



Freedom of Speech in Academia

Dr. Mike Ellis P.E., Idaho State University

Dr. Mike Ellis is an Associate Professor in Electrical Engineering Program at Idaho State University. He is the past Vice-Chair of the Faculty Senate at Idaho State University. He has over 20 years of university teaching experience. He has held faculty positions at Weber State University, Virginia Polytechnic Institute, North Carolina A&T University and Idaho State University. He has a BSEE from Brigham Young University, a Master's of Engineering from Rensselaer Polytechnic Institute and a Ph.D. from Virginia Polytechnic Institute.

Dr. Richard M. Wabrek P.E., Idaho State University

Dr. Wabrek has been an associate professor of mechanical engineering at Idaho State University since 1989. In the past he served in the capacity of associate dean and interim dean at ISU. Prior to that time, he served as a faculty member and chairman at the University of Wisconsin-Platteville.

Freedom of Speech in Academia

Dr. Mike Ellis and Dr. Richard Wabrek, Idaho State University

Situations often arise inside the classroom and outside the classroom setting in which faculty members are confronted with freedom of speech issues. For instance, a student asks a professor in class about his opinion of the dean's plan to reorganize the college or department and the impact this might have on the student's career or graduation plans. Or perhaps, a professor serves on a university budget committee. Can this professor publish articles and engage in public debate using the information gained through his involvement as a member of the committee?

The federal courts are currently split over the application of the First Amendment to speech by professors employed at public universities. In 2006 the U.S. Supreme Court ruled in *Garcetti v. Ceballos*¹ that government employees may be disciplined for speech "pursuant to their official duties". The Federal Appeals Courts for the Third, Sixth, Seventh and Eleventh Circuits have ruled that the *Garcetti* decision extends to public-college faculty members. This would mean that faculty members at public-colleges would be unable to claim illegal retaliation over certain types of speech related to their jobs. However, in 2013 the Ninth Circuit ruled in *Demers v. Austin*² that a professor's academic speech was protected under Academic Freedom. The Fourth Circuit handed down a similar decision in *Adams v. University of North Carolina*³. The split among the federal appeals courts makes it likely the Supreme Court will need to revisit this issue.

Given the uncertainty in the current law, this paper will attempt to review the issues that the courts are struggling to resolve. It will also attempt to discuss some basic tests that the courts have historically used to define the limits on the First Amendment. This will include some significant court cases as illustrations of the application of the law. This paper does not provide legal advice or opinion specific to an individual case.

The Distinction between the Free Speech Rights of Faculty at Public vs. Private Universities

The United States Supreme Court has articulated strong support for freedom of speech in academia with this statement from *Sweezy v. New Hampshire*:

*"The essentiality of freedom in the community of American universities is almost self-evident . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."*⁴

Despite this statement, the Supreme Court has not provided any definition or guidelines to lower courts to define the parameters of academic freedom. Consequently, the lower courts often do not distinguish between free speech cases involving faculty members and those involving other employees.

Furthermore, faculty members at public universities are in a different situation with respect to freedom of speech than their colleagues at private institutions. To quote from the *Guide to Free Speech on Campus*:

*“Faculty members—critical participants in the university marketplace of ideas—are often shocked to learn that many of the same rules that apply to employees of the postal service also apply to professors at public universities. While faculty members do enjoy certain academic freedom rights . . . that postal workers do not have, they both operate under the same legal framework governing the speech of government employees.”*⁵

While the comparison to postal workers may be inappropriate for state and municipal employees, public university faculty members are classified as government employees albeit with some special and vaguely defined rights related to academic freedom. Much of the case law related to academic freedom occurs in the context of the rights of public employees.

In contrast, private universities enter into private contractual agreements with their faculty members, and, as such, possess greater control over the speech and behavior of their employees. Professor of Law Michael Stokes Paulsen speaks to this issue:

*“A private university is in an altogether different situation, almost the precise opposite one. It is not constrained by the First Amendment; it is empowered by the First Amendment, vested with its own rights, as an organization, to the freedom of speech. . . . In First Amendment jargon, a private university is an ‘expressive association’ possessing the constitutional right to express its views as an institution, to control its membership decisions (e.g., faculty, students) so as to control its message, and to exclude voices and messages with which it disagrees . . .”*⁶

In practice, private universities may allow greater freedom of speech than their public counterparts, but they do so at their own discretion.

Because of the contractual nature of the relationship between private universities and their faculty members, the authors have limited the focus of this paper to public university cases.

A Short Legal History

Most freedom of speech cases of public employees are brought under a claim of violating 42 U.S.C 1983. Section 1983 was part of the Civil Rights Act of 1871. It is also known as the “Ku Klux Klan Act” because its primary purpose was to provide a civil remedy against the abuses that were being committed in southern states. Section 1983 states in part:

“Every person who, under color of any statute, ordinance, regulation, custom or usage of any Territory or the District of Columbia, subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress...”

This statute provides for a civil law suit for people whose constitutional rights have been violated by a state authority. For example, the Constitution protects the right to be free of unreasonable

searches. If a police officer acting “under the color of law” performs an illegal search then the officer has deprived the victim of a Constitutional right and is liable under this statute.

It is interesting to note that plaintiffs generally must sue the individual responsible for the violation, not that individual’s employer. The employer is not responsible for the conduct of one of its employees. However, the employer may be liable if its policy statement, ordinance, regulation, official decision, or custom causes a violation of a constitutional right. Successful plaintiffs may also be awarded attorney’s fees.

To substantiate a First Amendment retaliation claim under this statute, a public employee must present evidence that:

1. her speech was protected by the First Amendment,
2. her employer has caused her to suffer a deprivation likely to deter free speech and
3. her speech was at least a motivating factor in the employer’s action.⁷

Consequently, in every public-employee, free-speech case the court must first determine whether the speech was protected by the First Amendment.

Landmark Supreme Court Decisions

The first significant case that involved freedom of speech by a teacher was *Pickering v. Board of Education*⁸ in 1968. In this case a teacher was dismissed for writing a letter critical of the School Board’s fiscal allocations, to the editor of a newspaper. The United States Supreme Court overturned the lower court’s decision stating that the teacher’s speech was protected by the First Amendment. In their ruling, the Supreme Court provided a test to determine if the speech is protected under the First Amendment. The Pickering balancing test involves a sequential, five-step inquiry, which asks:

1. *“whether the plaintiff spoke on a matter of public concern;”*
2. *“whether the plaintiff spoke as a private citizen or public employee;”*
3. *“whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action;”*
4. *“whether the state had an adequate justification for treating the employee differently from other members of the general public; and”*
5. *“whether the state would have taken the adverse employment action even absent the protected speech.”*

The courts today often apply this balancing test to evaluate the merits of a freedom of speech case. However, as we will discuss with the next two landmark cases the key issue in this analysis has become the first and second test: (1) *whether the plaintiff spoke on a matter of public concern and* (2) *whether the plaintiff spoke as a private citizen or public employee.* In the Pickering case the courts held that the teacher was speaking more as a citizen than as an employee when he wrote the letter to the editor. The statements in the letter did not target any school official that the teacher dealt with on a daily basis.

The Supreme Court further defined when a plaintiff speaks on a matter of public concern in *Connick v. Myers*⁹. When Myers, an assistant district attorney, was informed that she was to be transferred to a different section of the criminal court, she told her supervisors that she opposed this transfer. Learning that she would be transferred despite her objections, she distributed a questionnaire to fifteen other assistant district attorneys. The questionnaire asked for colleagues' opinions about the transfer policy, office morale, the need for a grievance committee, the level of confidence in several individually-named supervisors, and whether the colleagues felt pressured to work in political campaigns. Myers's supervisor considered this an act of insubordination and fired her.¹⁰

The court held that all but one of the questions in Myers's questionnaire concerned only Myers's own dissatisfaction with her circumstances and therefore were not a public concern. The question whether her colleagues ever felt pressured to work on political campaigns did touch on a matter of public concern. The Court then defined the issue with a second criteria: "whether the employee's interest in speaking outweighed the employer's interest in efficient functioning". In *Connick v. Myers*, the Court found the government's interest in not having the District Attorney's office disrupted outweighed Myers's interest in distributing the questionnaire and therefore was not entitled to First Amendment protection.

Another more recent court case at my university illustrates the court's interpretation of a professor speaking as a "private citizen" versus a "public employee". The Provisional Faculty Senate had been using an email mailing list (listserv) provided by the administration to communicate with all faculty on campus. The Senate wished to inform the faculty of an upcoming university-wide vote on a proposed faculty constitution. The administration felt the vote was premature and blocked the Faculty Senate's use of the listserv to inform the faculty of the proposed vote. A group of faculty filed suit in federal court claiming this action violated their freedom of speech under the First Amendment. A federal judge denied the faculty's motion for injunctive relief. The judge applied the Pickering balancing test and concluded: "But, when faculty members speak concerning job-related matters—including communicating with other faculty members using a university-controlled listserv—they speak not as private citizens, but as public employees."¹¹

The second landmark case in this regard is the Supreme Court's 2006 decision in *Garcetti v. Ceballos*. This case involved an assistant district attorney who was demoted for publicly raising concerns about irregularities in the DA's office. The Court ruled that the First Amendment did not protect a public employee from retaliation for speaking as "pursuant to his official duties". The Court in its opinion noted there might be problems with "expressions related to academic scholarship or classroom instruction" and specifically reserved the issue of "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship and teaching".¹²

Lower Courts Struggle with Definition of "Official Duties" in Academia

Since the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, there have been a number of court cases involving university faculty members in which the courts have issued opinions on the application of this decision to academia. These decisions represent a wide range of views on what

constitutes the “official duties” of a professor and the universities’ legal authority to regulate this speech. In an attempt to provide a broad view of the present legal landscape, we have selected two court cases that represent both ends of the spectrum. These two cases are not significant from a legal precedent standpoint; they simply represent the breadth of the court’s interpretations of the application of *Garcetti v. Cabellos* to academia.

Some of the first cases to come before the courts following the *Garcetti v. Ceballos* ruling involved engineering faculty members. In 2007, Dr. Juan Hong, a chemical engineering faculty member at the University of California-Irvine, claimed the University violated his First Amendment right to free speech. Dr. Hong had, while participating in faculty governance, allegedly angered University administrators by opposing certain faculty hiring and promotion decisions and by his opposition to the University’s use of lecturers in place of professors.

The U.S. District Court for the Central District of California rejected Dr. Hong’s claim, finding in favor of the university. The judge in his decision referenced *Garcetti v. Ceballos* and concluded that because Dr. Hong was purportedly acting “pursuant to his official duties”, which included participation in faculty governance, he could not claim First Amendment protection. This case was appealed to the Ninth Circuit Court of Appeals which ruled that the university officials, the defendants, were immune from federal lawsuit. Because of the immunity, the court did not take-up the merits of Professor Hong’s First Amendment claims¹³.

Following the *Garcetti v. Ceballos* decision, another court cases involving a professor occurred at our university. In *Habib Sadid v. Idaho State University*, Dr. Sadid, a civil engineering professor at Idaho State University, alleged that the university “had retaliated against him because of his comments criticizing the administration that had been published in a local newspaper over several years”¹⁴. A district court judge ruled that the First Amendment did not protect Professor Sadid’s remarks because he spoke as a public employee rather than a private citizen. However, this ruling was overturned on appeal to the Idaho Supreme Court. The Idaho Supreme Court indicated that the “*issue is not whether Plaintiff Dr. Sadid spoke as a public employee, in the sense that he identified himself as a public employee and spoke about issues related to his employment based upon information obtained in his employment. It is whether his speech is pursuant to his official duties. In the instant case, there is no evidence showing that Plaintiff’s official duties included making public statements on behalf of the University regarding the subject matter of his letters, nor is there evidence that his employment responsibilities included creating the statements that were published in the newspaper. Therefore, his speech was as a private citizen.*”

Academic Freedom

The federal appeals courts for the Third, Sixth, Seventh and Eleventh Circuits have ruled that *Garcetti* does apply to faculty members at public colleges and universities. The Eleventh Circuit ruled in one case that a college employee did not have First Amendment protection when he testified under oath. The ruling came in a lawsuit by a director of the Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC). Edward Lane conducted an audit of the program’s expenses and discovered that Suzanna Schmitz, an Alabama State Representative on CITY’s payroll, had not

been reporting for work. Lane eventually terminated Schmitz's employment. Shortly, thereafter, federal authorities indicted Schmitz on charges of mail fraud and theft concerning a program receiving federal funds. Lane testified, under subpoena, regarding the events that led to his termination of Schmitz. Subsequently, Franks, CACC's president, terminated Lane's employment.

The Eleventh Circuit ruled that Lane's testimony was not entitled to First Amendment protection. It reasoned that Lane spoke as an employee and not as a citizen because he acted pursuant to his official duties when he investigated and terminated Schmitz's employment. This decision was overturned by a unanimous ruling by U.S. Supreme Court. Justice Sonia Sotomayor wrote in the Court's decision: "*Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.*"¹⁵

The Supreme Court has long recognized the unique role of freedom of speech and thought in public education. In his dissenting opinion in the *Garcetti v. Ceballos* decision, Justice Souter stated: "I have 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.'"

Just such a case came before the Ninth Circuit Court Appeals in 2012 in *Demers v. Austin*¹⁶. Professor Demers was a tenured professor in the Edward R. Murrow School of Communications at Washington State University. Demers authored two publications; a short pamphlet and drafts from an in-progress book that were critical of the certain practices and policies of the School of Communications. Demers sued the University and claimed that the University had retaliated against him by lowering his annual performance evaluation rating and subjecting him to unwarranted internal audits.

The district court dismissed Demers's First Amendment claim on the ground that Demers made his comments in connection with his duties as a faculty member. However, unlike most recent cases involving free speech the district court's analysis did not reference *Garcetti v. Ceballos*. Instead, the Court applied the five tests of the Pickering analysis and found that Demers was not speaking as a private citizen on matters of public concern.

Demers appealed the decision to the Ninth Circuit Court of Appeals. On September 4, 2013 the Ninth Circuit held that *Garcetti* did not apply to "*teaching and writing on academic matters by teachers employed by the state. Rather, such teaching and writing by publicly employed teachers is governed by Pickering v. Board of Education. The panel affirmed the district court's determination that the pamphlet was pursuant to his official duties, but reversed the district court's determination that the pamphlet did not address matters public concern under Pickering.*"

Universities' Policies on Free Speech

Given the uncertainty of the court's interpretation of what constitutes the "official duties" of a publicly employed teacher, some universities have sought to clarify the issue by adopting speech codes that specifically address the issue of free speech on campus.

The speech codes that have been challenged in court have not fared well.¹⁷ Courts have struck these policies down as being either overbroad or vague. A statute is overbroad if it prohibits a substantial amount of protected speech in its attempts to restrict unprotected speech. A statute or regulation is vague if it does not adequately inform a person of what expressive conduct is prohibited and what expressive conduct is allowed, leaving a person to guess at the statute's application.

To date the Supreme Court has not decided a case that involves university speech codes. In *Chaplinsky v. New Hampshire*¹⁸, the United States Supreme Court did address a New Hampshire statute preventing intentionally offensive speech being directed at others in a public place. This case illustrates the limits on free speech as defined by the Supreme Court. Under New Hampshire's Offensive Conduct law, it is illegal for anyone to address "an offensive, derisive or annoying word to anyone who is lawfully in any street or public place...or to call him by an offensive or derisive name."

In late November 1941, Walter Chaplinsky, a Jehovah's Witness, was using the public sidewalk as a pulpit in downtown Rochester, passing out pamphlets and calling organized religion a "racket". After a large crowd had begun blocking the roads and generally causing a scene, a police officer removed Chaplinsky to take him to police headquarters. Upon seeing the town marshal (who had returned to the scene after warning Chaplinsky earlier to keep it down and avoid causing a commotion), Chaplinsky attacked the marshal verbally. He was then arrested. The complaint against Chaplinsky stated that he shouted: "You are a God-damned racketeer" and "a damned Fascist". Chaplinsky admitted that, excepting the name of the deity, he said the words charged in the complaint.

The Supreme Court in a unanimous decision upheld the arrest. Writing the decision for the Court, Justice Frank Murphy advanced a "two-tier theory" of the First Amendment. Certain "well-defined and narrowly limited" categories of speech fall outside the bounds of constitutional protection. Thus, "the lewd and obscene, the profane, the slanderous," and (in this case) insulting or "fighting" words neither contributed to the expression of ideas nor possessed any "social value" in the search for truth.¹⁹

On the other side of the coin some faculty senates have proposed faculty policies and procedures designed to protect academic freedom from *Garcetti v. Ceballos*. For example the University of Wisconsin-Madison unanimously enacted an amendment to the Faculty Policies and Procedures of the University that reads in part:

*"Academic freedom is the freedom to discuss and present scholarly opinions and conclusions regarding all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to reach conclusions according to one's scholarly discernment. It also includes the right to speak or write – as a private citizen or within the context of one's activities as an employee of the university – without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, the functioning of the university, and university positions and policies."*²⁰

Conclusions

Before 2006 the courts generally applied the five steps of the Pickering Analysis to determine if a public-college faculty member's speech is protected under the First Amendment. In 2006 the Supreme Court ruled in *Garcetti v. Ceballos* that the First Amendment did not protect a public employee from retaliation against speaking as "pursuant to his official duties". What constitutes the "official duties" of a faculty member and to what extent the university is entitled to regulate this speech is not clear.

Currently there is a split in the federal appeals courts over the application of the *Garcetti* decision to public-college faculty. The Third, Sixth, Seventh and Eleventh Circuits have applied *Garcetti* to academia, while the Fourth and Ninth Circuits have rejected the application of the *Garcetti* decision to academia. The Fourth and Ninth Circuits have issued opinions that the *Pickering* Analysis governs the determination of First Amendment protection for public-college faculty. This split among the federal appeals courts makes it likely that the Supreme Court will revisit the question of how its *Garcetti* decision applies to speech in academic settings in the near future.

¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

² *Demers v. Austin*, No. 11-35558, 2014 WL 306321 (9th Cir. Jan 29, 2014)

³ *Adams v. University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011)

⁴ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)

⁵ Harvey A. Silverglate, David French, and Greg Lukianoff, *FIRE's Guide to Free Speech on Campus*, 2nd Edition. Foundation for Individual Rights in Education, 2012, p 123.

⁶ Michael Stokes Paulsen, *Freedom of Speech at a Private Religious University*, University of St. Thomas Journal of Law and Public Policy, Volume II, No. 1, p 105, Available at: <http://www.stthomas.edu/media/schooloflaw/pdf/jlpp/volume2no1/PaulsenFinal.pdf>

⁷ Sarah R. Kaplan, *Public Employee Free Speech After Garcetti: Has the Seventh Circuit Been Ignoring A Question of Fact?*, Seventh Circuit Review, Volume 5, Issue 2, Spring 2010

⁸ *Pickering v. Board of Education*, 391 U.S. 563 (1968)

⁹ *Connick v. Myers*, 461 U.S. 138 (1983)

¹⁰ Sarah R. Kaplan, *Public Employee Free Speech After Garcetti: Has the Seventh Circuit Been Ignoring A Question of Fact?*, Seventh Circuit Review, Volume 5, Issue 2, Spring 2010

¹¹ *Idaho State University Faculty Association for the Preservation of the First Amendment v. Idaho State University*, United States District Court for the District of Idaho, Case No. 4:12-cv-00068-BLW Document 31.

¹² *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

¹³ *Hong v. Grant*, 516F. Supp. 2d 1158 (C.D Cal 2007)

¹⁴ *Habib Sadid v. Idaho State University*, Supreme Court of The State of Idaho, Docket No. 37563-2010, 2011 Opinion. No. 125, Filed November 30, 2011.

¹⁵ *Lane v. Franks*, No. 13-483 (June 19, 2014)

¹⁶ *Demers v. Austin*, No. 11-35558, 2014 WL 306321 (9th Cir. Jan 29, 2014)

¹⁷ David L. Hudson, Hate speech & campus speech codes, First Amendment Center, available at <http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes>, 2002

¹⁸ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)

¹⁹ Sullivan, Harold J. (2005). *Civil Rights and Liberties: Provocative Questions and Evolving Answers*, 2nd. N.J. Prentice Hall, 2005 at 24.

²⁰ Faculty Policies and Procedures of Wisconsin-Madison, Faculty Rights and Responsibilities, available at: http://www.secfac.wisc.edu/governance/fpp/Chapter_8.htm