

University Oversight of Professors' Teaching Activities: A Professor's Academic Freedom Does not Mean Freedom From Institutional Regulation

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Abstract This article reviews federal case law that address a college instructor's right to academic freedom over classroom activities. This review shows that the federal courts have defined a college instructor's academic freedom rights narrowly in terms of the instructor's classroom activities. Institutions have a great deal of latitude to regulate an instructor's classroom speech, grading practices, and general manner of teaching a particular college-level course.

Keywords Academic freedom · Higher education · Instruction · Faculty rights

Based on a review of case law, some college and university instructors apparently believe that they have a constitutional right to academic freedom that gives them license to do or say whatever they want in a college classroom. A review of court cases in this area shows that this attitude is wrong. Higher education institutions have a great deal of latitude in regulating their instructors' classroom-teaching activities.

This article begins with a discussion of *Johnson-Kurek v. Abu-Absi* (2005), one of the most recent federal court decisions on the topic of a university teacher's academic freedom rights. The article will then go on to review other federal case law on this topic. This review will show that the federal courts have defined a college instructor's academic freedom rights narrowly in terms of the instructor's classroom activities. Institutions have a great deal of latitude to regulate an instructor's classroom speech, grading practices, and general manner of teaching a particular college-level course.

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Johnson-Kurek v. Abu-Absi: A University May Require an Instructor to Clearly Explain Course Requirements

Rosemary Johnson-Kurek was a part-time lecturer at the University of Toledo, teaching in the English Department and the Department of Theater and Film. She sued three tenured professors after the English Department declined to assign her a second class to teach in the fall of 2001. Johnson-Kurek alleged that the decision to deny her a second course assignment was made in retaliation for her refusal to comply with a request that she communicate more clearly with her students about what was required to complete the coursework of a class she had taught in the previous year.

The case is a little more complicated than this brief description, but not much. According to the Sixth Circuit's outline of the facts, Johnson-Kurek had given 13 of her 17 students an incomplete in a course she had taught during the fall of 2000. In a listserv message, she told her students that the incompletes had been assigned for one of three reasons: formatting issues, improper citations, or the need for textual changes. Johnson-Kurek "left it up to each individual student to determine which of these reasons applied in his or her own case" (p. 592). In a second listserv message, Johnson-Kurek expanded slightly on the reasons for the incompletes but she did not give students individualized information as to how their work was deficient.

In one of her listserv messages, Johnson-Kurek told the students that she had "very sound and ethical reasons for not providing students with specific, individual guidance on how to correct their texts" (p. 952), and she claimed in her court case that writing individualized letters would have interfered with her students' learning experience and the purpose of the class. One student complained about Johnson-Kurek's lack of direction; and Carol Nelson-Burns, Johnson-Kurek's supervisor, told Johnson-Kurek that her communications to her students were insufficiently clear. Nelson-Burns asked Johnson-Kurek to write a letter to each student with individualized instructions about what needed to be done to complete the course.

Nelson-Burns followed up her request with a memo, which said:

As we discussed, a more specific statement needs to be prepared for each student and each student needs to be told specifically what he or she must do to finish the coursework and earn a grade. Please note that although your instructions in those published messages may seem clear, a given student may still be confused as to what is expected of him or her personally. Please draft those statements and share them with me before forwarding them to students. (p. 592)

Apparently, Johnson-Kurek did not respond to Nelson-Burns's request. Five weeks after sending her first memo, Nelson-Burns repeated her request to Johnson-Kurek, emphasizing that the incomplete grades were a serious problem for some of the students, affecting their GPAs and their financial aid status. Johnson-Kurek did not respond to Nelson-Burns's second request or to a series of phone calls and mailbox notes. "In the end," the Sixth Circuit noted, "Nelson-Burns had to wait outside Johnson-Kurek's classroom to speak with her before class" (p. 592). Even so, Johnson-Kurek never prepared the letters that her supervisor had requested.

In the fall of 2001, Johnson-Kurek taught two courses in the Department of Theater and Film and one course in the English Department. Nelson-Burns claimed that the English Department offered Johnson-Kurek a second English course on two occasions.

Johnson-Kurek claimed that a second English course was refused her in retaliation for her refusal to comply with Nelson-Burns's requests concerning the incompletes.

Johnson-Kurek filed a lawsuit in federal court, alleging a violation of her First Amendment rights to free speech and academic freedom. In addition to Nelson-Burns, Johnson-Kurek sued Samir Abu-Absi, Chair of the English Department, for failing to take action on her complaints about Nelson-Burns. She also sued Thomas Barden, an associate dean, who had told Johnson-Kurek that she had no right to file a grievance because she was not a member of a university-recognized bargaining unit.

Johnson-Kurek's case was dismissed at the trial court level, and the Sixth Circuit Court of Appeals affirmed. The appellate court began its brief analysis by quoting from the Fourth Circuit's decision in *Urofsky v. Gilmore* (2000, p. 410), in which the Fourth Circuit court had said, "[T]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." Thus the Sixth Circuit implicitly endorsed the Fourth Circuit's view that academic employees at public universities have no constitutional right to academic freedom beyond the free speech rights that other public employees have under the First Amendment (Kinser and Fossey 2001).

The Sixth Circuit went on to quote from the US Supreme Court's opinion in *Epperson v. Arkansas* (1968). In that case, the Supreme Court noted that courts "do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values" (393 U.S. at p. 104). In the Sixth Circuit's view, Johnson-Kurek's dispute with three University of Toledo faculty members did not implicate her First Amendment rights in any way.

In affirming the dismissal of Johnson-Kurek's case, the Sixth Circuit court drew on the reasoning of *Parate v. Isibor* (1989), an earlier Sixth Circuit decision involving a university-level grading dispute. In that case, the Sixth Circuit affirmed the right of a university to reasonably determine how classes are to be taught and grades are assigned. The *Johnson-Kurek* court quoted this passage of the earlier Sixth Circuit opinion, finding it pertinent:

A nontenured person does not escape reasonable supervision in the manner in which she conducts her classes or assigns her grades. University officials remain free to review a professor's classroom activities when determining whether to grant or deny tenure. The university may constitutionally choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods do not conform to institutional standards. The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign until himself. (*Johnson-Kurek v. Abu-Absi*, 2005, pp. 593–94, quoting *Parate v. Isibor*, 1989, p. 827, internal citations omitted)

The court acknowledged that a First Amendment issue would be raised if university officials had changed Johnson-Kurek's grades and then required her to publicly endorse the changes. However, that was not the facts of the case.

In this case, Johnson-Kurek's First Amendment rights were not implicated, still less violated, by Nelson-Burns's request that she explain to her students

the precise requirements for obtaining a final grade in her class. She was not required to communicate the ideas or evaluation of others as if they were her own. She was not even told what grades to assign to her students, or what the requirements for completing the class should be. She was simply required, as one might be in preparing a syllabus, to spell out in detail the requirements she had devised. While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy. (pp. 594–95)

Johnson-Kurek is in harmony with other federal court decisions concerning a college instructor's right to academic freedom in his or her teaching activities. In fact, as the following review will show, courts have declined the opportunity to expand that right, repeatedly deferring to higher education institutions in disputes about an instructor's classroom speech or other teaching activity.

An Instructor's Academic Freedom Rights in the Classroom: A Review of Federal Cases

In essence, the federal courts have made clear, the concept of academic freedom encompasses two sets of rights. First, academic freedom protects the right of a college or university instructor to research, write, teach and publish without fear of retribution based on the ideas that the instructor conveys. Second, as Justice Frankfurter articulated in a famous concurring opinion, academic freedom gives higher education institutions the right to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (*Sweezy v. New Hampshire* 1957, p. 263).

Two Supreme Court decisions have recognized academic freedom as a concept closely associated with the First Amendment (Fossey and Wood 2004). In *Sweezy v. New Hampshire* (1957), the Supreme Court ruled that a state-agency investigation into the subject matter of a university teacher's lectures "was an invasion [of the teacher's] liberties in the areas of academic freedom and political expression," areas in which the Court said that government should be extremely reluctant to intrude (p. 250). In *Keyishian v. Board of Regents of the State University of New York* (1967), the Supreme Court said that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." The Court described the college classroom as a "marketplace of ideas" where a robust exchange of opinions should prevail, not an authoritarian directive as to what is true or not true (p. 603).

Although the Supreme Court has identified academic freedom as an important principle, it has not clearly defined the academic freedom rights of faculty members. Nor has the Court explained how the academic freedom rights of faculty members should be

balanced against the academic freedom right of colleges and universities to regulate the academic enterprise (Chang 2001; Fossey and Wood 2004; Zirkel 1988).

Some federal courts have ruled that a professor's academic freedom rights are no more extensive than the First Amendment rights of other public employees. In other words, these courts have declined to carve out a constitutional right of academic freedom for professors that goes beyond the First Amendment right to free speech that is enjoyed by all persons employed by a public agency (*Urofsky v. Gilmore*, 2000; *Bishop v. Aronov*, 1991). As the Eleventh Circuit Court of Appeals put the matter in a dispute about a public university professor's classroom speech, "Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right (*Bishop v. Aronov*, 1991, p. 1075).

Over the years, the federal courts have issued a number of decisions concerning the academic freedom rights of college and university instructors in matters pertaining to teaching (Fossey and Roberts 2002). Although the cases are not entirely consistent, in general the courts have upheld the right of higher education institutions to reasonably regulate the teaching enterprise and have upheld that right against the instructor's claim of academic freedom.

The cases can be divided into three categories: the instructor's academic freedom right to free speech in the classroom, the instructor's right to assign grades and make curricular decisions, and the institution's right to evaluate faculty members.

An Instructor's Academic Freedom Rights in the Classroom *Martin v. Parrish*, (1986), decided by the Fifth Circuit Court of Appeals, established that college instructors do not have an academic freedom right to engage in gratuitous classroom profanity. In that case, J. D. Martin, an economics instructor at a Texas college, repeatedly used profanity while teaching his class. Although college administrators warned Martin about his offensive speech, both orally and in writing, he continued to use such words as "bullshit," "hell," "damn," "God damn," and "sucks" (p. 584). In June 1984, two students filed written complaints about Martin's classroom speech, which included these statements: "the attitude of the class sucks," "[the attitude] is a bunch of bullshit," "you may think economics is a bunch of bullshit," and "if you don't like the way I teach this God damn course there is the door" (p. 584). When a college dean got notice of this outburst, he initiated termination proceedings against Martin. At the end of the college's administrative process, Martin was fired.

Martin sued, claiming a violation of his constitutional right to free speech and his right to academic freedom. A jury found in Martin's favor, but a federal judge voided the verdict, concluding that Martin's profanity was not constitutionally protected.

On appeal, the Fifth Circuit sided with the college. Martin's profanity did not address a matter of public concern, the appellate court concluded. Martin had not shown that his classroom profanity was for any other reason than to express frustration with his students and to motivate them. Such speech enjoyed no constitutional protection.

In ruling against Martin, the Fifth Circuit relied in part on the Supreme Court's decision in *Bethel School District No. 403 v. Fraser* (1986). In that case, the

Supreme Court upheld a school district's mild sanction against a high school student who had given a lewd and sexually explicit speech to a student assembly.

The *Bethel* case, the Fifth Circuit acknowledged, involved a high school student, not a college instructor. Nevertheless, the court reasoned, higher education was just as important to the national interest as secondary education.

[Higher education] carries on the process of instilling in our citizens necessary democratic virtues, among which are civility and moderation. It is necessary to the nurture of knowledge and resourcefulness that undergird our economic and political system. Repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach...(p. 585)

Thus, to the extent that college officials concluded that Martin's profanity diminished his effectiveness as a teacher, the college need not tolerate his classroom invective.

Several years later, a university's varsity basketball coach was fired after he used "the N word" in communicating with the basketball players he was coaching, apparently as a motivational tool. Like Martin in the Fifth Circuit case, the coach sued, claiming a violation of his First Amendment rights and his right to academic freedom.

The Sixth Circuit Court of Appeals was unsympathetic. Citing *Martin v. Parrish*, the Sixth Circuit court concluded that the coach's racial slur was not constitutionally protected. The offensive word had nothing to do with the "marketplace of ideas," the court said; and the university had the right to register its disapproval of the coach's motivational strategy (*Dambrot v. Central Michigan University 1995*).

In a later Sixth Circuit case, a community college attempted to suspend an instructor for using highly offensive language toward women in his classes (*Bonnell v. Lorenzo 2001*). The college had received several complaints about the instructor's classroom speech. One woman demanded a written apology and suggested that he should get counseling. Another woman wrote: "[I]f you continue to employ this perverted man, I suggest that you put warning labels on all the classes that he will be teaching...which state 'extremely explicit language and sexual content' on the course list each semester" (p. 808).

The instructor filed a lawsuit against the college and obtained a preliminary injunction barring the college from taking action against him. On appeal, however, the Sixth Circuit reversed. The lower court's order granting the instructor's motion for a preliminary injunction was based upon clearly erroneous findings of fact, the Sixth Circuit ruled, and an erroneous application of the law.

Likewise, in *Ruben v. Ikenberry (1996)*, a federal court ruled that a professor's sexual remarks during an education methods class were not constitutionally protected. In that case, two students filed a sexual harassment complaint against a tenured professor at the University of Illinois based on claims that he had made inappropriate sexual remarks.

The university took the grievances seriously and conducted an investigation. University officials then took remedial action by telling the professor that the grievances would be taken into account during his salary review and that his classes

would be monitored. The professor was also directed to present plans as to how he would incorporate many “different domains of human experience” into his teaching, and to re-examine “his motivations and purposes” for the examples he chose in classroom discussions (p. 1442).

The professor sued, but a federal district court found no merit to his claims. In the court’s view, the university’s conduct had been mild and reasonable. Furthermore, the court concluded, the professor’s remarks had nothing to do with the subject matter of the class, did not address an issue of public concern and were not protected under principles of academic freedom or the First Amendment.

In fact, the court went so far as to suggest that disputes about course content *never* address a matter of public concern for First Amendment purposes. “The University has the right to control classroom content,” the court said, and “[c]ourse content is not a matter of public concern.” This was true, the court said because “disputes about course content involve the public employee as a teacher and not as an interested citizen. Speech is not a matter of public concern if it is motivated by private interests” (p. 1443, internal citations omitted).

At least two federal appellate courts have upheld institutions that have prohibited instructors from discussing their religious views during instructional time. In *Bishop v. Aronov* (1991), the Eleventh Circuit Court of Appeals upheld a public university’s right to prohibit a professor from discussing his personal religious views in his physiology classes. Classroom time at a university is time reserved for instruction on the topic of a course, the Eleventh Circuit held; and a university can insist that its instructors not discuss their religion convictions with students during this time.

In the second case on this topic, Carl Sandburg College chose not to retain Martha Louise Piggee, a part-time cosmetology instructor who had given a gay student two pamphlets on the sinfulness of homosexuality during clinical instruction time (*Piggee v. Carl Sandburg College* 2006). Piggee asked the student to read the materials she had given him and invited him to discuss them with her later.

The student complained and the college determined that Piggee had sexually harassed the student. College officials wrote Piggee a memo telling her that a determination had been made that she had proselytized the student because of his sexual orientation in the hopes of changing the student’s sexual orientation and religious beliefs. Later, the college sent Piggee a letter informing her that her services were not needed for the following semester.

Piggee sued, claiming a violation of her constitutional rights, including her right to free speech under the First Amendment. She lost her case at the trial court level and appealed to the Seventh Circuit Court of Appeals. There she argued that the clinical beauty salon where she had approached the student was simply a store and that the college had violated her right to free speech by censoring her for approaching the student about his sexual orientation in this setting.

The Seventh Circuit rejected Piggee’s arguments, finding no difficulty in concluding that the clinical beauty salon was an instructional environment where college officials had the right to insist that instructors maintain a professional relationship with students. “No college or university is required to allow a chemistry professor to devote extensive classroom time to the teaching of James Joyce’s demanding novel *Ulysses*, nor must it permit a professor of mathematics to fill her

class hours with instruction on the law of torts” (p. 671), the court observed. Likewise, Carl Sandburg College “had an interest in ensuring that its instructors stay on message while they are supervising the beauty clinic, just as it had in interest in insuring that the instructors do the same while in the classroom” (p. 672).

On the other hand, courts have occasionally come to the aid of instructors who use controversial language in their classes in circumstances in which the instructor could show that the language was pertinent to the topic of the course. In *Hardy v. Jefferson Community College* (2001), Kenneth Hardy, a community-college instructor, used several inflammatory words in his class on interpersonal communication. During his lecture on language and social constructivism, Hardy challenged his students to consider how certain words could “marginalize” people who were minorities or members of oppressed groups. Hardy asked class members to identify some words that might make people feel marginalized, and students suggested such words as “nigger,” “bitch,” “faggot,” “girl,” and “lady” (p. 675). Hardy argued—and several students agreed—that the class discussion was “academically and philosophically challenging” and that the offensive words that were spoken were germane to the topic of the course.

There were several African Americans in Hardy’s class, including an African American woman who was offended by the use of the words “nigger” and “bitch.” She complained to Hardy and to college administrators.

Hardy apologized to the student for any discomfort she felt during the class, but she contacted a local civil rights leader about the incident. The civil rights leader met with the complaining student and the college president. At this meeting, the civil rights leader told the college president that he would “not allow our kids to come to an institution and be berated by the ‘N’ word and the ‘B’ word” (p. 675).

A few days after Hardy’s controversial class, a college administrator met with Hardy and asked him why the word “nigger” had been used in class, especially since Hardy’s class syllabus expressively prohibited the use of racist language. Hardy explained that the word had not been used abusively but only as an example of highly offensive language. The administrator allegedly expressed concern that incident would adversely affect the college’s enrollment.

Hardy finished teaching his class according to schedule, and the student’s complaint was apparently resolved satisfactorily. However, Hardy was never asked to teach at the College again. Hardy filed a lawsuit in federal court, accusing the college president and another administrator of violating his constitutional right to freedom of speech and academic freedom. He also sued for defamation, breach of contract, and conspiracy.

A federal trial court threw out most of Hardy’s claims, but it allowed Hardy to sue the two college administrators in their personal capacities. The trial court ruled that Hardy’s speech touched upon “matters of public concern” and was constitutionally protected. The court also ruled that a public employee’s right to speak on such matters had been clearly established by the Supreme Court, so the two administrators could not claim immunity from suit. Thus, if Hardy prevailed against the college officials at trial, both could be found personally liable to Hardy for money damages.

On appeal, a three-judge panel of the Sixth Circuit also sided with Hardy. Affirming the trial court’s analysis, the appellate court ruled that Hardy’s classroom speech clearly involved a matter of public concern and was constitutionally

protected. “Hardy’s speech was germane to the subject matter of his lecture on the power and effect of language,” the court concluded (p. 675). After all, Hardy’s course was on interpersonal communication, and his use of offensive words was restricted to an academic discussion.

In addition, the court pointed out that the offensive words were used during only one of Hardy’s lectures. After the class in which the controversial words were used, Hardy continued teaching his course without any conflict, and all students except one were positive about his teaching. “There is no indication,” the court stated, “that the lecture undermined Hardy’s working relationship with his department, interfered with his duties, or impaired discipline” (p. 681).

For most college administrators, the most interesting part of the Sixth Circuit’s opinion was its conclusion that Hardy’s constitutional right to free speech in the classroom was well established. If the court had concluded that Hardy’s free speech rights were unclear, the two college officials whom Hardy sued would have enjoyed immunity from personal liability. By ruling otherwise, the Sixth Circuit made it possible for Hardy to sue both of them personally for money damages.

A First Circuit case—this one involving a high school teacher—also affirmed an instructor’s constitutional right to use a profane word in the classroom. In *Keefe v. Geanakos* (1969), Robert Keefe, a Massachusetts high-school teacher, assigned an article in *Atlantic Monthly* to students in his senior English class. The article contained, as the First Circuit said cryptically, “a vulgar term for an incestuous son” (p. 361).

The magazine article came to the attention of the local school committee, which summoned Keefe to appear at a school committee meeting to defend his use of the offensive phrase. Keefe gave his explanation, and the school committee asked him informally to promise that he would never employ that particular phrase in the classroom again. Keefe refused to give this assurance, and the school committee commenced discharge proceedings.

Keefe filed a lawsuit seeking to enjoin the school committee’s termination action, but a federal trial court denied his injunction request. On appeal, however, Keefe found a very sympathetic court. In a brief opinion, the First Circuit Court of Appeals reversed the trial court’s decision.

In the First Circuit’s view, Keefe had utilized the *Atlantic Monthly* article in a manner that was entirely appropriate:

The...article, which we have read in its entirety, has been described as a valuable discussion of “dissent, protest, radicalism, and revolt.” It is in no sense pornographic. We need no supporting affidavits to find it scholarly, thoughtful, and thought-provoking. The single offending word, although repeated a number of times, is not artificially introduced, but, on the contrary, is important to the development of the thesis and the conclusions of the author. Indeed, we would find it difficult to disagree with the plaintiff’s assertion that no proper study of the article could avoid consideration of this word. (p. 361)

Moreover, the court observed, it seemed highly likely that most high school seniors were already aware of the word. Thus, the court continued:

[T]he question in this case is whether a teacher may, for demonstrated educational purposes, quote a “dirty” word currently used in order to give special offense, or whether the shock is too great for high school seniors to

stand. If the answer were that the students must be protected from such exposure, we would fear for their future. (p. 361)

The appellate court accepted the lower court's conclusion that some regulation of classroom speech is appropriate in public education. Nevertheless, under the facts of the case before it, the First Circuit believed that the school committee's proposed termination proceeding to be demeaning to "any proper concept of education" (p. 362). Furthermore, "[t]he general chilling effect of permitting such rigorous censorship" was a serious concern (p. 362).

Together, the Sixth Circuit's opinion in *Hardy v. Jefferson Community College* and the First Circuit's opinion in *Keefe v. Geanakos* uphold some constitutional right of instructors to utilize offensive and controversial language in their classroom, so long as that language is relevant to the topic under discussion. However, an instructor's gratuitous profanity and demeaning speech is not constitutionally protected, as the Fifth Circuit made clear in *Martin v. Parrish*, (1986), as did the Sixth Circuit in *Bonnell v. Lorenzo* (2001).

Before leaving this section, some mention should be made of *Silva v. University of New Hampshire* (1994), in which the University of New Hampshire attempted to sanction a professor for using sexual metaphors in a freshman writing class. Several students filed written complaints and described the professor's remarks as demeaning, vulgar, embarrassing, and inappropriate. The university created an alternative section of the professor's class for students who wished to take the course from someone else. Twenty-six students transferred out. The university eventually censored the professor for sexual harassment and put him on a 1-year leave without pay.

The professor sued the university, where he prevailed before a federal trial court. The court issued an injunction against the university and reinstated the professor to his job with full pay and tenure. According to the court, the professor's speech addressed a matter of public concern:

The evidence before the court demonstrates that Silva's classroom statements were not statements "upon matters only of personal interest," but rather were made for the legitimate pedagogical, public purpose of conveying certain principles related to the subject matter of his course. Further, the content, form, and context of said statements demonstrate that they are directly related to (1) the preservation of academic freedom and (2) the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American schools. (p. 316)

Several commentators have criticized *Silva* (DeMitchell and Fossey 1996; Woodward 1999). As Fossey and Wood said in a 2004 article, "Sexual harassment in the classroom 'has nothing to do with academic freedom.'" (Dziech and Weiner 1990, p. 179). It hinders the learning environment, violates federal sex discrimination law, and can subject a college to civil liability" (p. 58).

Fortunately, *Silva* stands almost by itself in protecting a professor's offensive speech in the classroom. As the cases discussed above attest, most courts have supported college and universities when they have sought to maintain a standard of civility in instructors' classroom speech.

Institution's Right to Assign Grades and Make Curricular Decisions Instructors may believe that they have an academic freedom right to choose their curricular materials and devise their own syllabi, but in fact their rights are limited in this regard. An important case in this area is *Edwards v. California University of Pennsylvania* (1998). Edwards taught a course entitled “Introduction to Educational Media,” which at one time had focused primarily on teaching students how to effectively use various classroom materials, such as projection equipment, photographs and films. Edwards, however, developed a new emphasis for the course and changed the syllabi to include some focus on bias, religion, and humanism. Edwards’s amended syllabus listed some publications on these issues either as suggested or required reading.

One of Edwards’s students complained to the university that Edwards had used the IEM class to advance religious ideas. Nancy Nelson, the university’s Vice President for Academic Affairs, wrote Edwards a letter in which she outlined the student’s concerns. Later, Nelson met with Edwards and other school officials to discuss the complaint; and then she sent Edwards a written directive to “cease and desist” from using “doctrinaire materials’ of a religious nature in his class (p. 490). Edwards appealed Vice President Nelson’s action to the university’s president, John Pierce Watkins; but Watkins expressly approved Nelson’s action and he directed Edwards not to advance religious beliefs in his lectures or course handouts.

Sometime later, David Campbell was named chair of the Education Department. Campbell became concerned that Edwards had “interjected something that didn’t belong in the [IEM] course[.] A distinct bias on religion and religious questions” (p. 490). Campbell concluded that Edwards was teaching from a non-approved syllabus, and he presented the matter to the Education Department faculty. The faculty responded by voting to reinstate an earlier version of the IEM syllabus. Relying on the earlier IEM syllabus, Campbell then revoked certain book orders that Edwards had made for the coming semester.

Around the time of these events, Edwards was assigned to teach an additional course—“Educational Tests and Measurements” (ETM), which he had not taught before. Apparently, Edwards was unhappy with the change, and Campbell received complaints that Edwards had not shown up for some of his ETM classes and that he had walked out of others.

Some students complained about Edwards’s ETM class, and school administrators scheduled a meeting with Edwards to discuss their concerns. Apparently, the meeting did not go well. Shortly before the meeting, the university had mailed materials to Edwards concerning the meeting’s topic, but Edwards said he had not received them and he asked for additional time to prepare. At this point, Nelson relieved Edwards of his duties, with pay, “until he was ready to discuss the University’s concerns” (p. 490). Edwards remained suspended with pay for the remainder of that semester, but he returned to his teaching duties the following semester.

Edwards sued the university, alleging various constitutional violations. The trial court dismissed some of his claims, and the rest of his case was rejected by a jury. On appeal, the Third Circuit affirmed the lower court decision, rejecting Edwards’s constitutional claims.

“[A]s a threshold matter,” the appellate court wrote, “we conclude that a public university professor does not have a First Amendment right to decide what will be

taught in the classroom” (p. 491). In reaching this conclusion, the Third Circuit relied in part on *Rosenberger v. University of Virginia* (1995) a U.S. Supreme Court decision, in which the Supreme Court said that when the state is the speaker, the state may make content-based choices. “When the University determines the content of the education it provides,” the Supreme Court stated, “it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker...(p. 833).

Drawing on the Supreme Court’s *Rosenberger* decision, the Third Circuit concluded that the university could make content-based decisions when shaping its curriculum without violating Professor Edwards’s constitutional rights.

The Supreme Court has explained that “academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself.” The “four essential freedoms” that constitute academic freedom have been described as a university’s freedom to choose “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” In sum, caselaw from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University’s dictates. (p. 492, internal citations omitted)

Other federal court decisions are generally in harmony with *Edwards*. As discussed earlier in this article, the Sixth Circuit upheld a public university’s right to direct a professor to be clearer in her directions to students about course requirements (*Johnson-Kurek v. Abu-Absi* 2005). The Sixth Circuit also ruled that a university may review and change an instructor’s grades, although it cannot constitutionally require the instructor to make the change (*Parate v. Isibor* 1989). And in *Brown v. Armenti*, (2001) the Third Circuit rejected the view that a professor’s grade is constitutionally protected expression. “A public university professor does not have a First Amendment right to expression via the school’s grade assignment procedures,” the Third Circuit ruled. On the contrary, grading is a teaching activity that is “subsumed under the university’s freedom to decide how a course is to be taught” (p. 75).

Finally, in a 1986 decision, the First Circuit rejected a nontenured teacher’s argument that a university had violated his right to academic freedom by failing to renew his teaching contract due to his rigorous grading standards (*Lovelace v. Southeastern Massachusetts University*, 1986). “Whether a school sets itself up to attract and serve only the best and brightest students or whether it instead gears its standards to a broader and more average population is a policy decision, which, we think, universities must be allowed to set,” the First Circuit ruled. “And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision” (p. 425).

Institution’s Authority to Evaluate Teaching

At least two decisions have upheld the authority of higher education institutions to evaluate their faculty members’ teaching quality against claims that the institutions’

evaluative activities violated the faculty member's constitutional rights. In *Wirsing v. Board of Regents* (1990), a University of Colorado professor refused to distribute a standardized faculty evaluation form to her students on the grounds that the university's faculty evaluation process was contrary to her personal theory of education. In response to this refusal, the university withheld the professor's merit pay raise. The professor sued, arguing that the university had violated her right to academic freedom.

A federal trial court rejected the professor's academic freedom argument, saying, "Academic freedom is not a license for activity at variance with job-related procedures and requirements" (p. 553, internal citation omitted). The professor might have an academic freedom right to disagree with the university's faculty evaluation policy, but "she had no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment" (p. 553).

An earlier Sixth Circuit decision is in harmony with the *Wirsing* opinion. In *Hetrick v. Martin* (1973), a university nonrenewed a nontenured professor's teaching contract based on institutional concerns about her pedagogical style and teaching methods. The professor sued, arguing that her teaching methods were constitutionally protected under the First Amendment. The Sixth Circuit disagreed: "Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students,...it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere in the teaching profession" (p. 709).

In essence, *Johnson-Kurek v. Abu-Absi* (2005), discussed earlier in this article, is a case about a university's evaluation of an instructor's teaching style. In that case, a nontenured lecturer's superior directed the lecturer to be clearer in her communications to students as to what was required to complete the instructor's course. The court rejected the lecturer's arguments that the university had violated her First Amendment rights to free speech and academic freedom.

In short, college instructors can not insulate themselves from evaluations of their teaching based on the argument that such evaluations violate their right to academic freedom. The university's right to evaluate the effectiveness of a particular teacher's classroom teaching style is well established, and constitutional and academic freedom arguments to the contrary are unavailing in the courts.

Conclusion

In its Statement of Principles on Academic Freedom, the American Association of University Professors (1940) stated: "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." In general, federal court decisions are in harmony with the AAUP's statement.

In particular, although instructors may use offensive language in the classroom if the language is related to the topic being taught, they have no right to bombard their students with gratuitous profanity or demeaning remarks. Colleges and universities maintain the right to determine grading policies and course syllabi; and they have the

authority to evaluate the quality of instruction without violating an instructor's academic freedom rights.

In analyzing a college or university instructor's academic freedom claims, several courts have declined to recognize an independent constitutional right to academic freedom. Instead, they have analyzed these claims like they would analyze free speech claims made by other public employees. Although courts remain cognizant of an instructor's right to free expression in the academic environment, they also recognize the right of the college or university "to determine for itself on academic grounds who may teach, what will be taught, how it shall be taught, and who may be admitted to study" (*Sweezy v. New Hampshire*, p. 263, Justice Frankfurter concurring).

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