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FREE SPEECH ON THE FIRING LINE: THE LEGAL CONTROVERSY CONTINUES

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ABSTRACT

First Amendment Speech Rights are increasingly becoming a source of controversy on college and university campuses. As the Court struggles to establish a balance between the teacher, as citizen, and the university, as employer, the line between protected and unprotected speech has been bent but not broken. An examination of recent Court decisions reveals some answers and provides educators with guidelines for determining the nature and extent of the protections offered within the preview of academic free speech rights. Indicators of the more typical issues raised about the conflict between free speech and academia will be suggested.

The free exercise of First Amendment rights is coming under greater scrutiny within the educational community. Increasingly, constitutionally protected interests—especially involving the freedom of speech—are being challenged by teachers and other educators. Due to recent developments, they could face discipline up to and including termination for classroom utterances. The problem, as enunciated by the Supreme Court, has been to establish a balance between "the interests of the teacher, as a citizen, in commenting upon matters of public concern," and "the interests of the state, as an employer, in promoting the efficiency of the public service it performs" *(Pickering v Board of Education, 391 U.S. @ p. 563 1 IER Cases 8 [1968]).* In this leading case, the right of faculty to speak out on public matter has been settled in part but questions still remain unanswered. The Supreme Court, in *Pickering,* refrained from establishing a

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general standard for judging statements by public employees. Where, then, is the line between protected and unprotected speech to be drawn? Does the truth or falsity of the statements matter? Does the impact or effect of the statement have import? Are the statements of a personal or public nature? Do the statements constitute such a form of criticism of a supervisor that the working relationship between the public-sector superior and subordinate is seriously undermined? If so, will the speech be deemed impermissible? An examination of recent court decisions reveals some answers and provides educators at all levels with guidelines for determining the nature and extent of the protections currently offered.

While no attempt will be made here to exhaust the case law, indicators of the more typical issues raised under the rubric of free speech and academia will be suggested.

Recent free speech litigation takes its impetus from the 1968 landmark *Pickering v Board of Education* case. *Pickering* centered on the discharge of a public school teacher for writing a critical letter to a local newspaper. The letter called into question the appropriateness of a School Board's allocation of funds for athletics, and was also critical of a proposed bond issue. The statements in the letter were not directed at the individual teacher's supervisor but rather at the local School Board and school superintendent. The kind of working relationship requiring personal loyalty or confidentiality for proper administrative functioning was not adversely affected, and the statements made were not proven to be "false, whether knowingly or recklessly made" *(Pickering v Board of Education, 391 U.S. @ p. 563 1 IER Cases @ [1968]).*

Many subsequent cases have involved the application of what has come to be known as the *Pickering Balancing Test.* This test suggests to educators that their expression of certain topics, such as matters of public concern, will be more protected than disruptive criticism of their employer. The *Rankin* case following *Pickering* shows an interesting intersection of interests where the Third Circuit has declared that a public employee's criticism of the internal operations of a place of employment can be construed as a matter of public concern *(Rankin v McPherson 107 S. Ct. 2891, 2-IER Cases 257 [1987]).*

Other cases illustrate facts that would support an employee-teacher's free speech despite serious disruption in the employment relationship. One such case involved a school district's failure to renew a black teacher's contract. Her vocal protests in support of beliefs that the school's employment practices were racially discriminatory in either purpose or effect were, she alleged, the cause of the nonrenewal. The Court agreed and found that the District's motivation in failing to renew her contract was impermissible. It was, in reality, a pretense covering the actual purpose of ridding themselves of a vocal critic of the School Board's policies and practices *(Ayers v Western Line Consolidated School District, 18 FEP Case 1399, U.S. District Court, Northern District of Mississippi, July 2, 1975).*

In a comparable higher education case *(Kemp v Ervin, 651 F. Supp. 495 [N.D. Georgia, 1986]), U.S. District Court N.S. Georgia, Atlanta Division, April 1986),* a professor alleged she was terminated for speaking out against the preferential treatment she believed had been given university athletes. Testimony was heard relating to her professional activity. The Court found that this adverse employment action would not have taken place absent Professor Kemp's criticism of the athletes' preferential treatment. The evidence of the administration's reckless and careless indifference to her protected rights was deemed to be intentional, deliberate and calculated to conceal the actual reason for the administration's action, which was retaliation for her protected speech *(Kemp v Ervin, 651 F Supp. 495 [N.D. Georgia, 1986] U.S. District Court N.S. Georgia, Atlanta Division, April, 1986).* In another decision involving *Lincoln University,* a faculty member's picketing activities involved criticism of a state-related university president. As long as the picketing and parading were subject to reasonable time, place, and manner restrictions, they could not be restrained on the basis of content. The fact that the criticism was strident and may have been "misguided" did not derogate from the status of the protected speech. The Court went on the state

> In an academic environment, suppression of speech or opinion cannot be justified by undifferentiated fear or apprehension of disturbance not by mere desire to avoid discomfort or unpleasantness that always accompany an unpopular viewpoint; instead, restraint on such protected activity can be sustained only upon showing that such activity would materially and substantially interfere with appropriate discipline and operation of school. (*Ervin,* p. 497)

The burden is thus placed with the administration to show that correspondence from the president involving dismissal was not retaliation for the speech activity but took into account the totality of the conduct. That is, the denial of tenure or the failure to promote would have occurred anyway, even if the picketing had never occurred *(Trotman v Board of Trustees of Lincoln (University, No. 70-2490, 635 F. 2dm 216, U.S. Court of Appeals, Third Circuit, Nov. 25, 1980).*

In most instances, the *Pickering Balance* test must be preceded by a determination of the characterization of the speech itself. Does it relate to matters of public concern or simply consist of unprotected private utterances? In a case that challenged the employer's decision to terminate, an employee aired his personal grievance and attacked how the institution was run *(Kurtz v Vickrey, 855 F 2d 723 [11 Cir. 1988]).* The Court addressed the content of the employee's speech by placing the burden on the employee to prove that his speech was primarily of public concern and not merely a personal opinion or dispute with his employer.

To qualify as a public concern, the speech must meet the requirements established under the Connick rule *(461, U.S. @ p. 146, 103 S. Ct. at 1690)* as speech

relating "to any matter of political, social or other concern to the community." A public employee could not transfer a "personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run *(Ferrara v Mills 781, F.2d 1508, 1516, 11th Cir. [1968]).* The Kurtz case mentioned above involved a quantity of speech of both an oral and written nature and covered a span of several years' duration. Some of the material at issue related to Kurtz's concern for his personal salary, but others related to his contention that dollars allocated for public education were being improperly spent. To determine whether the Pickering Balancing Test could be invoked, it was first necessary to determine whether if qualified as "related to public issues . . ." under Connick. As there were "mixed" issues involved, the Court also had to use the Eiland test for mixed speech. To clarify the issue of "mixed" speech, the Court turned to *Eiland v the City of Montgomery 797 F.2d 953, 957 (11 Cir. 1986, Cert. Denied, 483 U.S. @ p. 1020, 107 S. Ct. 3263, 97 L.Ed. 2d, 762) [1987].* In this case, the court held that instances of mixed speech should not be broken down into separate pieces of protected and unprotected speech for the purposes of analysis and the determination of some speech as protected will protect the whole speech.

In Kurtz, the employee won, but a strong dissent insisted that this speech was not primarily of public concern. The dual burdens on the employee are further discussed in cases that develop the *Pickering* standard and address the motivation of the employer.

Once the plaintiff has met the burden of establishing his activity as protected under the First Amendment, he must then demonstrate that the protected activity was substantial. It must also be a motivating factor in the employment action taken against him. Finally, it must be shown "by a preponderance of the evidence that (they) would have reached the same decision" absent the protected activity *(Mount Healthy City Board of Education v Doyle 429, U.S. @ 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d, 471 @ p. 484 [1977]).*

In determining the applicability of *Mount Healthy* to free speech cases, it is necessary to determine if constitutionally protected conduct played a substantial role in the decision not to rehire. It is important that a management determination has been made to show, by a preponderance of evidence, it would have reached the same decision even in the absence of protected conduct by the teacher *(Mount Healthy City School District Board of Education v Doyle, 429 U.S. @ p. 274, 50 L. Ed 2d 471).* The fact that Doyle did not have tenure meant that he could have been discharged for no reason whatever. However, Doyle could establish a claim for reinstatement as a nontenured teacher if denied his employment if the demise of his employment was caused by the exercise of his free speech rights *(Perry v Sindermann 408 U.S. @ p. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 [1972]).* What is at issue here is that a borderline or marginal employee should not suffer an adverse employment consequence because of constitutionally protected conduct. But, by the same token, engaging in free speech should not prevent an employer

from evaluating performance or making a negative rehiring decision *(Mount Healthy City Board of Education v Doyle 429, U.S. @ p. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d, 471, 484 [1977]).*

This point is well illustrated in *Givhan v Western Line Consolidated School District (439 U.S. @ p. 410, 58 L. Ed. 619, 99 S. Ct. 693).* A teacher's criticisms of the school district were characterized as insulting, hostile, loud, and arrogant. These were the primary reasons given for the failure to rehire. The District was unable to demonstrate that Givhan would have been rehired except for her criticisms. The District successfully argued that the administrator had been subjected to a "captive audience . . ." speech by the Appellant. However, the Court found that having opened the door voluntarily to Givhan, the administrator lost his captive audience status. Further, although the District did argue that the adverse decision was justified, absent the protected speech, it did not prove it would have been made. It thus failed to meet the burden of the "same decision anyway" defense *(Givhan 555 F.2d at 1315).*

Of particular concern to educators is the relationship between an individual's tenure status and that person's free speech rights. If the speech isn't substantially disruptive of the educational process, does the tenure status of the faculty member matter? In *Perry v Sindermann 408 U.S. @ p. 593, 92 S. Ct. 2694, 22 L. Ed. 2d 578 [1972],* it was determined that a teacher's nontenure status was "immaterial to his free speech claim . . ." Dismissal could not be based solely upon the exercise of one's protected speech rights. However, where a plaintiff has received his full due process rights, and the employer is able to meet the burden of the *just cause* standard, the termination would be upheld regardless of the tenure status *(Smith v Kent State University 696 F.2d 476 [1983]).* Here it was detemiined that the plaintiff had "flouted the authority of the music department director and assistant director but also had refused to meet his scheduled classes." It was further found that it was Smith, himself, whose actions were the underlying reason for his own suspension and subsequent termination.

In a similar, but unrelated case, *Fong v Purdue University 692 F. Supp. 930 (N.D. Ind 1988),* the professor had been awarded full procedural rights. Any procedural due process rights, which were problematic, had been adequately obviated. It was established that this public employee's various speech activities had a detrimental impact on the close working relationships within the faculty. The harmony among co-workers had been destroyed. A wide degree of deference was accorded the employer's judgment on whether the speech related to matters of public concern and was thereby protected under the First Amendment. In *Fong,* Purdue University was clearly able to demonstrate that an adverse employment decision, independent of the actual speech, was warranted. Even under the *just cause* standard, this adverse employment action could be maintained. The unprofessional conduct of tenured Professor Fong constituted *just cause,* and thus his dismissal was upheld.

The *Fong* case also illustrates that a professor's public comments which materially and substantially interfere with the orderly and efficient operation of an academic department and/or university may occasion discipline up to and including dismissal. While it is clear that mere criticism of an administration is insufficient grounds for termination, remarks disruptive to the educational process can result in discipline. In this instance, Purdue University considered that a professor's conduct in making serious charges of criminal misconduct, without any objective basis for doing so, justified discipline by the University.

Another allegation of disruption was subject to review in *Duke v North Texas University 469 F.2d 829 (5th Cir. 1973).* Here a faculty member's firing was upheld. Duke admitted to using profanity during a speech to an unauthorized student meeting. The University asserted that this talk established the basis for *just cause* and demonstrated a complete lack of responsibility. The professor "owed the University a minimal duty of loyalty and civility to refrain from extremely disrespective and grossly offensive remarks aimed at the administration of the University" *(Duke v North Texas University 469 F.2d 829 [5th Cir. 1973]).* The employer's view of the working environment seems to be given significant weight in these cases.

Even if speech is protected under a labor contract, a First Amendment controversy may arise. In *Mahoney v Hankin 844 F.2d 64 (2nd Cir. 1988),* a section of a faculty contract on academic freedom stated in part that:

> In the exercise of this freedom, the faculty member may, without limitation, discuss his own subject in the classroom. He may not, however, claim as his right, the privilege of discussing in his classroom controversial matters which have no relevance to his subject *(844 Fed. Reporter, 2d Series, p. 66 (2nd Cir., 1988)).*

Unlike the *Fong* case, the Court in *Mahoney* ruled that objections to the appellant's behavior were not concerned with the integrity of the educational experience or work environment. Rather, the grievant alleged that the administrative interference with his expression of views, because they were contrary to those held or espoused by the management of Westchester Community College, caused his difficulty.

On the other hand, it was held that the University of Oklahoma did not violate employee Seibert's rights under the First Amendment when they discharged him for repeatedly submitting disruptive safety complaints. Seibert's statements did constitute protected speech under *Pickering* and related matters of public concern. The issues had been investigated by the University and had been considered settled matters. Professor Seibert's free speech rights, under the *Connick* test, were determined to be outweighed by Oklahoma's interest in promoting efficient operations in the conduct of its public service *(Seibert v Oklahoma ex re University of Oklahoma Health Service Center [Ca. 10, February 10, 1989] 4 IER Cases 459).* The employer's focus again was the Court's focus.

When a tenured professor's transfer is at issue, free speech questions can also arise. While the transfer was found to be motivated by the exercise of a faculty member's free speech rights, the Court held that an Auburn administrator's interest in the efficient administration of an academic department could prevail and outweigh an appellant's free speech interests. This meant that Auburn University could freely transfer professors between departments, within the University, as long as no change occurred in the income, rank or tenure status of the individuals transferred. Such changes were upheld by the Court and justified as having no diminution in the professors' professional standing within the Auburn University community *(Maples v Martin, 858 F.2d, 1546 [11th Cir., 1988]).* This provides further indication that speech by members of an academic community, no matter how critical, will be constitutionally protected unless it violates the standard established in *Mahaffey v Kansas Board of Regents 652 F. Supp. 887 (1983).* However, given the additional test of *Pickering,* the Court has concluded that, if there is sufficient interference with the efficiency of administrative operations, discipline may be justified.

This decision is further supported because the appellants had access to a collective bargaining grievance procedure and declined to use it. Grieving could have afforded them another opportunity to rebut the charges against them and would further enhance their due process rights. In failing to utilize their grievance procedure, they chose to deny themselves review opportunity. Claims by them, based on their denial of due process cannot be upheld. The appellants are then left with their case being determined under the *Pickering Balancing Test* which the Court did not resolve in their favor *(Lewis v Hillsborough Transit Authority, 726 F.2d 664, 667 11th Cir. [1983] Cert. Denied, 469 U.S. @ p. 822, 105 S. Ct. 95, 83 L. Ed. 2d 41 [1984]).* Clearly all avenues of appeal must be exhausted before resorting to relief in the Court system.

The exercise of First Amendment rights in the educational community represents a complex issue for faculty and administrative personnel alike. The lines between permissive and unprotected speech, as well as the boundaries of acceptable criticism, will continue to challenge the members of the university community. Administrators, as well as faculty, need to address each other's competing needs in a collegial fashion if they do not want court review of their faculties' free speech. Future court decisions should help to further clarify the boundaries of this critical issue in the years to come.

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ENDNOTES

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Connick, 461, U.S. @ p. 146, 103 S. Ct. at 1690.

Duke v North Texas University, 469 F.2d 829 (5th Cir. 1973).

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