

What Every Faculty Member
Should Know About
Idaho Abortion Laws &
Your Speech Rights

MONDAY, JANUARY 23

Topics Covered

Introduction of Abortion Laws

Introduction of No Public Funds Law

Speech Rights on the Job

Speech Rights off the Job

Hypotheticals/Recommendations

Q & A

Abortion Laws Post-*Dobbs*

[Idaho Code 18-622](#) (total abortion ban)

[Idaho Code 18-8804](#) (six-week abortion ban)

[Idaho Code 18-8807](#) (civil liability for abortion)

*All three upheld by Idaho Supreme Court in a 3-2 decision issued January 5, 2023, [Planned Parenthood v. State of Idaho, No. 49615, 49817, 49899 \(Jan. 5, 2023\)](#)

Abortion Laws Post-Dobbs

To avoid constitutional problems, Idaho Supreme Court determined that:

1. Based on definition of pregnancy in 18-622(2) and 18-604(11), Total Abortion Ban only prohibits abortion of a viable fetus. Only type of pregnancy that counts for purposes of prohibited abortion is pregnancy where fetus is developing. Ectopic and non-viable pregnancies do not fall within that definition.
2. Six-week ban and civil liability statute does not have similar limiting provision/definition of pregnancy, but ISC applied a limiting judicial construction, concluded that ectopic and non-viable pregnancies fall within the “medical emergency” exception of these statutes.
3. Affirmative defense to save the life of the mother depends on a physician’s subjective good faith judgment
4. The subjective standard also applies to the requirement that the abortion be performed in a manner that provides the best opportunity for the unborn child to survive.
5. The EMTALA exception does not apply to the six-week abortion ban or civil liability statute, but that is of little moment because both Idaho Code 18-8804 and 18-8807 have a “medical emergency” exception.

Abortion Laws Post-Dobbs

U.S. v. State of Idaho – EMTALA

18-622 conflicts with EMTALA

- Affirmative defense in 18-622 is narrower than what EMTALA requires
- Dr. can't comply with both
- EMTALA pre-empts 18-622 to extent there is a conflict

U.S. v. State of Idaho -- EMTALA

State of Idaho prohibited from initiating criminal prosecution against, attempting to suspend or revoke the professional license of, or seeking to impose any other form of liability on, any medical provider or hospital based on their performance of conduct that is defined as an abortion under 18-604(1) but that is necessary to avoid

- Placing the health of a pregnant patient in serious jeopardy
- A serious impairment to bodily functions of the pregnant patient
- Serious dysfunction of any bodily organ or part of the pregnant person

Legislature and State have asked Judge Winmill to reconsider

- No deadline/hearing set
- Injunction remains in place

Other Idaho abortion laws

[18-505](#) – prohibiting abortions after 20 weeks gestational age except in limited circumstances

[18-608\(2\)](#) – second trimester abortions must be performed in a hospital

[18-617](#) – generally prohibits the use of abortifacients to effect a chemical abortion

- Abortifacient does not apply when used to treat ectopic pregnancy

General aiding/abetting liability

[Idaho Code 18-204](#) – all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission . . . are principals in any crime so committed

- Aiders and abettors, accessories, are punished as principals
- Has to be a crime committed to be an aider and abettor or an accessory

No Public Funds for Abortion Act

[Idaho Code Section 18-8705](#)

(2) No person, agency, organization, or any other party that receives funds authorized by the state, a county, a city, a public health district, a public school district, or any local political subdivision or agency thereof may use those funds to perform or promote abortion, provide counseling in favor of abortion, make referral for abortion, or provide facilities for abortion or for training to provide or perform abortion.

(3) No fund or committee authorized by Idaho Code for the special protection of women or children shall be authorized to use or distribute public funds for payment for abortion, abortion referrals, abortion counseling, or abortion-related medical or social services.

No Public Funds for Abortion Act

[H.B. 2 \(2023\).](#)

24 18-8705. USE OF PUBLIC FUNDS FOR ABORTION PROHIBITED. (1) No pub-
25 lic funds made available by the state, a county, a city, a public health
26 district, a public school district, or any local political subdivision or
27 agency thereof and distributed by any institution, board, commission, de-
28 partment, agency, official, or employee of the state, a county, a city, a
29 public health district, a public school district, or any local political
30 subdivision or agency thereof shall be used in any way to provide, perform,
31 or induce an abortion; assist in the provision or performance of an abor-
32 tion; promote abortion; counsel in favor of abortion; refer for abortion; or
33 provide facilities for an abortion or for training to provide or perform an
34 abortion. As used in this subsection, the term "promote" shall not be inter-
35 preted as preventing any classroom discussion on the subject of abortion at a
36 school, college, or university.

37 (2) No person, agency, organization, or any other party that receives
38 funds authorized by the state, a county, a city, a public health district, a
39 public school district, or any local political subdivision or agency thereof
40 may use those funds to perform or promote abortion, provide counseling in fa-
41 vor of abortion, make referral for abortion, or provide facilities for abor-
42 tion or for training to provide or perform abortion. As used in this subsec-
43 tion, the term "promote" shall not be interpreted as preventing any class-
44 room discussion on the subject of abortion at a school, college, or univer-
45 sity.

Speech Rights on the Job

Overview Employment
Protections

Academic Freedom

Adequate
Cause/Morality Clause

Sources of job protections

- Annual Contracts
- University Faculty Staff Handbook
- Idaho State Board of Education Policy
- Tenure Protections– policy and constitutional
- Whistleblower Protection – IPPEA
- First Amendment Outside of Work
- Academic Freedom and Free Speech in the Classroom/at Work
- Equal Protection/Anti-Discrimination

Academic Freedom

Relevant Policies

Who is Covered

What is Covered

Relevant Policies

[Idaho State Board of Education's Academic Freedom and Academic Responsibility Policy](#) (Adopted February 2022)

- “[F]aculty have the right to engage in free inquiry, intellectual debate, and freedom of scholarship both on and off campus. Faculty shall not be subject to retaliation or censorship in response to their research, publications, creative activity, pedagogy, participation in institutional governance, and all other official aspects of their job description.”

Relevant Policies

Some examples from ISBOE's Academic Freedom and Academic Responsibility Policy . . .

Academic Freedoms	Academic Responsibilities
Faculty right to determine course content	Respect rights of others to express differing opinions.
Faculty may pursue Research of their choosing	Present intellectual diversity related to faculty member's discipline.
Faculty may express opinions about governance without fear of censorship/retaliation.	Not threaten the rights of others students, faculty, or administrators while exercising academic freedom.

Who is Covered

- Academic freedom applies to:
 - full-time
 - part-time
 - tenure and tenure-track
 - adjunct professors and lecturers
 - graduate student instructors**and**
 - research assistants

Who is Covered

- U.S. Supreme Court precedent has recognized the importance of the First Amendment on university campuses. The government, which includes state university administration, **CANNOT** compel university faculty to avoid discussing controversial topics or viewpoints.

Who is Covered

Sweezy v. State of N.H. by Wyman, 354 U.S. 234 (1957)

- NH legislature authorized a commission to investigate subversive activities.
- Sweezy was called before the commission and asked about a lecture he gave at the University of New Hampshire.
 - 'Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?'
 - 'Did you advocate Marxism at that time?'
 - 'Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?'
- "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the **vital role in a democracy that is played by those who guide and train our youth**. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. **Particularly is that true in the social sciences**, where few, if any, principles are accepted as absolutes. 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." at 250 (emphasis added).

Who is Covered

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)

- University regulations treated treasonable or seditious utterances or acts as removable offenses.
- "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." at 603 (emphasis added).
- "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" at 603
- "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which **clearly inform teachers what is being proscribed**." at 604

What Conduct is Covered

- Includes the liberty to conduct research and draw conclusions rooted in evidence.
- Includes the right to select course materials and content, pedagogy, make assignments, and assess student performance. These should be germane to the subject matter.
- Certain limits: e.g. University grading policy, protections against a hostile education environment

What Conduct is Covered

Speech in the Classroom

- *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001)
 - An African-American student alleged that professor Hardy used offensive language in a lecture on language and social constructivism. Hardy was not offered a class to teach the following semester.
 - In Hardy's course, students were asked to examine how language "is used to marginalize minorities and other oppressed groups in society," and the discussion included examples of derogatory, sexist, and racist language.
 - The Court ruled in favor of Hardy, finding that the topic of the class—"race, gender, and power conflicts in our society"—was a matter of public concern and held that "a teacher's in-class speech deserves constitutional protection."

What Conduct is Covered

Speech in the Classroom

- *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).
 - A female student filed a sexual harassment complaint alleging Bonnell repeatedly used lewd and graphic language in his English class. The college terminated Bonnell.
 - “While 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.” at 823-24.
 - Bonnell’s use of vulgar language was “not germane to the subject matter” of the course, and therefore unprotected.

What Conduct is Covered

Curricular Assignments

- *Yacovelli v. Moeser*, 324 F.Supp.2d 760 (M.D.N.C. 2004)
 - At the beginning of the school year, UNC scheduled a school-wide discussion for all new students based on the book *Approaching the Qur'an: The Early Revelations*. Lawsuit alleged this violated separation of church and state.
 - The court ruled in favor of the university: “There is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students.”

What Conduct is Covered

Curricular Assignments

- *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)
 - Axson-Flynn, a college theater student, changed some words in assigned scripts for in-class performances so as to avoid using words she found offensive based on her religious beliefs. Her professors warned her that she would not be able to change scripts in future assignments. Axson-Flynn left the program and sued.
 - Court: the school could compel speech from Axson-Flynn if doing so was “reasonably related to legitimate pedagogical concerns.”
 - Courts should not to override a faculty member's professional judgment “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).
 - [W]e may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.
 - So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.” *Settle*, 53 F.3d at 155–56

What Conduct is Covered

Outside the Classroom

- *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)
 - Professor alleged his university retaliated against him for publishing a draft book and pamphlet about whether the university should separate two faculties.
 - The Ninth Circuit used the *Pickering* test to determine that academic employee speech is protected if
 - 1) the speech addresses matters of public concern; and,
 - 2) the matters of public concern outweigh the state's interest in promoting efficient public services through its employees.
 - "But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are 'a special concern of the First Amendment.'" at 411 (citing *Keyishian*)
 - "First, not all speech by a teacher or professor addresses a matter of public concern. . . . Second, protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*." at 416

What Conduct is Covered

Outside the Classroom

- *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001)
 - Former university professor alleged First Amendment violation when another professor removed handbills announcing his speaking event at the university.
 - The removal of the handbills was First Amendment violation because it was placed on a bulletin board treated as a traditional public forum and the removal targeted only one speaker, leading to viewpoint discrimination.
 - "Suppression of notices announcing an upcoming speech is suppression of the view to be communicated through the speech, because a speech to an empty auditorium, no matter how brilliant it may be or how persuasive its delivery, does not convey any message to anyone." At 1188-89

What Conduct is Covered

Outside the Classroom

- *Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001)
 - College professor faced possible discipline under "overtones" of workplace violence policy after publishing controversial newspaper illustrations and articles in disagreement with university administrators.
 - Court considered five factors and held that the professor's interest in making the statements outweighed the college's administrative interest in regulating the speech.
 - "[G]iven the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect—indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams."

Adequate
Cause &
Morality
Clause

Relevant Policies

Immorality

Cause Standard

Adequate Cause & The Morality Clause

“Discipline – Adequate Cause – All Employees,” Idaho State Board of Education Policies and Procedures (“SBOE”), Section II.L:

- * Governs classified and non-classified employees, including Faculty
- * Discipline (including dismissal) may be imposed for “adequate cause”

“Immorality” is an identified example of “adequate cause” for disciplinary action

“Adequate Cause”

SBOE Policies and Procedures, Section II.L(3), defines “adequate cause” to mean:

- * One (1) or more acts or omissions which, singly or in the aggregate, have directly and substantially affected or impaired an employee’s performance of his professional or assigned duties
- * One (1) or more acts or omissions which, singly or in the aggregate, have directly and substantially affected or impaired the interests of the Board, institution or agency
- * Any conduct seriously prejudicial to the Board, institution or agency

Listed examples of “adequate cause” include:

- immorality;
- criminality; dishonesty; unprofessional conduct;
- actions in violation of policies, directives, or orders of the Board, an institution or agency;
- one or more instances of sexual harassment or other form of harassment prohibited by law;
- unsatisfactory or inadequate performance of duties, or failure to perform duties

Where Else is the Morality Clause?

The SBOE “[Adequate Cause](#)” definition and its “[Immorality](#)” example are adopted in:

- * University policies and procedures
 - University of Idaho Faculty Handbook, Policies 3910, 3920, 3930
 - Idaho State University Policies and Procedures, ISUPP 3130
 - Boise State University, Policy 7430 (Classified Employees)
- * Faculty contracts

Abortion

“[T]he relevant history and traditions of Idaho show abortion was viewed as an immoral act and treated as a crime. Thus, we cannot conclude the framers and adopters of the Inalienable Rights Clause [of the Idaho Constitution] intended to implicitly protect abortion as a fundamental right.”

Planned Parenthood Great Northwest v. State of Idaho, 2023 WL 110626 (Jan. 5, 2023)

From 1934: “Though sec. 809, Code, is construed so as not to render a woman on whom an abortion is performed, with her consent criminally liable, she was engaged in an immoral act”

Nash v. Meyer, 54 Idaho 283 (1934)

What is Immorality?

Example judicial definitions of “moral turpitude”:

“in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good morals, justice of ethics as to be shocking to the moral sense of the community.”

Siercke v. Siercke, 167 Idaho 709 (2020)

“an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”

"doing a thing against good morals, honesty or justice; unlawful conduct; infamy."

In re Downs, 46 Idaho 464 (1928)

Clear as Mud?

“Today’s morals may be tomorrow’s ancient and absurd customs.”

“Terms such as ‘immoral or unprofessional conduct’ or ‘moral turpitude’ stretch over so wide a range that they embrace an unlimited area of conduct.”

Morrison v. State Board of Education, 461 P.2d 375 (Cal. 1969)

Idaho: The “Cause” Standard

Facts: Part-time chief of campus security was dismissed for making racist remarks to the press. He sued, challenging as unconstitutionally vague the ISBOE’s policy allowing dismissal “for good cause shown.”

In analyzing this clause, the Idaho Supreme Court looked to the SBOE’s definition of “cause” for faculty in the same policy section:

“Cause for dismissal or termination of a faculty member shall be any conduct seriously prejudicial to the institution, its students or faculty; for example (but not by way of limitation) **immorality**, criminality, dishonesty, unprofessional conduct, actions in violation of policies, directives or orders of the Board, incompetence in the performance of his or her assigned or contractual duties, and failure to perform his or her assigned or contractual duties.“

The Court concluded the good cause standard **was legally sufficient** and upheld the employment dismissal:

“[A] contract employee **may not be dismissed for conduct unrelated to the performance of his job or the welfare of the institution** by which he is employed.

“Under the circumstances, we conclude that the **ordinary person exercising common sense** could sufficiently understand the meaning of the term “good cause” as it is used in [the policy] to conduct himself or herself in a manner as to avoid termination.”

Allen v. Lewis-Clark State College, 105 Idaho 447 (1983)

Take-Aways

Is there a direct nexus between the off-duty speech/conduct and the job?

= An act or omission that has directly and substantially affected or impaired

- an employee's performance of his professional or assigned duties or
- the interests of the Board, institution or agency

= Conduct seriously prejudicial to the Board, an institution or agency

Speech Rights Off the Job

Policies

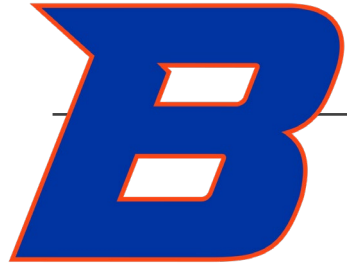
First Amendment

Retaliation Test

Social Media

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- *Academic Freedom is a long-standing philosophical, legal, and constitutional principle of freedom of speech that advances the right of postsecondary students, faculty, and institutions to pursue educational opportunities that seek, examine, apply, discuss, and build knowledge, theories, values, concepts, or ideas without fear of censorship, retaliation, or threat to institutional status.*
 - *In addition to constitutionally protected freedoms of speech, assembly, and religion, faculty have the right to engage in free inquiry, intellectual debate, and freedom of scholarship both on and off campus. Faculty shall not be subject to retaliation or censorship in response to their research, publications, creative activity, pedagogy, participation in institutional governance, and all other official aspects of their job description. When speaking or writing as a citizen, each faculty member should be free from institutional censorship or discipline. Faculty are subject to the responsibilities outlined in paragraph 3.b. of this policy.*

Faculty Constitution



Boise State University

Faculty Senate Constitution

Amended: December 2018

Effective Date: February 2019

College and university teachers are citizens, members of a learned profession, and officers of the 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.



**University
of Idaho**

Faculty Staff Handbook

- Policy 3160 B-3.b.

“Teachers are citizens, members of learned professions, and representatives of their institutions. **When they speak or write as citizens, they should be free from institutional censorship or discipline.** However, as members of the academic community and as representatives of their institutions, they should at all times be accurate, exercise appropriate restraint, show respect for the opinions of others, and make every effort to indicate that they do not officially speak for the institution.”

First Amendment Retaliation Test

Public Employee Speech Doctrine – 5 part test (*Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968))

Employee must show:

1. Spoke out on a matter of public concern – Repro Rights/Abortion = matters of public concern
2. Spoke as a private citizen (vs. fulfilling a job duty as a public employee) – see take aways
3. Speech was a motivating factor in the adverse employment action – direct v. circumstantial evidence

University must show:

1. University had adequate justification for treating employee different from other member of general public – how disruptive to University – controversial speech always causes some disruption
2. University would have taken adverse employment action anyway (absent the protected speech)

Cases – Applying the Test

Gray v. Union County Intermediate Educ. District (9th Cir. 1975): Special Ed teacher advocated for her intellectually challenged student's right to a therapeutic abortion contrary to Welfare Department's (student was a ward of department) decision that abortion was not advisable. Teacher's contract was non-renewed, in part, because of the problems her advocacy caused in the relationship between the Welfare Dept. and the School. Court found teacher's conduct went beyond free speech.

Cases Continued

Maybe v. Reagan, (9th 1976): Political and academic unrest on campus in the 1960s. Untenured college professor made angry comments at faculty senate hearing (no students present) including calling President/administrators “Older punks, jerks and damned liars” in response to President’s referring to younger faculty using the same terms. Whether speech was protected could not be decided without a full trial.

Cases Continued

Adamian v. Lombardi (9th Cir. 1979): Professor engaged in unauthorized student protest re: Cambodian invasion/Kent State killings. Protest was on campus, during school hours and during Governor Day ceremonies. Protesters blocked motorcade, and then this professor disrupted ceremony – leaving the stands and walking onto the field and encouraging others to follow. Court found not protected because his speech/conduct created a potential confrontation and was intentionally disruptive.

Cases Continued

Sadid v. Idaho State University (Idaho S.Ct. 2011): Professor made public comments criticizing university administration published in a local newspaper (letters to editor, paid advertisement, etc.) including statements that ISU and U of I were conspiring to shift engineering to U of I so ISU could create a medical school, among other things. Professor identified self as University employee. Issues on appeal were 1) whether speaking as employee or citizen - Court said as a citizen b/c no duty to make statements; 2) matter of public concern or private grievances - Court said at least one issue was public concern (medical school);

Sadid Part II (Idaho S.Ct. 2013): Same professor's "employment related tirades" to supervisors and colleagues within faculty meeting (accused administrators of dishonesty and misconduct), was not protected speech. Happened after he was warned to follow proper protocol in raising concerns.

Cases Continued

Dodge v. Evergreen School District (9th Cir. December 2022): Middle school teacher with MAGA cap on at teacher only trainings – which caused offense to some. Court found speech/conduct was matter of public concern, and was private (no official duty to wear the hat) – don't lose right to speak out just because not in public space. Thus, speech was protected.

Social Media

No Idaho or 9th Circuit court opinion that addresses university faculty social media statements.

But, see:

Hernandez v. City of Phoenix 43 F.4th 966, 973 (9th Cir. 2022)

Court held police officer's posts regarding Muslims was speech protected by First Amendment. Remanded for further development of factual record to determine whether posts detrimental to mission and function of police department or undermined the respect or public confidence in police department

“publicly posting on social media suggest an intent to communicate to the public or to advance a political or social point of view beyond the employment context.”

Social Media

Other Jurisdictions-Speech Protected

Cowden v. Bd. of Governors of Colorado State Univ. Sys. by & through Colorado State Univ.-Pueblo, 2022 WL 4349620, at *2 (D. Colo. Aug. 23, 2022)

Court held that social media posts by professors that female faculty members were being terminated while male faculty members were keeping their jobs was protected by the First Amendment. “[F]act that employees speak at work or about information involving the subject matter of their employment and acquired during the course of their employment does not convert speech made as a citizen into speech made as an employees.”

Hayes v. Bd. of Educ. of City of Chicago, 2022 WL 4356924, at *1 (N.D. Ill. Sept. 19, 2022)

Court held University employee’s social media posts criticizing “lack of resources and systemic inequities have become an acceptable status quo” and “stop inaccurate rhetoric about the longer day and year” which led to termination after school official complained adequate to state a First Amendment retaliation claim

Social Media

Other Jurisdictions-Speech Protected

Higbee v. E. Michigan Univ., 399 F. Supp. 3d 694 (E.D. Mich. 2019), *case dismissed*, No. 19-1751, 2019 WL 5079254 (6th Cir. Aug. 7, 2019)

Public university professor's social media post criticizing university's response to racist graffiti on campus, which was to discipline protestors, and derogatorily refer to African American administrators involved matter of public concern, as required for protection under the First Amendment.

Weiss v. Perez, No. 22-CV-00641-BLF, 2022 WL 11337461 (N.D. Cal. Oct. 19, 2022)

Social media posts by tenured professor of physical anthropology at public university regarding opposition to repatriation of Native American speech protected by First Amendment.

Jones v. Matkin, No. 4:21-CV-00733, 2022 WL 3686532 (E.D. Tex. Aug. 25, 2022)

Professor's post on social media raising concerns about college's pandemic reopening plan was protected under First Amendment. "Plaintiff had a clearly established right to use her private social media account as a vehicle for engaging the public in a governmental response to a matter of public concern."

Social Media

Other Jurisdictions-Speech Not Protected

Howell v. Millersville Univ. of Pennsylvania, 283 F. Supp. 3d 309, 334 (E.D. Pa. 2017), *aff'd*, 749 F. App'x 130 (3d Cir. 2018)

Music professor's email complaints that he lacks confidence in the current leadership model and it is "heavy handed" about leadership and management "sound[ed] quite a different key" from matters of public concern recognized in other cases. *E.g.*, school funding, pressure to contribute to political campaign, legislative testimony by teacher, complaints about school board policies and practices

Wiley v. Plattsburgh, 407 F. Supp. 3d 119, 128 (N.D.N.Y. 2019)

Court held Facebook posts that "rebutted salacious allegations against" university employee (diversity officer) and attempted to rebut public accusations against his personal character and employment role involved personal grievances concerning his own self-interest and not a matter of public concern

AAUP* 2018 Guidance

“The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for the position.”

Professor’s hold “special position in community” which “imposes special obligations.”

At all times, professors should be accurate, exercise appropriate restraint, show respect for the opinion of others, and state that not speaking for institution

*American Association of University Professors

Take-Aways

The facts matter so get advice before you engage in the speech if possible;

Matter of public concern – Repro/abortion rights/abortion laws are matters of public concern;

Make it clear you are speaking/acting in your individual capacity not as a member of faculty or on behalf of University (make disclaimers where appropriate);

Off company time and off company property is always safer;

Stay professional;

What's it All Mean

Hypotheticals

Recommendations

Q & A

Contact Information

Hypothetical # 1

Public employee participates in a peaceful protest for reproductive rights in their private time and off campus

Hypothetical # 2

Public employee lectures about reproductive rights while teaching a course where those rights are relevant to the course content

Hypothetical # 3

Public employee tweets information about access to abortion in neighboring state

- Are you tweeting as professor or in private capacity?
- Do you identify or are you identifiable as University employee?
- What is the content of your tweet?
- What if any disruption or consequence to University come of your tweet?
- Is abortion legal in neighboring state?

Steps to take if investigated/fear enforcement

It's never too early to reach out for legal advice - AFT/ ACLU/ Employment lawyers

Take notes: what, where, when, who, how

Read your University policies

Collect important material that may be evidence (only what you are entitled to have access to): contracts, emails, voicemails, policies, trainings, notes, social media pages, text messages, etc.

Pay attention to timing between any protected activity and adverse actions

Breathe....

Questions?

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