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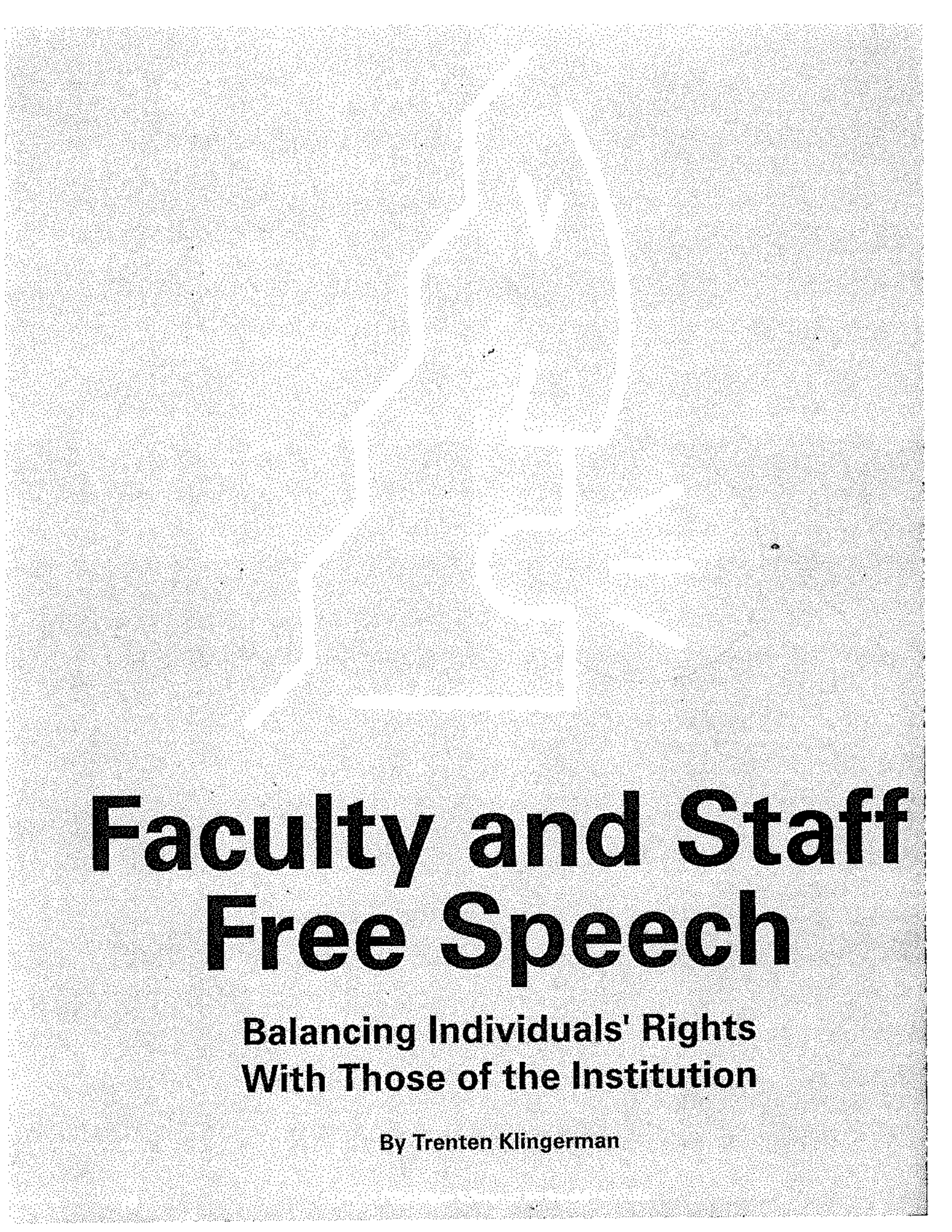

Faculty and Staff Free Speech

Balancing Individuals' Rights With Those of the Institution

By Trenten Klingerman

College and university campuses face myriad free speech scenarios spanning an array of viewpoints and involving stakeholder populations with a variety of interests … from visitors and alumni to students, faculty and staff. Human resources professionals can and must play an active role in recognizing and appropriately addressing faculty and staff free speech issues, which are sometimes brought to the university as "employee conduct" matters accompanied by a call for the university to "take action."

Recognizing what does and does not constitute free speech and understanding the closely related concept of academic freedom is critically important to ensure that HR's advice and support balance competing stakeholder interests while respecting faculty and staff's legal and policy rights. The critical concepts of responding to faculty and staff speech issues are well within the purview and strengths of effective HR departments. This article provides a general understanding of each of the concepts so that HR practitioners can recognize them and can develop a consistent approach to supporting and advising decision makers on both the academic and administrative sides of campus.

A Fundamental Right, With Some Exceptions

The starting point for any legal analysis of what does and does not constitute protected speech is the source of the law. In the case of public institutions, the starting point is the First Amendment, which states:

"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."

While the fundamental rule is simply stated, it is important to recognize that "make no law" does not mean that a college or university does not have an interest in what is said or done in its name or on its campus. There are narrow exceptions to the general rule against regulating speech. Those exceptions serve as an important first point of reference in any faculty or staff speech matter. If speech falls within any of the exceptions, it is not protected by the First Amendment. Still, each of the exceptions poses challenges for a college or university as an employer to regulate.

Obscenity

The first exception is for **obscenity**. Expression that appeals only to the morbid, shameful interest in nudity or sex and has no artistic or other value is "obscene." That is the standard, and it must be applied using the judgment of a reasonable person in the relevant community. Some private institutions and institutions with religious affiliations may have relevant community standard codes that assist with an obscenity analysis. Most institutions, however, do not, and so the best advice is often that obscenity must be adjudicated with regard to what is lawful and within other university policies.

For example, if employees are sharing pornography during work time and using university computing facilities, it is appropriate to discipline that conduct. Such a conclusion is completely separate from any subjective review of whether the material is obscene or "art." Also, if the conduct is illegal (as in the case with child pornography), employment sanctions are appropriate.

Defamation

The second narrow exception to the rule against regulating free speech is **defamatory speech**. Untrue statements about another person (or an identifiable group of people) which tends to harm the reputation of the other is not protected speech. In every state there is a set of court-made laws and rules for defamation, and understanding those rules is important.

An employer certainly has an interest in preventing the disruption caused by defamatory speech and may undertake an investigation to ascertain: (1) whether the statements are true or false, (2) the purpose for which the statements were made, and (3) the impact of the statements on the workplace. Based on those factors, HR can assist decision makers in assessing appropriate disciplinary sanctions.

True Threats, Fighting Words and Harassment

The next set of narrow exceptions really is a group of exceptions along a continuum of similar speech. First on the continuum is expression that constitutes a **true threat**. According to the FindLaw Legal Dictionary, a true threat is a "threat that a reasonable person would interpret as a real and serious communication of an intent to inflict harm." Unfortunately, there is no uniform analytical approach or test for determining when expression comprises a true threat. One approach finds a true threat to

exist only when: (1) there is a clear expression of the harm that will occur, (2) there is a clear target of the harm, and (3) there are other circumstances to lead one to believe that the speaker is capable of carrying out the threatened harm. When these factors exist, the university has a legitimate public safety/law enforcement concern that it must urgently address.

Next on the continuum is **fighting words**, or expression that is designed to incite imminent lawless action. The essential requirements for incitement are that the expression is clear and is intended to provoke an immediate breach of the peace or imminent lawless action. Like true threats, incitement is a difficult concept to apply in the employment context. It is clear that incitement means more than the mere abstract statement of the moral and necessity or propriety of violence. In order to constitute unprotected "incitement," there must be evidence that the speaker intends to incite or produce violence. The speech must be "likely" to incite or produce violence, and the violent action(s) must be immediate or imminent.

Harassment is also on the same continuum as true threats and fighting words. Of these three exceptions to free speech, harassment is the most obvious area that calls for intervention by human resources. Most universities have an anti-harassment policy that defines harassment and procedures under which harassment claims are investigated and adjudicated. It is critical to ensure that your institution's definition of harassment comports with free speech principles and includes only a scope of expressive conduct that is unprotected by the First Amendment. One recognized standard defines harassing speech as speech that is "severe" or "pervasive" and "unreasonably interferes with the work or educational environment."

The standard necessarily has two components. First, it must be objectively interfering — that is, the complaining employee must establish how the expression has impacted them at work. Second, the evidence has to establish that a reasonable person in the shoes of the employee would find the expression interfering.

These narrow exceptions are the "easy" part of handling faculty and staff free speech. This is because if speech falls within one of the recognized exceptions, the speech is unprotected and an employer may act without violating constitutional rights. More difficult is the question of what an employer can or should do when speech is arguably protected. How does an employer know when it should act? The answer is not always clear and depends on both the type of speech and the type of employee.

Recognizing what does and does not constitute free speech and understanding the concept of academic freedom is important to ensure that HR's advice and support balance competing stakeholder interests while respecting faculty and staff legal and policy rights.

Public Employee Speech Doctrine

To fully understand the current state of the public employee speech doctrine, it is important to briefly revisit its history. The seminal case was *Pickering v. Board of Education* — a 1968 case in which a high school teacher wrote a letter to the editor of the local newspaper criticizing his school board over its strategies for developing revenue for the schools. The school board fired him, and he sued the school. The school board's firing was upheld, and the plaintiff appealed to the U.S. Supreme Court, which held that because Pickering was speaking via a letter to the editor as a private citizen and was speaking on an issue of public importance, the school could not terminate him without violating his First Amendment right to free speech.

The next important case is *Connick v. Myers* (1983). In that case, Myers was an assistant district attorney who resisted a transfer from one division of her office to another. She was transferred anyway, and in response to the transfer created a questionnaire that asked coworkers' opinions on issues like employee morale, trust and other issues related to the workplace. She was fired for creating the questionnaire, disrupting the workplace and undermining the authority of the district attorney. She sued for reinstatement, and the lower courts ordered the employer to reinstate her.

The district attorney's office appealed to the U.S. Supreme Court, which held that Myers' dismissal was lawful and justified. The Court pointed out that Myers was not speaking as a private citizen on a matter of public importance when she circulated the questionnaire in the workplace; rather, she was speaking as an employee on personal issues involving her workplace.

From *Pickering v. Board of Education* and *Connick v. Myers*, the Pickering-Connick balance test was born. In **Step 1** of the test, the employer asks two questions: "Is the employee speaking as a citizen?" and "Is the employee speaking on a matter of public concern?" If both answers are "yes," the employer must move to Step 2. If the answer to either is "no," then the speech is unprotected and the employer may act.

Step 2 moves away from the employee's interest and asks whether the employer has a legitimate interest in disciplining the employee. Central to this is a consideration of how the speech impacted the employer's operations. Was it disruptive? Is the employer acting within a proper area of management authority and discretion? If so, the employer can act.

In the 2006 *Garcetti v. Ceballos* decision, the free speech test was updated to its current form. Ceballos was an assistant district attorney who believed that the Los Angeles County Sheriff's Department had falsified information in order to obtain a search warrant. Ceballos took his concerns to his supervisor and asked him to dismiss the case. The supervisor did not dismiss the case, so Ceballos notified the criminal defense attorney of his belief that the warrant was wrongfully obtained. Ultimately, the criminal case moved forward without dismissal. Ceballos then sued his employer, claiming that he was subjected to several retaliatory actions, including being transferred, reassigned and denied opportunities for promotion. After the Ninth Circuit Court of Appeals held that his employer had violated Ceballos' First Amendment rights, the district attorney's office appealed to the U.S. Supreme Court.

The Court elaborated on the public employee speech test, which is now a three-part Garcetti-Pickering test that works like this:

Step 1: The employer asks whether the speech was made pursuant to an employee's official duties. If the answer to this question is "yes," then the *Garcetti* decision says the employer has an interest in that speech, and it is not protected. If the answer to this question is "no," then the analysis proceeds to the second step.

Step 2: The employer asks whether the speech was on a matter of public concern. If the answer is "no" (e.g., a workplace grievance), then it is not protected speech. If the answer is "yes," then the analysis moves to the third and final step.

Step 3 seeks to balance interests, weighing the interests of the employee in speaking against the employer's interest in an efficient and effective workplace. If the employer's interests outweigh the employee's interests, then it is proper for the employer to act to protect its interests, including disciplining the employee for disrupting those interests.

The Garcetti-Pickering test provides a framework for a consistent approach to handling difficult, fact-sensitive disputes. For most staff cases, the employer can look at the worker's job responsibilities, the context of the expression and the impact of the expression on the workplace and decide whether it is within its discretion to act without violating the staff member's constitutional right to free expression.

Application to Faculty Speech

There are many difficulties in applying the framework, particularly in the context of faculty speech. The Garcetti-Pickering test instructs that once it is determined that speech is within the context of employment, an employer can find that the speech is unprotected and act to sanction the conduct. However, the published *Garcetti* opinion noted that speech related to academic scholarship or classroom instruction might implicate "additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."

Defining an approach to faculty speech issues requires a balance between available analytical frameworks and principles of academic freedom. Almost every college and university has defined what "academic freedom" means there. The foundation for most definitions is the American Association of University Professors (AAUP)'s definition, first memorialized in writing in 1915 and still relied on today as the foundation of the term. AAUP defines the principle of academic freedom as "protecting the freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action."

This common framing of academic freedom reveals the obvious problem of applying Garcetti-Pickering's first step, which requires us to define whether the speech is within the scope of employment or outside of it. Proper recognition of the principle of academic freedom minimizes, if not eliminates, any such distinction, because academic freedom protects "teaching" and "research"

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expression that is within the scope of employment as well as some expression that is outside of the scope of employment.

Still, post-*Garcetti* decisions provide guidance on a framework for faculty speech. For example, courts have recognized that a university can legitimately protect its intellectual property rights and academic integrity in the context of faculty research and scholarship. Also, while faculty are afforded academic freedom in the classroom, they must teach matters that are germane to the curriculum, and employers may act to correct frequent or extended digressions from relevant course material.

Based on these cases, a potential framework for faculty free speech follows two steps:

Step 1: Is the speech within the course of employment?

- **If yes:**
  Is the speech germane to employment activity?
  - o If no, the employer can likely take action (see Step 2)
  - o If yes, the speech is likely protected
- **If no:**
  Is the faculty member speaking as a private citizen on an issue of public importance?
  - o If yes, the speech is likely protected
  - o If no, the employer can likely take action (see Step 2)

Step 2: Do the employer's interests in an efficient and orderly educational environment outweigh the faculty member's free speech/ academic freedom rights?

- **If yes:** The employer may take action notwithstanding protected speech
- **If no:** The employer may not act

Be Consistent, Be Fair

HR professionals who are confronted with faculty and staff free speech issues must develop a consistent and fair approach for advising employees and managers regarding their rights and responsibilities. As a threshold issue, it is important to ensure that policies clearly recognize free speech protection and that employers only act within the narrow exceptions as defined by the courts.

When matters do not fall within those exceptions, most staff free speech issues can be resolved by carefully applying the Garcetti-Pickering analytical framework. The framework protects personal speech while recognizing an employer's interest in workplace expression and efficient and effective work environments. Developing a framework for faculty that balances free speech and academic freedom rights with important employer interests is challenging, but can be done if the employer's interests are clearly defined and consistently applied. While the faculty framework outlined here is one suggested approach, as the law evolves on the issue, it should be frequently revisited and updated as necessary.

About the author: *Trenten Klingerman is deputy general counsel at Purdue University. He presented a session on navigating staff and faculty free speech at CUPA-HR's Spring Conference earlier this year.*