme Court decision, *Pickering v. Board of Education of Township High School District 205*.[1] In that case, the Supreme Court held that in many circumstances, teachers and other public employees retain their First Amendment rights to speak out on public issues. At the same time, the Court recognized

1 391 U.S. 563 (1968).

that public employers such as school districts have legitimate grounds to exercise authority, including termination of employment, over teachers whose speech crossed the line from public debate to insubordination. The Court described the need to reconcile these two interests. "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."[2] The Court recognized the "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought . . . to furnish grounds for dismissal" and rejected any "attempt to lay down a general standard against which all statements may be judged. "[3]

Subsequent Supreme Court decisions have developed two principles expressed in *Pickering*, namely that the speech for which constitutional protection is sought must be a matter of public concern and that the employee be speaking as a citizen and not as an individual concerned with his or her private interests. *See Connick v. Myers*, 461 U. S. 138, 147 (1983) ("[W]hen 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 employee's discharge]."). The Supreme Court has repeatedly emphasized and in its own decisions demonstrated that the determination of whether employee speech is protected requires a careful examination of the facts.

In *Connick*, the Court defined "a matter of public concern" as one that "relat[es] to any matter of political, social, or other concern to the community."[4] The Court held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[5] The Court's decisions in this area have frequently involved its own detailed review of the circumstances under which the statements were made.

Most recently, in *Garcetti v. Ceballos*[6], the Court reemphasized the distinction between statements addressing public concerns and those which relate to the workplace and the teacher's obligations to the school and her students. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens" for purposes of the First Amendment.[7] Because schools are very much in the public eye, the distinction between the statements of a teacher as a citizen and as a professional is often very fine.

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2 *Id.* at 568.

3 *Id.* at 569.

4 461 U.S. at 146.

5 *Id.* at 147–8.

6 547 U.S. 410 (2006).

7 *Id.* at 412; *see also Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.")

B. Impact of *Garcetti* on Academic Freedom

Academic freedom is an important, yet widely misunderstood concept. Faculty tend to adopt a broad view of academic freedom protections, believing that it applies to everything they write, say, or do, whether in the classroom or not. Currently, however, there is a circuit split about the impact of *Garcetti* on academic freedom, particularly whether its "official duties" rule applies to "scholarship and teaching." If the *Garcetti* "official duties" rule does not apply to "scholarship and teaching," then such speech has potential First Amendment protection, even though it is part of the academic's job. If the *Garcetti* "official duties" rule does apply, then a faculty member's work traditionally protected by "academic freedom" does *not* carry with it First Amendment rights. Why did the split form?

In his dissent in *Garcetti*, Justice Souter opined that *Garcetti* could cause damage to the speech rights of public university professors, writing: "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.'"[8] In response, writing for the majority, Justice Kennedy wrote, "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."[9] That carve-out left the door open for the circuit courts.

In 2011, the Fourth Circuit declined to apply *Garcetti* to the case before it, but made no larger ruling about *Garcetti's* impact. [10] Then, two years later, the Ninth Circuit took it further in *Demers v. Austin*. [11] In that case, the Ninth Circuit unequivocally declared that *Garcetti* does **not** apply to teaching and academic writing that is performed pursuant to the official duties of the professor. Instead, the Ninth Circuit held, the extent to which such writing and teaching is speech protected by the First Amendment is governed by the balancing test set forth in *Pickering* (not by *Garcetti*). Importantly, the court also noted that such protected academic writing is not confined to traditional scholarship but could possibly include writings addressing topics such as budgets, curriculum, departmental structure and faculty hiring. This view conflicts with the Third, Sixth and Seventh Circuits, each of which has declined to apply an exception to *Garcetti* for speech in the public institution context.[12]

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8 547 U.S. at 438 (J. Souter, dissenting).

9 *Id.* at 425.

10*Adams v. Trustees of Univ. of N. Carolina-Wilmington,* 640 F.3d 550 (4th Cir. 2011).

11 729 F.3d 1011 (9th Cir. 2013).

12 *See Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to an associate professor at the University of Wisconsin-Milwaukee, who had challenged the proposed use of the grant money, concluding that administering the grant fell within the professor's teaching and service duties that he was employed to perform); *Gorum v. Sessoms*, 561 F.3d 179 (3rd Cir. 2009) (applied *Garcetti's* "official duties" rule to determine that a former Delaware State University professor's advising a student athlete in a disciplinary appeal, and involvement in rescinding an invitation to the University President to speak at a fraternity event, was not protected speech under the First Amendment); *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012) (applying *Garcetti's* official duties test to find that

C. Private Employee Speech

Private institutions do not face the same Constitutional constraints as public institutions. That is because the First Amendment protects only individuals whose speech is suppressed by the government. As a result, employee and faculty at private colleges and universities do not enjoy First Amendment protection at their institution -- although they may be promised academic freedom by a faculty handbook or policy, which could provide them with contractual protection. As a result, the proper scope of First Amendment protection on private campuses often turns on the institution's application of free speech policies. So, it is critical for those schools to revisit such policies before taking adverse action in response to speech on campus. Schools should also be mindful of state law, which could impact their speech policies and related responses.

III. Updated Case Law (2019-2020)

As noted in the introduction, this section provides quick summaries of cases over the past year only, as these cases provide a snapshot of the current legal trends. In no specific order, these trends appear to include: (1) whether an institution regulate the pronouns and titles that a professor must use to address students in class; (2) whether an institution can take adverse reaction for speech on an employee's personal social medial account; (3) whether an institution can take adverse action for in-class speech that the employee claims is germane to the class discussion; and (4) whether an institution can take adverse action (from a First Amendment standpoint) against an employee who has raised whistleblower-like complaints pertaining to the institution.[13]

Some opinions discussed may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. Furthermore, jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. The reader is advised to consult the appropriate statutory or regulatory compilations for their respective jurisdiction.

A. Can an institution regulate the pronouns and titles that a professor must use to address students in class?

Kluge v. Brownsburg Community School Corporation
No. 1:19-cv-2462, 2020 WL 95061 (S. D. Ind. Jan. 8. 2020)
Opinion granting-in-part and denying-in-part Defendants' Motion to Dismiss

Plaintiff, a former music and orchestra teacher, filed an action against Brownsburg Community School Corporation ("BCSC"), and others, alleging that he was discriminated

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the Head of Reference and Library Instruction at Ohio State University's speech as a committee member commenting on book recommendations was made pursuant to his official duties, and was therefore not protected speech.)

13 Notably, these are not the only questions permeating in the industry. Many other cases remain pending without decision and news articles crop up daily about pertinent issues.

against and ultimately forced to resign because his religious beliefs prevented him from following a school policy that required him to address transgender students by their preferred names and pronouns. Defendants filed a motion to dismiss.

Plaintiff began his employment with BCSC in August of 2014. Throughout his employment, he received positive evaluations. During the summer of 2017, BCSC began to allow transgender students and students experiencing gender dysphoria to change their names and genders in the BCSC database known as PowerSchool. BCSC then instructed its employees, including plaintiff, to refer to students using the names and genders listed in the PowerSchool database. In July 2017, plaintiff informed BCSC that the new policy conflicted with his religious beliefs against affirming gender dysphoria. Initially, he was told to either abide by the policy, resign, or be terminated, though later he was granted an accommodation, permitting him to refer to all students by their last names. But then in December 2017, administrators told plaintiff the last-name policy had created "tension" and that he should resign if he could not abide by the school's policy. Plaintiff alleged that he was then coerced into resignation.

Plaintiff filed suit, raising thirteen claims under Title VII, the First and Fourteen Amendments, the Indiana Constitution, and other state law provisions. He sued the school district and individual employees, but all of the individual-capacity claims were dismissed. The court granted the motion to dismiss all claims, except for two of the Title VII claims (failure to accommodate and retaliation). In permitting the Title VII claims to survive, the court found itself bound by the standard of review for motions to dismiss. Plaintiff alleged that allowing him to call students only by their surnames, which the school briefly offered but later withdrew, would not have resulted in undue hardship for the school and would have been a reasonable accommodation. Regarding plaintiff's retaliation claim, the court found that at the motion to dismiss stage it was plausible that the school did not tolerate plaintiff's religious beliefs and used student complaints as a pretext to withdraw its offer of the surname-only accommodation and force plaintiff to resign.

In granting the motion to dismiss the First Amendment claims, the court held (citing Seventh Circuit case law) that a school may regulate a teacher's interactions with students inside school and in the context of the school day or school activities. In other words, it held that the school could require him to refer to students by their preferred names because although issues relating to gender identity are of great public importance, plaintiff was not conveying a message concerning such matters. That is, "the act of referring to a particular student by a particular name does not contribute to the broader public debate on transgender issues." In this way, he was speaking in his capacity as a public-school teacher, not a private citizen, when he addressed students.

Meriwether v. Trustees of Shawnee State University
No. 1:18-cv-753, 2019 WL 4222598 (S. D. Ohio Sept. 5, 2019)
Report and Recommendation granting Defendants' Motion to Dismiss

Plaintiff, a philosophy professor, filed a lawsuit in federal court in November 2018 claiming that his religious beliefs were violated by Shawnee State University. The professor - who

typically used "Mr." or "Ms. " when addressing students in class - had a warning placed in his personnel file after he refused to use female pronouns to address a trans female student. University officials said that the professor's treatment of the student created a "hostile environment" and violated the school's nondiscrimination policy. A federal magistrate judge recommended that the suit be dismissed.

Despite an objection from the plaintiff, the court concluded that it was bound to analyze plaintiff's First Amendment retaliation claim under *Garcetti*. Under *Garcetti,* the first question is whether plaintiff's speech was "as a citizen" or was made "pursuant to [plaintiff's] duties" as a professor at Shawnee State. If the plaintiff's speech clearly owed its existence to his responsibilities as a government employee, then his speech was pursuant to his official duties and was not speech made as a citizen.

The court concluded that plaintiff spoke pursuant to his duties based on the following factors: plaintiff's employment duties (university professor), the setting of plaintiff's speech (a university classroom), the audience (the students in his Political Philosophy class), the impetus for the speech (to address students in a manner that plaintiff considered to be an important pedagogical tool), and the general subject matter of the speech (titles and pronouns for addressing students in his classroom).

As a backstop, however, the court addressed the second *Garcetti* prong – whether the speech a matter of public concern. The court determined that even assuming plaintiff was not speaking pursuant to his official duties, plaintiff's in-class speech did not touch on a matter of "public concern." Although gender identity is "undoubtedly [a] . . . matter[ ] of profound 'value and concern to the public,'" plaintiff's speech did not implicate the broader social concerns surrounding the issue because: it was limited to titles and pronouns used to address one student in plaintiff's class; the speech was directed to plaintiff and heard only by her and her fellow students; and absent any further explanation or elaboration, the speech cannot reasonably be construed as having conveyed any beliefs or stated any facts about gender identity.

Moreover, the court held that even if plaintiff's motivations were understood, the court held that plaintiff's use of titles and pronouns did not "advance an idea transcending personal interest or opinion which impacts our social and/or political lives." Instead, plaintiff was acting on and conveying his personal beliefs and views about gender identity toward one student; he was not sharing ideas or inviting discussion. In this way, the speech did not take place in the context of a broader discussion, and there was no academic purpose.

Plaintiff's compelled speech claim failed because plaintiff did not allege that Shawnee State forced him to express a view that he found objectionable since they gave him the option to stop using gender-based titles during class altogether. The court also dismissed plaintiff's facial and as-applied content and viewpoint discrimination claims because plaintiff's speech was not protected, therefore the policies were not applied to him in violation of his First Amendment rights. Furthermore, the nondiscrimination policies were not overboard on their face because plaintiff did not plead any facts suggesting that the policies pose a threat of chilling his speech on matters of legitimate political, cultural, or social concern. Plaintiff's free exercise claim failed because Shawnee State's nondiscrimination policies are neutral on

their face, and he alleged no facts suggesting that the policies were aimed at his particular religious beliefs.

B. Whether an institution can take adverse reaction for speech on an employee's personal social medial account?

Wozniak v. Adesida
932 F. 3d 1008 (7th Cir. 2019)
Opinion affirming grant of summary judgment to Defendants

A University of Illinois professor was fired and lost tenure after he harassed honor society students who presented a student award to another professor. He filed a First Amendment claim alleging that he could not lose tenure or be fired because his speech was protected by the First Amendment. The Seventh Circuit affirmed the district court's dismissal.

For context, two student honor societies at the College of Engineering jointly give an annual teaching award. Plaintiff did not receive the award but thought that he should have received it and set out to investigate. He called the head of one honor society to his office, aggressively interrogated her, got her to cry, and repeated the process with one of the University's employees (who did not cry but was distressed). The plaintiff then proceeded to criticize the student honor society leaders by name on his personal website and posted a report from the Committee of Academic Freedom (which named the students). He also included a link to this material in the signature block of every email he sent from his University account. Plaintiff took these actions even after the Committee informed him that disseminating identifying information about the students would be grounds for dismissal. Despite requests from the Dean, plaintiff refused to remove this material.

The university board of trustees revoked plaintiff's tenure for violating university rules on student privacy and for disrespecting students. The professor argued that the First Amendment allowed him to make student information public no matter how embarrassing in nature. The court rejected the professor's argument, relying on *Garcetti*.

Under *Garcetti*, the First Amendment does not govern how employers respond to speech that is part of a public employee's job. Here, plaintiff's speech was made in his capacity as a teacher: the subject of the award was teaching; he called students into his faculty office (a power he possessed by virtue of his job) and used his position to inflict the injuries that precipitated his discharge. Plaintiff attempted to argue that *Garcetti* was inapplicable to his case because the speech at issue was not part of his job-related duties. The court rejected this argument, holding that how a faculty member relates to students is part of their job; thus, making *Garcetti* applicable and pulling his claim outside of First Amendment protection. The court also added that professors who harass and humiliate students cannot successfully teach them, and a university that permits professors to degrade students cannot fulfill its educational functions.

Lastly, the circuit court concluded that speech which concerns "personal job-related matters" is outside the scope of the First Amendment, and that although the teaching award was important to the plaintiff; it was not a matter of public concern.

Higbee v. Eastern Michigan University
399 F. Supp. 3d 694 (E. D. Mich. 2019)
Opinion denying Individual Defendants' Motion to Dismiss

In September 2016, racist graffiti appeared on the campus of Eastern Michigan University. Students protested, and the university instituted disciplinary action against the protestors. Almost a year later, a former student was arrested for the vandalism. In the arrest's aftermath, Plaintiff—a history professor at the university—posted a message in a public Facebook group, criticizing the university's response to the graffiti and referring to African American administrators as "'HN in C' functionaries." The university interpreted this phrase as a racial slur and suspended plaintiff, without pay, for one semester. Plaintiff filed a grievance through his union, and an arbitrator reversed his suspension. Plaintiff then filed a lawsuit, alleging retaliatory discharge under state law and First Amendment retaliation claims against the individual Regents and other administrators who decided to punish him for the posts. The individual defendants filed a motion to dismiss, arguing that they are entitled to qualified immunity because they did not violate a clearly established First Amendment right by disciplining plaintiff for his use of the term "HN in C."

To establish a prima facie case of First Amendment retaliation, plaintiff was required to demonstrate that (1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a 'substantial' or 'motivating factor' in the adverse action. The individual defendants did not dispute the second or third element, nor did they dispute that they each participated in the decision to discipline him. Rather, the individual defendants only argue that, as pleaded, plaintiff did not engage in constitutionally protected activity.

To show that his speech was constitutionally protected, a public employee must satisfy two *Garcetti* requirements, namely that the employee spoke as a private citizen and on matters of public concern. The employee must also show that his speech interest outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The last requirement employs the *Pickering* balancing test.

Here, for purposes of this motion, the court determined that plaintiff properly alleged that he spoke as a private citizen on a matter of public concern, and that the defendants have not met their burden to show that their efficiency interest outweighs plaintiff's speech interest. Specifically, the court drew a "reasonable inference" that using a public forum to comment on the university's response to recent racial incidents was unlikely to be within a history professor's official duties, and thus he spoke as a private citizen. It also found that the post appears to be a matter of public concern because the plaintiff is "expressing his opinion that the individual defendants have perpetuated racial conflict by failing to adequately address racism on campus."

On the *Pickering* balancing test, the crux of the defendants' efficiency-interest argument was that plaintiff's post was likely to cause disruption. They argued that his use of the term "HN in C" to refer to co-workers was likely to interfere with the performance of his duties as a professor, especially given the heightened atmosphere of racial tension on campus after the graffiti. They also argued that it was reasonable to believe that there would be disharmony

between plaintiff and his co-workers and administrators, and that his comment endangered the prospective enrollment of African American students. Based on the pleadings, the court was unable to conclude that the defendants reasonably predicted that his post would cause disruption. The court found that the year-old protests, which had a different catalyst, provided little insight into whether the defendants reasonably predicted disruptions after the post. The court also noted that "in the academic setting dissent is expected, and, accordingly, so is at least some disharmony." Therefore, without further factual development, the court cannot conclude that the defendants' predictions of workplace or student disharmony were reasonable.

Turning to the qualified immunity defense, an individual defendant must establish that the relevant Constitutional guarantee was not "clearly established" at the time of the alleged misconduct. Here, the defendants could not make that showing at this stage. As the court noted, a professor wrote a post on a public forum, criticizing his university's response to racial tension on campus. Although the post was critical of the professor's employer, there is currently no indication that it impeded, or would impede, the professor's proper performance of his daily duties in the classroom or that it interfered with the regular operation of the university generally. Under those facts, and as of now, the *Pickering* balancing test weighed in plaintiff's favor and the court denied qualified immunity to the individual defendants at this time.

Isabell v. Trustees of Indiana University
No. 2018-cv-00364, 2020 WL 94070 (N. D. Ind. Jan. 7, 2020)
Opinion granting-in-part and denying-in-part Defendants' Motion for Summary Judgment

Plaintiff sued Indiana University and an individual defendant when she was passed over for a full-time position as a clinical assistant professor in the nursing school. Plaintiff claimed that her recent blog exposing her pro-life views on abortion motivated the university's retaliation. Although she originally asserted several claims, for purposes of this opinion, she pressed only two: A First Amendment claim against the individual defendant and a claim under the Indiana Conscience Statute against the Trustees of Indiana University.

In 2016, plaintiff was hired as an adjunct professor in the school of nursing at its South Bend campus, where she taught a maternal-child nursing course. Almost two weeks after she was hired, plaintiff posted a blog describing her switch to an anti-abortion mindset, titled "*How a Formerly Pro-Choice Nursing Instructor Discusses Abortion with Her Students*." In the article, she explains that she philosophically had been pro-choice at one time and even had assisted with therapeutic abortions, but over time she changed to a pro-life view "based on the anatomy and physiology of pregnancy, and on logical reasoning," and on "biology, human anatomy and physiology, and not a particular religion." Plaintiff testified that she did not discuss this article with anyone at Indiana University.

On October 18, 2016, Indiana University posted a new clinical assistant professor of nursing position that was full-time for the 2017-2018 academic year and required a specialization in maternal newborn and women's health nursing. Indiana University formed a search and screen committee to receive and evaluate applicants, conduct interviews, and ultimately

make a recommendation for hiring to the Dean of Health Sciences. Four faculty members in the nursing school served on the committee, including the individual defendant.

Two candidates were brought in for interviews. Per university policies, this interview was intended to consist of committee members asking the candidates questions from a pre-determined list prepared in advance of the interviews. That same list of questions was supposed to be used for each candidate for the same position. But during plaintiff's interview, the individual defendant deviated from the script and asked the following question: "How would you discuss controversial topics, healthcare controversial topics, and introduce them to students in a teaching manner" and "using science, how would [she] discuss a controversial issue with [her] nursing students when [she's] at clinical"). Although the individual defendants testified that she frequently asks this question of candidates during the interview process because "in healthcare there are a lot of ethical dilemmas and concerns" she did not ask similar questions of the other candidate.

In upholding the claims against the individual defendant, the court held that the Eleventh Amendment immunity did not bar plaintiff's claim against the chair of the search committee in her individual capacity. Furthermore, in permitting the First Amendment retaliation claim to proceed, the court held that a reasonable jury could find that the chair of the committee treated plaintiff differently in her interview than other candidates because she had read plaintiff's blog post and asked plaintiff how she would teach controversial topics, when she did not ask that question to any other candidate. Notably, because the court found that the Eleventh Amendment barred plaintiff's claims against the school under the First Amendment and state law, the individual remains the sole defendant.

C. Whether an institution can take adverse action for in-class speech that the employee claims is germane to the class discussion?[14]

Ali v. Woodbridge Township School District
No. 17-2210, 2019 WL 1930754 (D. N. J. Apr. 30, 2019), *appeal pending*
Opinion affirming grant of summary judgment to Defendant

This employment dispute raises the question of whether a teacher can be terminated for allowing access to anti-Semitic media as part of a high school history lesson on the terrorist

[14] Please note that for many of these inquiries, there are important cases falling outside the temporal scope of the manuscript. As a result, readers are reminded to review the current and historical case law in your respective jurisdiction. Here are a few examples of older case law siding with the plaintiff, *see Silvva v. Univ. of New Hampshire, 888 F.Supp. 293* (Dist. Ct. New Hamp.1994) (finding for English professor who had been disciplined for saying in class, "Focus is like sex. You seek a target. You zero in on your subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one."); *Hardy v. Jefferson Community College,* 260 F.3d 671 (6th Cir. 2001) (upholding in-class use of derogatory words for different racial/ethnic/gender groups in the context of discussing the power of speech); *DiBona v. Matthews*, 220 Cal. App. 3d 1329 (Cal. Ct of Appeal, 4th District 1990) (finding for a professor who appealed after cancellation of controversial play *Split Second* in a drama class involving the shooting of police officer); *Cohen v. San Beranrdino Valley,* 92 F.3d 968 (9th Cir. 1996) (sexual harassment policy found to be vague, amounting to "legal ambush").

attacks that occurred September 11, 2001. Plaintiff alleges that defendants unlawfully terminated his employment because of his race and religion.

For context, in accordance with instructions from the High School's History Department, Plaintiff prepared and presented a lesson on the terrorist attacks that occurred on 9/11. Plaintiff's lesson plan directed the students to: "*Analyze the abstract of official 9/11 commission. Analyze the recently released 28 pages of the 9/11 commission report as well as the Saudi Intelligence Report translated by MEMRI. [Middle Eastern Media Research Institute]."* His department supervisor approved the lesson plan but attached a note that read: "As previously discussed, please be certain to provide nonpartisan view of 9/11 with equal weight given to conventional accounts." In connection with the lesson, however, plaintiff also posted links to anti-Semitic articles on a school-sponsored website. He was subsequently terminated.

Plaintiff alleged that he engaged in activity protected by the First Amendment when he posted, on the school's public portal, "alternative views on the cause of the September 11, 2001 attacks." The court rejected this claim without much analysis, finding that the district, not plaintiff, has the ultimate right to decide what will be taught in the classroom. In essence, the court found that the First Amendment does not protect a teacher's in-class conduct because during class, the teacher acts as the educational institution's proxy, and the educational institution, not the individual teacher, has the final say in how to teach students. That is the institution, not the teacher, has control over "who may teach, what may be taught, how it shall be taught, and who may be admitted to study. Accordingly, the court found that plaintiff failed to demonstrate that posting the MEMRI links on the school-sponsored website constitutes protected speech.

Buchanan v. Alexander
919 F. 3d 847 (5th Cir. 2019)
Opinion affirming-in part and reversing-in part grant of summary judgment to Defendants

Plaintiff was an associate professor at LSU with tenure. She taught in the Early Childhood Program for teacher education. In November 2013, LSU received a complaint from the superintendent of a local public-school district regarding her "professionalism and her behavior" when she visited schools in his district. LSU also received complaints from some of the Plaintiff's students regarding her classroom behavior. One student complained about the professor's comments regarding the student's sexual relationship with her fiancé. Another student complained that the professor recorded her crying during an assessment team meeting. LSU had received a letter in 2012 from a group of students complaining that she made offensive classroom comments, such as (1) "a woman is thought to be a dike if she wears brown pants"; (2) "it was a choice to be in the program and it was not the fault or problem of the professors if any of us chose to be mommies or wives and not to expect to get an A in the class"; and (3) use of "extreme profanity on a regular basis. "

Plaintiff was removed from the classroom pending a human resources investigation to determine whether she violated university policy. That investigation, and a subsequent faculty hearing, found that Plaintiff's action violated the university's sexual harassment

policy and created a hostile learning environment through her use of profanity, poorly worded jokes, and sometimes sexually explicit jokes. Plaintiff was dismissed.

The Supreme Court has established that academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. Accordingly, "classroom discussion is protected activity. However, even this protection has limits: Students, teachers, and professors are not permitted to say anything and everything simply because the words are uttered in the classroom context.

In ruling that her speech was not protected, the court found her use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K–Third grade teachers. Because the court found that Buchanan's speech was not protected, it held that her termination did not violate the First Amendment.

D. Whether an institution take adverse action (from a First Amendment standpoint) against an employee who has raised whistleblower-like complaints pertaining to the institution?

Plouffe v. Cevallos
777 Fed. Appx. 594 (3d Cir. June 12, 2019)
Opinion affirming the district court's award of summary judgment to defendants

Plaintiff, a former tenure-track assistant professor at Kutztown University, alleged that the university terminated him because he filed a whistleblower complaint alleging that defendants intended to hire a candidate for a temporary faculty position, although he did not meet the required qualifications.

Plaintiff was hired by the university as a tenure-track assistant professor in the Criminal Justice Department. His employment contract was renewable annually. The first-year evaluation he received from the Performance, Evaluation, and Tenure Committee was satisfactory, but it did note some issues with disputes he had with his co-workers. Following those evaluations, plaintiff's contract was renewed for a second year.

A few months into his second year, plaintiff, along with two other department members, was named to a search committee to recommend a temporary faculty member. According to plaintiff, his colleagues on the committee told him that a particular candidate was favored and was going to be hired. Plaintiff discovered, however, that the candidate did not have the required qualifications, which, in addition to other concerns about his candidacy, made him ineligible to be hired, or even interviewed. Plaintiff raised those concerns in the department but was met with a hostile response, and the candidate was interviewed. As those events unfolded, Plaintiff filed a whistleblowing complaint with the university's Dean, Provost, and with its Office of Social Equity. His complaint led to the Office of Social Equity eventually concluding that the candidate was not eligible to be hired.

In the wake of those events, plaintiff's relationship with other faculty members in the department deteriorated, and a detailed document with over 140 complaints against plaintiff

was sent to the Dean. An investigation was held, a report was prepared, and the university president held a pre-disciplinary conference with plaintiff. After that meeting, plaintiff was formally terminated.

Focusing on the First Amendment claim, Plaintiff contends that when he reported the candidate's ineligibility to be hired, he was speaking as a "citizen" claiming that reporting misconduct does not fall within the official duties of a teacher. The court disagreed. Here, plaintiff was on the search committee as part of his employment and was only aware of the misconduct he reported because of his role on that committee. Accordingly, the circuit court concluded that the district court properly awarded summary judgment to the Defendant on plaintiff's First Amendment claims because plaintiff spoke as an employee, and not as a private citizen, when he filed his whistleblower complaint.

Rodriguez v. Serna
No. 1:17-cv-01147, 2019 WL 2340958 (D. N. M. June 3, 2019)
Opinion granting-in-part and denying-in-part Defendants' Motions to Dismiss

Plaintiff, a former adjunct faculty member at Northern New Mexico College brought multiple claims against the college and individual Defendants, alleging that they retaliated against her after she questioned alleged financial improprieties. In particular, plaintiff alleged that defendants improperly claimed copyrights, forcing her to take down her website; banned her from campus; and assaulted, battered, and threatened her when she was inspecting public records.

Although the court dismissed the First Amendment free speech and associational claims for supervisory liability against the current and former college presidents because neither defendant was personally involved in the alleged adverse actions nor did either of them know that plaintiff had engaged in any protected activity, the court allowed plaintiff's due process claim to proceed against the Provost. This claim proceeded based on allegations that the Provost disinvited plaintiff to academic conferences and events by imposing a campus ban in retaliation for protected speech, as part of a concerted effort to tarnish her academic career.

Conte v. Bergeson
764 Fed. Appx. 25 (2d Cir. Mar. 13, 2019)
Summary Order affirming summary judgment for the Defendants

Plaintiff, a licensed pharmacist and former employee at the State University of New York at Stony Brook (SUNY), alleged violations of her First and Fourteenth Amendment rights and state law claims against employees at SUNY, when defendants refused to renew Plaintiff's employment contract because she complained to the New York State Board of Pharmacy about a coworker's alleged illegal dispensation of medication.

Plaintiff argued that her grievances to an outside regulatory body were a matter of public concern because, by complaining about an individual who was dispensing medication without a license, she was voicing a concern related to the wellbeing of the Stony Brook student body. The district court held, and the circuit court agreed, however, that this claim fails at step one of the public employee speech analysis because, even if plaintiff is correct

that her complaints were about a matter of public concern, she was speaking as an employee, pursuant to her job duties, rather than as a private citizen. Specifically, her duties as a supervising pharmacist included ensuring that the pharmacy was in compliance with the laws and regulations of federal and state agencies governing pharmacies. While it may not have been explicitly within her job description to file her grievance about the pharmacy's lack of compliance with an outside body, and the Board invites and receives complaints from the general public, those facts do not render her speech that of a private citizen.

The court was clear that "the existence of a civilian analogue is not dispositive of whether a public employee spoke as a private citizen." Here, her complaint to the Board concerned the pharmacy's failure to abide by applicable rules and regulations, which were squarely part of her job duties. Accordingly, the circuit court concluded that the district court properly ruled that the plaintiff's speech was not protected by the First Amendment.

IV. Conclusion

It is commonly understood that higher education institutions are the quintessential "marketplace of ideas," and therefore hold a unique position in the constellation of free speech issues. Yet, importantly, courts do not readily differentiate between speech in the public academic setting and speech made by traditional public employees. This, and the pivotal case of *Garcetti,* has provided more leeway in recent years for (public) institutions to take some adverse action in response to certain speech on its campuses. That noted, schools cannot simply curb all employee speech, nor should (or do) they want to do so. Speech is pivotal in creating a vibrant education culture but keeping up on the current case trends will place schools in a better position to recognize if, when, and how to respond when needed.