

Staff Advisory Letter

June 1, 2009

Rights and Limitations under Principles of Academic Freedom and the First Amendment to the U.S. Constitution

The UC Chapter AAUP staff routinely receives questions about the relationship between the First Amendment guarantee of “freedom of speech” and the principle of academic freedom, which is woven into our collective bargaining agreement and which has been vigorously advanced for nearly a century by the national AAUP. Although there is indeed a relationship between the two, the questions of **which speakers** are protected, **what kinds of speech** are protected, and **in what contexts** speech is protected, are complex and do not yield themselves to easy, bright-line answers. To help clarify these issues, we provide the following advisory. Please keep in mind that the laws and customs governing free speech and academic freedom continue to evolve as court cases are decided. If a question or problem arises that potentially involves these issues, we encourage you to contact us so that we may offer you advice based on the most current information available.

I. The First Amendment: What Does It Say and How Does It Apply in the Workplace?

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment to the U.S. Constitution, as well as the other nine Amendments collectively known as the “Bill of Rights,” was ratified in 1791. As its text indicates, the First Amendment forbids Congress (i.e., the Federal government) from “abridging the freedom of speech.” This prohibition is not directed at State or local governments. However, in a series of cases starting in the first several decades of the twentieth century, the Supreme Court selectively “incorporated” (or, in other words, “applied to the States”) several rights and guarantees in the Bill of Rights through the “due process” clause of the Fourteenth Amendment (ratified in 1868). The “due process” clause appears in Section 1 of the Fourteenth Amendment, which provides, in relevant part:

*No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; **nor shall any State deprive any person of life, liberty or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.* (emphasis added)

The Supreme Court incorporated the First Amendment guarantee of “freedom of speech” in the case of *Stromberg v. California*, 283 U.S. 359 (1931). It is important to remember that the First Amendment, as written and subsequently incorporated by the Supreme Court, applies to **government** entities, not to the private sector. Therefore, the “freedom of speech” protection in the First Amendment does not apply to private sector employees’ speech about their employers or within their workplaces.

While the First Amendment does protect public sector employees’ speech about their employers, this protection applies **only** when public sector employees are speaking as private citizens about matters of concern to the general public, and even then is not an absolute guarantee. Differentiating a public sector employee’s speech as a private citizen from his/her speech as an employee is complicated, and is a still-evolving area of law.

II. Speech in the Public Sector Workplace: Citizens or Employees?

When considering the scope of First Amendment speech rights regarding institutional matters for employees of state or municipal governments, K-12 public schools, and state-supported colleges or universities, the threshold question is whether the public employee is speaking (1) in his or her capacity as a **private citizen** or (2) in the course of performing his or her duties as a **public employee**. As the Supreme Court recently established in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the answer to this question determines whether the public sector employee enjoys any “free speech” protections under the First Amendment regarding **issues pertaining to his or her public sector employer**.

If the public employee is speaking as a **private citizen**, then a court likely will apply the “balancing test” established by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, the Board of Education dismissed Marvin Pickering, a teacher, for having published a letter in a local newspaper in which he criticized the ways in which the Board had spent taxpayer funds. The Supreme Court found that Pickering was speaking on “a matter of public concern,” and proceeded to balance:

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 the its employees. (*Id.* at 568)

The *Pickering* ruling established, therefore, that a public employee who speaks as a private citizen on a matter of public concern **is** protected by the First Amendment, **but only if** the employee’s interest in speaking on the issue in question outweighs the public employer’s interest in maintaining a functioning workplace.

The Supreme Court modified the *Pickering* balancing test in *Connick v. Myers*, 461 U.S. 138 (1983), in which it considered an assistant district attorney’s challenge of her dismissal for having distributed a questionnaire to her co-workers regarding office operations, morale and the pressure to work on political campaigns. The Supreme Court found that although one of the issues that the questionnaire addressed did involve a “matter of public concern,” i.e., the pressure to work on political campaigns, the rest pertained to the attorney’s personal grievances against her employer and supervisors. Accordingly, the Court held:

[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 wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior. (*Id.* at 147)

Notably, the Supreme Court’s focus in *Connick* was on **what** was said, **not where** (i.e., in the workplace). The Supreme Court’s decision in *Connick* finds an antecedent in *Givhan v. Western Line Consolidated School District, et al.*, 439 U.S. 410 (1979), in which the Court considered the case of a public school teacher who had been dismissed following two conversations with her school principal in which she had criticized what she perceived to have been racially discriminatory employment practices at the school. The Court found that the fact that the teacher expressed these criticisms privately to the principal, rather than in a public forum (as in *Pickering*) did not place them “beyond constitutional protection.” *Id.* at 413. Again, the fact that the teacher’s speech took place at her workplace did not appear to affect the Court’s perspective.

Recently, the Supreme Court’s focus shifted in *Garcetti v. Ceballos*, 126 S.Ct 1951 (2006), when it turned sharply away from the *Connick* precedent. In a 5-4 decision, the Court adopted a highly restrictive approach to public

sector employees' speech rights in the workplace. In *Garcetti*, Richard Ceballos, a deputy district attorney, alleged that his superiors had retaliated against him after he had criticized, both in writing and in testimony, the procedures used in a criminal investigation. The Supreme Court declined to apply the *Pickering/Connick* balancing test, and held that:

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. (*Id.* at 1960)

In *Garcetti's* wake, then, it does not matter whether the public employee speaks on a "matter of public concern" in the workplace (at least in a non-academic setting); the fact that the public employee engages in speech **in the course of performing his/her official duties** is sufficient to remove it from First Amendment protection.

This most recent ruling, dramatically narrowing the free speech rights of public employees in the workplace, has been controversial. Despite the serious implications and even inherent contradictions within the ruling, given the current composition of the Court and potential replacements over the next few years, it is doubtful that *Garcetti* will be reversed or modified anytime soon. Initial indications are that lower courts are applying *Garcetti* broadly, leading to a real-world narrowing of public employees' free speech rights in the workplace.

III. What Does *Garcetti* Mean for First Amendment Rights in Educational Settings?

The *Garcetti* decision has implications for faculty members' freedom of speech rights in public educational institutions. The Supreme Court in *Garcetti* acknowledged that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.* at 1962. Since the Court was not presented with this issue in *Garcetti*, however, it declined to decide whether the "official duties" test "would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* This happens often in Supreme Court rulings—and so we are left to wonder whether scholarship and teaching are considered "official duties" which are **not** protected by the First Amendment.

Garcetti does have implications for activities in higher education other than scholarship and teaching. Courts since *Garcetti* have construed "official duties" in public sector workplaces (including higher education settings) fairly broadly, which means that a wide range of speech is likely **not** to be protected. For example, in a 2008 case (*Renken v. Gregory*, 541 F.3d 769), the Seventh Circuit Court of Appeals held that a faculty member's complaints about the University of Wisconsin-Milwaukee's administration of his NSF grant were not protected by the First Amendment because administering the grant was part of his official duties. In another case from earlier this year (*Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009)), the Third Circuit Court of Appeals considered the case of a tenured faculty member at Delaware State University who alleged that his dismissal was in retaliation for having supported a student during disciplinary proceedings and withdrawn a speaking invitation to the president. The Third Circuit found that the faculty member's dismissal was not a violation of his First Amendment rights because he had engaged in these activities as part of his official duties.

IV. Is a Professor's Speech about Issues of University Governance Protected by the First Amendment in the Wake of *Garcetti*?

Since the Supreme Court in *Garcetti* expressly declined to decide whether or how the "official duties" test would

apply to speech that is squarely related to scholarship or classroom instruction, it is an open question as to how courts will handle these issues going forward. The status of faculty speech with respect to issues involving shared governance is even more uncertain. The National AAUP has convened a subcommittee to explore these questions. The National AAUP policy position is that speech about governance should be protected, but whether courts are going to protect it is up in the air. (See <http://www.aaup.org/AAUP/pubsres/academe/2008/MJ/col/lwhong.htm> for a brief description of the problem and AAUP's advocacy approach.)

In summary: faculty members cannot assume that the First Amendment protects any and all commentary they make in their "official capacity" as public employees about institutional matters. This does not, however, undermine your right to speak as a private citizen on matters of debate in the public arena (e.g., ballot initiatives, partisan politics) so long as you do not imply you are representing a "university position." **You do have protections under academic freedom principles and the AAUP-UC contract, albeit with some limits.**

V. Academic Freedom Principles: What Are They?

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

1940 Statement on Principles of Academic Freedom and Tenure

"Academic freedom" principles are rooted in the AAUP's founding. The AAUP issued its *1915 Declaration of Principles*, the major statement on academic freedom in America, in response to the widespread dismissal of faculty members for expressing viewpoints on controversial topics, such as Darwinism, with which administrators and boards of trustees disagreed. The *1915 Declaration* was subsequently codified and expanded upon in the *1940 Statement*.

Academic freedom principles address the rights of faculty within the educational contexts of teaching, learning, and research (both in and outside the classroom) at both public and private institutions of higher education. These rights may be incorporated into faculty handbooks and collective bargaining agreements and have some standing in the law. At the University of Cincinnati, these principles are incorporated into the AAUP-UC Collective Bargaining Agreement under Article 2, as well as in language throughout various sections of the contract.

VI. What Is the Difference between First Amendment Rights and Academic Freedom Principles? Where Do They Overlap?

During the Red Scare years, beginning in the early part of the 20th century, reaching a peak during WWI (when many professors and teachers were dismissed for purported unpatriotic behavior or views), and continuing through the McCarthy era, many public employers required teachers and other public employees to sign statements affirming that they were not associated with any “subversive organizations.” As teachers challenged such policies through the courts, the Supreme Court began to “constitutionalize” academic freedom in a series of cases, culminating in *Keyishian v. Board of Regents* (385 U.S. 589 (1967)). In *Keyishian*, the Supreme Court officially extended First Amendment protection to academic freedom, holding:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. (*Id.* at 603)

A. The Classroom

The First Amendment and the concept of academic freedom generally protect speech by professors in the classroom, **if** the speech is germane to the subject matter of the course. For example, in *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002), Kenneth E. Hardy, an adjunct communications professor, lectured on language and social constructivism and asked students to examine how language “is used to marginalize minorities and other oppressed minorities.” The classroom discussion, which included examples such as “bitch,” “faggot,” and “nigger,” prompted controversy. As a result, although Hardy had been scheduled to teach courses in the fall, the administration informed him that there were no classes available for him to teach. The court found that the administration’s action violated the First Amendment, since the topic of the class – “race, gender and power conflicts in our society” – was a matter of public concern and was protected under the Constitution. The court added: “Reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.” *Id.* at 683.

However, there is no protection for gratuitous vulgarity in the classroom, whether under the First Amendment or principles of academic freedom. For example, in *Bonnell v. Lorenzo*, 241 F.3d 800, *cert. denied*, 534 U.S. 951 (2001), the Sixth Circuit upheld Macomb Community College’s suspension of John Bonnell, a professor of English, after a female student filed a complaint in which she claimed that Bonnell used lewd and graphic language in his class. The Sixth Circuit found that “[w]hile a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.” *Id.* at 823-24. Notably, the Sixth Circuit found that Bonnell’s vulgar language was “not germane to the subject matter” and thus was unprotected.

Bonnell illustrates well the fact that, where the First Amendment applies, courts have recognized that these rights are shared by institutions, professors and students alike, whose interests must be balanced against each other. In other words, a professor’s right of expression may not compromise a student’s right to learn in a hostility-free environment; there is no protection for verbal abuse or harassment under either the First Amendment or academic freedom. Likewise, a professor’s right to the legitimate exploration of academically grounded subject matter cannot be undermined by one or more students’ mere discomfort with that subject matter.

B. Curriculum

Both the principle of academic freedom and the First Amendment protect the right of faculty to control curriculum. The AAUP's *Statement on Government of Colleges and Universities* provides that faculty have "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction[.]" Article 27.2 of the AAUP-UC Collective Bargaining Agreement similarly recognizes that the Rules of the UC Board of Trustees vest in the "Faculties of the colleges and other units" the power to make their own regulations governing "the courses of instruction to be offered, grading policy, recommendations for degrees, honors and prizes, other fundamental areas of curriculum, and such other matters as may be within their jurisdiction." As the *Statement on Government* and Article 27.2 suggest, these powers belong to the faculty as a *body*, whether at the departmental or college level.

Similarly, in extending First Amendment protection to curricular choices, the courts generally have done so with respect to decisions made at the institutional and departmental levels, as opposed to those made by *individual* faculty members. For example, in *Yacovelli v. Moeser*, Case No. 02-CV-596 (M.D.N.C., Aug. 15, 2002), *aff'd*, Case No. 02-1889 (4th Cir. Aug. 19, 2002), a group of students and taxpayers sued to halt a summer reading program, involving a schoolwide discussion for all new students based on Michael Sells's book *Approaching the Qur'an: The Early Revelations*, at the University of North Carolina at Chapel Hill. In a ruling that was upheld at the appellate level, the trial court rejected the plaintiffs' arguments that the assignment of the book violated the First Amendment doctrine of separation of church and state under "the guise of academic freedom," and held: "There is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students."

Likewise, in *Linnemeir v. Board of Trustees, Indiana University-Purdue University Fort Wayne*, 260 F.3d 757 (7th Cir. 2001), the Seventh Circuit Court of Appeals found that a departmental faculty committee's approval of Terrence McNally's controversial play "Corpus Christi," selected by a student for his senior thesis did not violate the First Amendment. In *Linnemeir*, some taxpayers and state legislators sued to force Indiana University-Purdue University (IPFW) to halt the campus production of the play, arguing that it was an "undisguised attack on Christianity" and claiming that performance of the play on a public university campus therefore violated the First Amendment's guarantee of separation of state. The Seventh Circuit rejected their arguments, and held: "The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd." *Id.* at 759. The Seventh Circuit continued: "Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers ... Academic freedom and states' rights alike demand deference to educational judgments that are not invidious." *Id.* at 760.

The Third Circuit Court of Appeals, in *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (1998), expressly found that the *individual* faculty members do not possess the right of curricular control. In this case, Prof. Dilawar Edwards's departmental colleagues had disapproved his suggested classroom materials for a course in educational media, and had voted to use an earlier version of the course syllabus. Edwards sued the administration, alleging that it had violated his right to free speech by restricting his choice of classroom materials. The court rejected Edwards's argument, and found that "because a university professor does not have a First Amendment right to decide what will be taught in the classroom," it was not relevant whether his proposed course content was "reasonably related to a legitimate educational interest." *Id.* at 491. Instead, relying upon Supreme Court jurisprudence on this issue as well as its own, the court found that, with respect to determining course content, a *university* has First Amendment rights and academic freedom interests that must be protected, and that an individual professor "does not have a constitutional right to choose curriculum materials in

contravention of the University's dictates." *Id.* at 492. Bear in mind that here, Prof. Edwards's *department* (faculty colleagues and leadership) was the "speaker" whose speech rights and academic freedom were recognized by the court.

C. Grading Policy

"Under the 1940 Statement, one faculty right that flows from a 'teacher's freedom in the classroom' is the assessment of student academic performance, including the assignment of grades. In addition, the AAUP's *Statement on the Assignment of Course Grades and Student Appeals* sets forth principles to be followed in assigning and changing grades, with a focus on faculty control over assignment and review of grades." Rachel Levinson, "Academic Freedom and the First Amendment" (2007). As mentioned above, Article 27.2 of the AAUP-UC Collective Bargaining Agreement similarly recognizes that the Rules of the UC Board of Trustees vest in the "Faculties of the colleges and other units" the power to make their own regulations governing "grading policy." Note that, as with curricular control, this right is held by faculty collectively, at the departmental and college levels, as opposed to individual faculty members.

One point of contention is whether a university administration has the right to change a grade given by a faculty member to a student, whether on its own or by compelling the faculty member to change the grade. Simply put, the courts do not agree on this issue. For example, in *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1986), the Sixth Circuit Court of Appeals found that, by assigning grades to students, a professor was exercising his First Amendment "to send a specific message to the student." However, the Sixth Circuit also held that a professor "has no constitutional interest in the grades which his students ultimately receive." *Id.* At 829. Therefore, while the university administration could not compel the professor to change the grade, it could change the grade itself. The Third Circuit Court of Appeals decided otherwise, however, in *Brown v. Armenti*, 247 F.3d 69 (2001), in which it considered the case of a tenured professor at the California University of Pennsylvania who had been ordered by the president of the university to change a student's grade from an "F" to an "incomplete." The Third Circuit found that a "public university professor does not have a First Amendment right to expression via the school's grade assignment procedures," observing that "[b]ecause grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is taught." *Id.* at 75.

The UC administration has a limited right to change a student's grade over a faculty member's objections per the Student Grievance Policy. Under the Student Grievance Policy, if a student files a grievance alleging "capricious or biased academic evaluation" and the College Grievance Review Committee finds in favor of the student, then "the College Dean may exercise his/her authority to alter the grade." This policy is in line with the AAUP's statement on *The Assignment of Course Grades and Student Appeals* (1998).

D. Collegiality

In its 1999 statement *On Collegiality as a Criterion for Faculty Evaluation*, the AAUP observed: "Few, if any, responsible faculty members would deny that collegiality, in the sense of collaboration and constructive cooperation, identifies important aspects of a faculty member's performance." The AAUP continues: "collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of teaching, scholarship and service," but "rather a quality whose value is expressed in the successful execution of these three functions." However, "the invocation of collegiality may ... threaten academic freedom" if it is coupled with an expectation that a faculty member show "excessive deference to administrative or faculty decisions where these may require reasoned discussion."

Courts generally have permitted academic institutions to factor "collegiality" into their reappointment and tenure decisions when it is demonstrated that the concept of "collegiality" is not being used to disguise discrimination or

other inappropriate motivations. For example, in *Bresnick v. Manhattanville College*, 864 F.Supp. 327 (S.D.N.Y. 1994), the college denied tenure to an instructor who it deemed to have “difficulty working with colleagues ... ‘in a sufficiently collegial and collaborative manner.’” Although the instructor argued that “collegiality or working with colleagues in a collaborative manner [were] not part of the criteria listed in the College’s documents,” the federal district court upheld the college’s decision, observing that “cooperation and collegiality” were essential to the department’s pedagogic mission. *Id.* at 328. Therefore, the court opined, “[w]here what is mentioned is clearly within a relevant category, it would be blind in the extreme to require the category to be specified” in minute detail. *Id.*

In addition, in *Stein v. Kent State University Board of Trustees*, 994 F.Supp. 898 (N.D. Ohio 1998), a non-tenured professor was denied reappointment on the basis of concerns about her “teaching, research and collegiality.” With respect to collegiality, one of her reviewers noted that she exhibited “a consistently negative pattern of behavior that ... undermined the well-being of the unit.” *Id.* at 909. The professor claimed that her alleged “lack of collegiality” was a pretext for gender-based discrimination. Finding that there was no evidence of gender discrimination to support her claim, the federal district court noted that “the ability to get along with co-workers, when not a subterfuge for sex discrimination, is a legitimate consideration for tenure decisions.” *Id.* at 909.

In addition, it is important to remember that the principle of academic freedom does not protect any and all speech by faculty in their professional capacities. As the AAUP observes in its statement *On Collegiality*,

Professional misconduct or malfeasance should constitute an independently relevant matter for faculty evaluation. So, too, should efforts to obstruct the ability of colleagues to carry out their normal functions, to engage in personal attacks, or to violate ethical standards.

Finally, speech that is defamatory (e.g., falsely accusing a colleague of plagiarism) or that would be unacceptable in the private sphere (e.g., verbal or written harassment) falls outside the bounds of academic freedom.

VI. First Amendment Rights & Academic Freedom Principles in Practice

It’s often easiest to absorb these concepts in the context of a “case study,” or in this case, a hypothetical example. What would the professor’s rights be in this scenario?

Bill Smith is a tenured professor of history at State University. State University has an AAUP collective bargaining agreement in place. Professor Smith teaches a class on modern U.S. history (1914 to the present). As part of course reading material, he assigns several articles harshly critical of the government’s actions during the Palmer Raids, the McCarthy era, and elements of the 2001 Patriot Act. In discussion and as a required short paper, he asks that students consider the similarities and differences in the U.S. government’s approach to real or perceived terrorist threats during the Red Scare, the McCarthy era, and today’s post-9/11 “war on terror.”

Professor Smith considers one student, Joe, particularly difficult; he perceives him as hostile and disrespectful. He considers Joe’s views to be extreme right-wing; Joe is constantly criticizing Professor Smith and the course materials. They have engaged in some fairly heated exchanges during class discussions, and in one class session he told Joe that he “didn’t want to hear any more of this fascist pseudo-analysis from you this semester.”

At one point during the course of the semester, the U.S. Congress is engaged in a debate about the

renewal of the Patriot Act. Professor Smith writes a letter to the editor of the local paper criticizing the Act. He gets a call the next day from his department chair, who is extremely upset because Professor Smith identified himself as a “Professor of History, State University” in his byline. The department chair warns Professor Smith that this could result in disciplinary action if it happens again, saying that he is dragging the University into “political matters.”

Professor Smith is also a Faculty Senator and is lobbying other senators to pass a Faculty Senate resolution banning U.S. Army recruiters from the campus as a form of civil disobedience. (The law currently requires public universities to allow military recruiters on campus.)

At the end of the semester, Joe makes a formal complaint to the department, stating that the course materials are “inflammatory” and “political” in nature, not educational; that he was prevented from participating in course discussions; and that he received a C in the course instead of the higher grade he believes he merited because his political views were different from the professor’s.

In this scenario, is Professor Smith protected by the First Amendment and/or Academic Freedom principles? Yes, and no.

Both the First Amendment and AAUP principles of academic freedom protect Professor Smith’s right to assign educationally relevant material. While students may not agree with some or all of the scholarly viewpoints expressed in course readings, the professor has the right to assign that material so long as the reading are germane to the subject matter. Simply because the material is controversial does not mean it is not educationally appropriate.

However, instructors must honor students’ right to learn in an environment that is respectful of dissent. By telling Joe to, in essence, stop speaking in the classroom, Professor Smith created a hostile learning environment—not only for Joe, but inadvertently for all of the other students in the classroom, too. Neither First Amendment rights nor academic freedom principles protect him in this situation. As noted above, the *Bonnell* case makes it clear that a professor’s right of expression may not compromise a student’s right to learn in a hostility-free environment; there is no protection for verbal abuse or harassment under either the First Amendment or academic freedom.

Joe’s assertions that he was given a lower grade than he merited must be investigated through the appropriate student grievance procedure. As the weight of case law suggests, if the student grievance committee were to find that Joe’s complaint was justified and Professor Smith refused to change the grade, the University could do so without violating Professor Smith’s First Amendment or academic freedom rights. In addition, if the University had reason to believe that, indeed, the lower grade was given solely or in part because the student’s political beliefs differed from the professor’s, Professor Smith could face discipline for professional misconduct.

Under *Garcetti*, and given that lower courts have been applying *Garcetti* quite broadly, it is very likely that Professor Smith’s activities as a Faculty Senator could be considered part of his “official duties” and would therefore *not* be protected by the First Amendment. However, because State University faculty have an AAUP contract that incorporates academic freedom principles, he cannot be disciplined for speech he engages in as part of his duties as a Faculty Senator. “Academic freedom is based upon the premise that scholars are entitled to immunity from coercion in matters of thought and expression and on the belief that the mission of the University can be performed in an atmosphere free from administrative or political constraints on thought and expression” (from the AAUP-UC contract, Article 2.1). The fact that he is advocating—by his *speech*—for an act of civil disobedience is irrelevant to his protections under academic freedom. However, any *physical* acts of civil

disobedience he might engage in, on or off the campus, are not protected by academic freedom. (Another tricky area, beyond the scope of this paper, is the extent to which the First Amendment might protect any physical acts of civil disobedience such as demonstrations, picketing, blockades, etc., on campus.)

Finally, on the issue of the letter to the editor: the *Pickering* balancing test would apply with regard to the First Amendment. Professor Smith is a citizen expressing his thoughts about a matter of public concern. His letter gave no hint of “University sponsorship” (i.e., official University policy); rather, stating his profession and position lends additional credibility to his opinion on this public matter. A court reviewing the matter would most likely rule that Professor Smith’s rights outweigh the University’s rights, because it would be extremely difficult for the University to prove that his speech impaired the function of the institution or negatively affected the workplace. Furthermore, academic freedom principles and the AAUP contract would protect him against any attempt at discipline: “The University shall also continue to recognize that all Faculty Members are citizens and members of learned professions. When they speak or write as citizens, they shall be free from institutional censorship or discipline. . . . Faculty Members shall be free in their public utterances or activities to identify their University affiliation so long as no false impression of University sponsorship or endorsement is created” (from the AAUP-UC contract, Article 2.3).

VII. CONCLUSION

It is our hope that this advisory letter clarifies the rights and limitations of both academic freedom principles and First Amendment rights in the academic workplace. As you can see from the above review, faculty members should not presume that the First Amendment affords them extensive protection in the workplace; this is true for employees across the United States, and academia is no different. However, faculty members at UC should feel very confident in the protections afforded you under the AAUP-UC contract with regard to academic freedom as defined in the 1940 Statement on Principles of Academic Freedom and Tenure, and as elaborated in subsequent AAUP documents and in court cases.

As always, if you have questions or concerns about an issue or incident related to academic freedom, please do not hesitate to contact us.

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