June 21, 2010

Professors Try to Shore Up Speech Protections Undermined by Courts

By Peter Schmidt

Alarmed by a series of recent federal court decisions seen as endangering academic freedom at public colleges, faculty members at a growing number of public institutions are pushing their administrations to officially ensure their right to speak out on institutional governance and other matters related to their jobs.

Policies protecting the work-related speech of faculty members are under consideration in the University of California and the University of Illinois systems, as well as at individual colleges in other states, and have been adopted by the University of Michigan and the University of Minnesota. Collective-bargaining agreements offering such speech protections were approved by the University of Florida in February and by the University of Delaware in May.

Many more public colleges are expected to adopt such faculty speech protections in the coming year, largely as a result of a campaign by the American Association of University Professors urging its members to push for such changes. The AAUP has been joined in its effort by the Modern Language Association, which in February adopted a statement urging faculty senates at public colleges to make sure academic freedom is adequately protected in their institutions' faculty handbooks.

Driving such activity is a spate of recent federal court decisions calling into question how much the First Amendment protects academic freedom at public colleges—or, for that matter, whether faculty members at such institutions are any more free to speak out on job-related matters than employees of any other public agency.

Among the most recent such rulings, a U.S. District Court last month rejected claims by a University of South Alabama faculty member that the First Amendment protected her complaints about a lack of diversity in hiring decisions. A separate U.S. District Court held in March that two professors of nursing at Medgar Evers College, in New York, were not protected by the First Amendment when they complained about the management of their academic
department to a union representative, a grievance officer, and administrators there.

In urging public colleges to adopt policies or contracts formally guaranteeing academic freedom, the AAUP and the MLA are trying to establish new, legally binding protections of faculty speech to replace the First Amendment protections that may no longer exist.

"You just assume that academic freedom gives you broad-stroke protection to speak freely, when, in fact, it doesn’t," says Greg B. Pasternack, a professor of watershed hydrology at the University of California at Davis who helped develop the policy under consideration there as chairman of his campus faculty’s committee on academic freedom and responsibility.

Mr. Pasternack says it is "important to have this freedom in writing," especially when weighing in on divisive topics such as the administrative and academic reorganizations his campus is going through to deal with a tight budget. Technological advances such as online discussion boards offer "a lot of opportunity to speak," Mr. Pasternack says, but "it important to have that mesh with freedom not to have that speech held against you."

On the Defensive
The U.S. Supreme Court appeared to have opened the door to court rulings curtailing the speech rights of public-college employees with its 2006 decision, in Garcetti v. Ceballos, holding that government agencies can restrict the statements their employees make in connection with their official duties.

The Garcetti case did not deal directly with higher education; it involved a dispute within a district attorney’s office. Moreover, the court acknowledged that the employee speech restrictions allowed by its ruling might not be appropriate for academic settings, with the majority opinion explicitly putting off to another day the question of whether reasoning "would apply in the same manner to a case involving speech related to scholarship or teaching."

Nevertheless, several federal courts have cited the Garcetti ruling in denying faculty members and other college employees any First Amendment protection for statements related to their jobs.

Among the those decisions, the U.S. Court of Appeals for the Seventh Circuit ruled in 2008 that a tenured associate professor at the University of Wisconsin at Milwaukee was not protected by the First Amendment when he complained that administrators there had mishandled a grant. The U.S. Court of Appeals for the Third Circuit held last year that a Delaware State University professor was
when he spoke about job-related activities not specifically covered by his contract.

Pending before the U.S. Court of Appeals for the Ninth Circuit is a case dealing with the question of whether the First Amendment protected a professor at the University of California at Irvine from repercussions over statements he made in connection with personnel decisions in his academic department.

Meanwhile, the U.S. Court of Appeals for the Fourth Circuit has been asked to take up the case of Michael S. Adams, a prominent conservative commentator and associate professor of criminology at the University of North Carolina at Wilmington who claims he was denied a promotion based on his online columns and other expressions of opinion. In ruling against Mr. Adams in March, a U.S. District Court held that he had caused his columns to be considered as work-related speech—rather than as outside speech clearly protected under the First Amendment—by including them in the package of materials submitted as part of his promotion bid.

Other recent federal court decisions have similarly adopted a fairly expansive view of the applicability of the Garcetti ruling to higher education.

Among them, the U.S. District Court for the Southern District of Alabama held last month that a faculty member’s calls for more diversity in hiring were not protected, especially since they did not amount to a formal discrimination complaint. In ruling against Moira K. Miller, a former tenure-track assistant professor of English at the University of South Alabama who alleged that the university chose not to reappoint her in retaliation for such speech, Judge Kristi K. DuBose noted that Ms. Miller herself had acknowledged she expressed her views as a faculty member.

Judge DuBose’s decision said that although the public may have an interest in the diversity of the faculty in the University of South Alabama’s English department, "Miller simply did not speak on behalf of the public as a citizen."

Judge Frederic Block of the U.S. District Court for the Eastern District of New York similarly held in March that two tenured nursing professors at the City University of New York's Medgar Evers College, Anthony Isenalumhe and Jean Gumbs, were not protected by the First Amendment in filing complaints about a manager with union and college officials. In rejecting the professors' claims that administrators had illegally retaliated
against them over such speech, Judge Block called their lawsuit "nothing more than an attempt—regrettably all too common—to dress an internecine feud in First Amendment garb."

"There may be circumstances in which such struggles implicate the First Amendment, as when it involves what may and may not be taught in a public university," Judge Block's ruling said. "Here, however, the speech at issue involves a string of complaints by faculty members unhappy with the administration of their department. While the complaints may well be justified, the First Amendment does not transform a federal court into a battleground for their resolution."

Judge Block's decision cited a January ruling by a three-judge panel of the U.S. Court of Appeals for the Second Circuit holding that a teacher at a public elementary school in New York City public was not protected by the First Amendment when he filed a grievance with his union over a supervisor's failure to discipline an unruly student. In rejecting the teacher's claim that he was the victim of illegal retaliation, the Second Circuit found irrelevant the teacher's argument that filing grievances was not one of his everyday job responsibilities.

In a separate decision last month involving a New York City public-school teacher who was removed from the classroom for writing vulgar slang terms offered by eighth graders on the blackboard during a lesson on HIV prevention, a U.S. District Court held that "teacher instruction is public employee speech," and therefore is not protected.

Although the courts generally treat First Amendment cases involving higher education differently than those involving elementary and secondary schools, Rachel Levinson, senior counsel for the AAUP, says she finds the decisions in the Second Circuit "incredibly worrisome." In a presentation delivered this month at the association's annual conference, Lawrence White, vice president and general counsel at the University of Delaware, said there was nothing in the two decisions involving public schools stating that disputes involving college faculty members should be handled any differently.

This month, in ruling against a former librarian at Ohio State University at Mansfield who claimed he had been forced out of his job over a controversial reading-assignment recommendation, Judge William O. Bertelsman of the U.S. District Court for the Southern District of Ohio construed the Garcetti decision's
exception for academic speech in the narrowest possible terms, as solely covering "scholarship or teaching." Holding that the Garcia majority "recognized no broader exception to the rule it propounded," Judge Bertelsman said the librarian was not protected by the First Amendment when he made a book recommendation as part of his work with a faculty committee.

The only recent speech-related federal court decision welcomed by the AAUP was a March ruling, by a U.S. magistrate judge, which held that a professor of obstetrics and gynecology at the Wright State School of Medicine was protected by the First Amendment in teaching certain medical techniques and procedures that his boss opposed. In rejecting the medical school's argument that the Garcia precedent should be applied in an academic setting, U.S. Magistrate Judge Michael R. Mertz said universities "should be the active trading floors in the marketplace of ideas."

Patching a ‘Gaping Hole’

In explaining his decision to urge the University of Illinois system to adopt a policy protecting the job-related speech of faculty members, Matthew W. Finkin, a professor of law at the Urbana-Champaign campus, said faculty members "don't want to be in the hands of the judiciary" when disputes related to academic freedom arise.

Michael Bérubé, a professor of literature at Pennsylvania State University who is on the AAUP's national council and who drafted the Modern Language Association statement urging the revision of faculty handbooks to protect speech, says the courts have torn "a gaping hole" in academic freedom with their recent rulings. The MLA statement, adopted by the group's executive council, is "our last resort," he says.

The MLA statement says faculty members at public colleges can now conceivably face disciplinary action for "everything a faculty member might do or say in the course of his or her working day," including serving on academic committees or discussing university procedures and policies. The statement says such a development "has even more chilling implications in light of the financial crisis many universities now face," because faculty members who speak out about cost-cutting measures "can now face administrative retaliation if they participate in college and university governance, and they may have no recourse under the First Amendment."

Among the other institutions where faculty members are pushing for the formal adoption of policies protecting academic freedom are Auburn University, Oakland University, and the University of
Wisconsin at Madison.

Most of the proposed policies are modeled after the one adopted by the University of Minnesota last year. It defines academic freedom as "the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the university." It also states, however, that faculty members have a responsibility to faithfully perform their professional duties, to recognize "the demands of the scholarly enterprise," and to make clear when they are speaking on matters of public interest that they are not speaking for their institution.

Mr. Pasternack, of UC-Davis, who is a leader in the effort to get the University of California’s Board of Regents to adopt a policy broadly protecting faculty speech, says most faculty members simply assume they are free to speak out about institutional matters. "It has been somewhat of a process," he says, "to educate faculty that a gap in their academic freedom exists."

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The Chronicle of Higher Education  1255 Twenty-Third St, N.W.  Washington, D.C. 20037