ACADEMIC FREE SPEECH: "WHAT DOES IT MEAN?"

A Community College student is enrolled in the dental assisting program for the 2015 academic year at GTCC. While walking her dog, Penelope, the pet was struck and killed by a car. The student sent a text to her college professor that said "Good morning Mrs. Shook. This is Bailey. I won't be in class today. My sister died in a car accident this morning." College staff and students express condolences and raised money in honor of the student's sister. The student needs excused absences because she was reaching the maximum number allowed in the program. When the student is asked for an obituary to verify the excused absences, she agrees to provide one. About 10 days into the charade, GTCC faculty discovered that "Penelope" was not the student's sister, but her dog. Facebook posts disclosed the truth. The student was placed on long term suspension. Student sues GTCC alleging discipline imposed against her was based on her speech, and violated her First Amendment rights as it was an expression of grief. Really you ask? Yes, and she really did file a lawsuit against the College.

A cursory glance at the U.S. Counts.gov website asks the question "What does free speech mean?" We are all well aware that the First Amendment states that "Congress shall make no law….abridging freedom of speech." And while freedom of speech under the landmark decision of **Tinker v. Des Moines** ***393 U.S. 503(1969)*** allows the right of students to wear black armbands to school to protest a war, it does not include the right to yell "Fire" in a crowded theater as a prank or joke. **Schenck v. United States** ***249 U.S.47 (1919) Independent Community School District.***

So what does free speech permit in an academic setting? What are the boundaries? The "sister died" case of **Clemmons v. GTCC** 2017 U.S. Dist. Lexis 113587 (NC Middle District Federal Court) gives us some insight.

The student was advised she had violated the College student conduct policy. As a result, the student was long term suspended until the fall semester of the next year.

Among the questions before the Court were the following three (3) part analysis:

1) Did she engage in protected speech?

2) Did the Court identify the nature of the forum in which she spoke?

3) Whether the justifications for the exclusion satisfy the requisite standard for that forum? Did the College make reasonable restrictions in this case?

Starting with question number one (1) "the issue of protected speech", in light of the **US v. Alvarez, *567 U.S. 709 (2012)*** decision the Court will assume the answer is yes. (Alvarez noted that falsity alone does not take speech outside the First Amendment).

Moving to question number two (2), the College is a non-public forum. A nonpublic forum is not specially designated as open to public expression. For example, public school, jails and military bases are non-public forums. Thus, as a non-public forum, GTCC is entitled to "make reasonable, viewpoint neutral restrictions on speech in the educational context."

And finally, "this turns the inquiry to an assessment of the justifications of the College for disciplining (the student)." And while "students do not shed their constitutional rights of freedom of speech at the schoolhouse gate **Morse v. Federick**, ***551 U.S. 393, 396 (2007)*** (quoting **Tinker v. DesMoines *supra***), "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." **Bethel School District No 403 v. Franser**, ***478 U.S. 675, 682 (1986)***. And why is that, you may ask? Because prior U.S Supreme Court decisions hold that "a school can properly regulate speech that has a negative effect on the school's mission." **Morse**, ***supra at 408-405***. Balancing "the right to free speech with the need to maintain decorum in our public schools so that the learning process may be carried out in an orderly manner is proper in light of a school environment." **Hardwick ex rel. Hardwick v. Heyward**, ***711 F. 3d 426, 436 (4th Cir. 2013)***. In other words, "certain speech, which would be protected in other settings, might not be afforded First Amendment protection in a school setting". **Bell v. Itawamba Cty. Sch. Bd.**, ***799 F. 3d 379, 390 (5th Cir. 2015).*** **Thus, in affirming her suspension, the College did not exclude viewpoint or prohibit the student's speech, but "rather disciplined her for being dishonest."** And the GTCC Faculty "expressed concerns at the student's appeal hearing about letting a student who exhibited dishonesty practice in a clinical setting." **Clemmons**, ***supra at 16.***

Pickering Decision:

The benchmark case on public employee free speech rights is **Pickering v. Board of Education** ***391 U.S. 564 (1968)***. Mr. Pickering was terminated as a public school teacher due to his letter to a newspaper critical of the superintendent and the school board for alleged mismanagement of public money. After Pickering's letter was published, the BOE found the letter to be at odds with the efficient administration of the schools. Pickering was dismissed. The Supreme Court held the dismissal of the teacher was not justified. Public school teachers and other public employees enjoyed the right of free speech, but their free speech right "is not unfettered" (**Pickering**, ***supra***). Further, "the problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commentary on matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. ***Id. 391 U.S. at 568.***

The Court emphasized a two-step test. First, determine whether an employee has addressed a matter of public concern. **Connick v. Myers,** ***461 U.S. 138, 103 S. Ct. 1684 (1983)***. And second, if that is the case, then weigh the right to speak against the right of the employer to a disruption free workplace.

This balancing test referenced above correlated to several factors outlined by the Court in **Pickering, 391 U.S. at 570-572:**

a) The parties' working relationship;

b) The detrimental effect of the speech on the employer;

c) The nature of the issue upon which the employee spoke and relationship of that employee to that issue.

Accordingly, the Court in **Pickering** astutely recognized that the letter to the newspaper criticized the school board policies and not his direct supervisors. The letter was essentially a difference of opinion over the allotment of school revenues, and there was no active disruption of the workplace. And, finally, the Court reasoned that the topic of proper school funding was a matter of public concern.

Former UNC School of Government professor and current Richmond School of Law faculty member Stephen Allred duly notes in his article entitled **"Not My**

Job: Determining the Bounds of Public Employee Protected Speech" (2014) (UR Scholarship Repository) the following:

> "In many ways, Marvin Pickering was a perfect plaintiff. He was apparently a competent teacher, not a disruptive or hostile employee. He engaged in a quintessential act of free speech, writing a letter to a newspaper, acting in much the same way as many of his neighbors who were following the school board's deliberations on a local bond vote might have done. He was not a close ally or immediate staff member who reported directly to the school superintendent; rather, he was just a teacher in one of the district's many schools." **Allred** ***supra at 191.***

The previous history of free speech by public employees as noted by Robert Joyce of UNC School of government is as follows:

> "It has never been the case, of course, that a public employee could get away with saying just anything at just any time. Instead, the federal Courts (and most notably the Supreme Court) have, over the years, imposed a couple of direct restrictions on public employees' exercise of free speech. First, for public employee speech to be protected, it must be centered on a matter of public concern. Expressions of private or personal concern are simply not protected free speech. Second, the employee, in speaking out, must have not caused turmoil or disruption or otherwise significantly interfered with the ability of the governmental employer to get its work done. As it is commonly said, the balance of interests must rest in the employee's favor." ***Robert Joyce*** **"The Developing Law of Academic Freedom in Public Colleges and Universities." Coates' Cannon SOG.UNC (2011).**

Garcetti vs. Ceballos: Supreme Court Decision (2006):

It wasn't until 2006 that the Supreme Court added an "official duties" component. The case is **Garcetti v. Ceballos,** ***574 U.S. 410, 126 5.CT. 1951 (2006).*** Ceballos was a supervising assistant deputy district attorney who was requested by defense counsel to review the contents of an affidavit utilized to get a search warrant. Ceballos thought the affidavit made misrepresentations to the Court that were not accurate. He advised his office of his concerns and even prepared a memorandum recommending dismissal of the case. The DA office proceeded to prosecute the case despite his disagreement. Ceballos was

subpoenaed by defense counsel and he testified truthfully. Yet, the trial Court denied the defense challenge to the search warrant.

Ceballos files a lawsuit and alleges that the DA office retaliated against him by denying him a promotion and later transferring him to a distant location. The District Court granted summary judgment ruling that the memorandum was not protected speech since Ceballos wrote it pursuant to his job duties. The 9th Circuit Court of Appeals reversed interpreting the memo allegations to be a matter of public concern protected by the First Amendment. ***Id. 547 U.S. at 416.***

Near the end of its decision in **Garcetti,** and in response to Justice Souter's dissent, the Supreme Court stated:

> There is some argument that expression related to academic scholarship of classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. ***Id. 547 U.S. at 425.***

Thus as other Courts have recognized, the "plain language of **Garcetti** explicitly left open the question of whether its principles apply in the academic genre where issues of "scholarship or teaching" are in play." This distinction is re-visited later by the 4th Circuit Court of Appeals, and is the last case study in this presentation.

The central issue before the **Garcetti** Court was….."are the allegations of wrongdoing" in the memorandum of Ceballos protected speech under the First Amendment? The Court concluded NO.

Thus, the additional new wrinkle added by the Supreme Court in **Garcetti** supra, was that if the memorandum was part of his job duties, then he is speaking as an employee not as a citizen exercising the right of free speech. In other words, his "actions were simply part of his job description, and he was merely performing the tasks he was paid to perform as an employee." ***Id. at 422.***

And where are we today? Two cases of particular interest to Community Colleges are the final topics of discussion.

Lane v. Franks: Supreme Court Decision (2014):

The case of **Lane v. Franks** ***573 U.S. 228, 134 S. Ct. 2369 (2014)*** asks the question "whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by a subpoena, outside of the scope of this ordinary job responsibilities?" ***Id. At 2374-2375.***

The facts of this case are that during an audit by Director Lane of a program for underprivileged youth operated by Central Alabama Community College, he discovered that an employee, who was also a State representative, had not been reporting for work……yet she was still collecting a paycheck. Does this scenario sound familiar here in NC? Lane fired the State representative/employee. And when the fired employee was later indicted, since the program received federal funds, Lane testified under subpoena against her. Later, while the program was in a budget crisis, Franks (president of the program) laid off Lane along with 28 other employees. Shortly thereafter, all but 2 of the 29 dismissals, Lane and another former employee, were rescinded. Lane filed a lawsuit alleging that his First Amendment rights had been violated due to the retaliatory firing by Franks.

The Federal District Court granted Frank's motion for summary judgment holding that "individual – capacity claims" were barred by qualified immunity and "the official- capacity claims" were barred by the Eleventh Amendment.

The 11th Circuit affirmed holding that Lane's testimony was not entitled to First Amendment protection. It reasoned that Lane spoke as an employee and not as a citizen because he acted pursuant to his official duties when he investigated and terminated the State representative.

The issue before the Supreme Court was "Did the First Amendment protect Director Lane, as a public employee who provided truthful sworn testimony compelled by subpoena, outside the scope of his ordinary job responsibilities?" The Supreme Court answered YES, holding that a public employee's Court testimony about public corruption was protected by the First Amendment.

A unanimous Court added: "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes." That is so even when the testimony related to public employment or concerns information learned during that employment." ***Id. at 2378.*** Law Professor Stephen Allred points out "The Court didn't take the opportunity to overturn Garcetti, but by stating that speech is protected when it is

based on what a public employer knew as a direct result of his or her employment, the Court may well have reduced the scope or effect of Garcetti. ***Allred, "Not my job...." (2014) supra at 197.***

Adams v. UNC-W: 4th Circuit Court of Appeals (2011):

The final case in our review is close to home. In 2011, the 4th Circuit Court of Appeals addressed the case of **Adams v. The Trustees of the University of North Carolina-Wilmington, et. al., 640 F. 3d 550 (2011).**

In 1993, UNC-W hired Adams as an assistant professor of criminology. Over the next five (5) years, Adams earned strong faculty teaching reviews from students and faculty. He received two (2) faculty awards among other honors. In 1998 he was promoted to the tenured position of associate professor. In 2000, Adams found religion and became a Christian that transformed both his religious and ideological views. And, of course, Adams became more vocal about social and political issues, and often appeared on television and radio. Nevertheless, Adams continued to receive favorable teaching reviews. But, Adam's conservative viewpoint started to generate complaints from members of the Board of Trustees, the faculty and staff, and general public at large. Yet, it was generally acknowledged the First Amendment and academic freedom protected Adams' writings. But open displeasure with Adam's views grew.

In 2004, Adams applied for promotion for full professorship. The University Faculty Handbook described the criteria for promotion stating all applicants are "evaluated in four (4) areas: teaching, research or artistic achievement, service and scholarship and professional development. Despite eleven (11) peer reviewed journal publications, teaching awards, two (2) published books and a school wide service award, "the majority of senior faculty did not favor the promotion. The Department Chair denied his application. Adams was not granted promotion to full professor, and he filed suit.

The Court opined on the task before it by stating that the "university employment cases have always created a decisional dilemma for the Courts." Unsure how to evaluate the requirements for appointment, reappointment, and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the Court has refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the Courts review has been narrowly directed as to whether

the appointment or promotion was denied because of a discriminatory reason. **Smith v. University of North Carolina**, ***632 F. 2d 316, 345-46 (4th Cir. 1980);*** **Adams**, ***supra at 557.***

Thus, while Adams argues that his writings and public comments on current political issues resulted in denial of promotion to full professor, UNC-W countered that Adams speech was related to scholarship and teaching; hence, the **Garcetti** standard should apply. **Adams**, ***supra at 557.*** But, UNC-W acknowledged the speech in question was unrelated to any of Adams' assigned teaching duties at the university, and he was paid by independent third parties.

The Fourth Circuit held that the lower Court "misread **Garcetti**, especially when it decided that protected speech was converted into unprotected speech based on its use after the fact." In addition, the District Court applied **Garcetti** without acknowledging or addressing the clear language in that opinion that casts doubt on whether the **Garcetti** analysis applied in the academic context of a public university. **See Garcetti**, ***547 U.S. at 425 (response to Justice Souter's dissent).***

Thus in summary, the **Garcetti** ruling that a government employer does not violate free speech by disciplining an employee for speech made pursuant to his/her official duties **may not** apply to scholarship and academic teaching. **Adams v. UNC-W** ***supra,*** was remanded, and a jury found that the College had retaliated against Adams. Later a Federal Court judge ruled that Adams was to be made a full professor and receive back pay. UNC-W initially appealed the case, but later agreed to withdraw the appeal, put into place procedures to prevent any further retaliation and to pay his attorney fees in addition to the Court order herein.

Conclusion:

The Adams Court noted that in **Pickering** (1968) and **Connick** (1983) "the Supreme Court analyzed the competing interests at play between the public employee as a citizen, in commenting upon matters of public concern and the government as an employer, in promoting the efficiency of the public services it performs through its employees. (**Pickering,** ***391 U.S. at 568***). The free and open debate of matters of public interest by professors should result in a more informed and educated public.

And while the Garcetti decision restrained public employer free speech if it was part of the job duties, a window remained open to provide protections for academic freedom for professors and teachers, such as the **Adams** decision. So in light of Adams is academic free speech unlimited? As is so firmly stated in Article I, Section 14 Declaration of Rights of the North Carolina Constitution, these words still hold true today:

> "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-196
HOUSE BILL 527

AN ACT TO RESTORE AND PRESERVE FREE SPEECH ON THE CAMPUSES OF THE CONSTITUENT INSTITUTIONS OF THE UNIVERSITY OF NORTH CAROLINA.

Whereas, the Constitution of North Carolina recognizes in Article I, Section 14, that "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse"; and

Whereas, the constituent institutions of The University of North Carolina have historically embraced a commitment to freedom of expression in policy; and

Whereas, it is appropriate for The University of North Carolina System to restate and confirm their commitment to free expression; and

Whereas, in 1974, the Committee on Free Expression at Yale issued a statement known as the Woodward Report that stands as a classic defense of free expression on campuses; in 2015, the Committee on Freedom of Expression at the University of Chicago issued a similar and widely respected report; and, in 1967, the Kalven Committee Report of the University of Chicago articulated the principle of institutional neutrality regarding political and social issues and the essential role of such neutrality in protecting freedom of thought and expression at universities. The principles affirmed by these three highly regarded reports are inspiring articulations of the critical importance of free expression in higher education; and

Whereas, the General Assembly views freedom of expression as being of critical importance and requires that each constituent institution ensure free, robust, and uninhibited debate and deliberation by students of constituent institutions; and

Whereas, the General Assembly has determined that it is a matter of statewide concern that all constituent institutions of The University of North Carolina officially recognize freedom of speech as a fundamental right; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 116 of the General Statutes is amended by adding a new Article to read:

"Article 36.

"Campus Free Speech.

"§ 116-300. Policies required.

The Board of Governors of The University of North Carolina shall develop and adopt a policy on free expression that states, at least, the following:

(1) The primary function of each constituent institution is the discovery, improvement, transmission, and dissemination of knowledge by means of research, teaching, discussion, and debate. To fulfill this function, the constituent institution must strive to ensure the fullest degree of intellectual freedom and free expression.

(2) It is not the proper role of any constituent institution to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

(3) The constituent institution may not take action, as an institution, on the public policy controversies of the day in such a way as to require students, faculty, or administrators to publicly express a given view of social policy.

(4) Students and faculty have the freedom to discuss any problem that presents itself, as the First Amendment permits and within the limits of narrowly tailored viewpoint- and content-neutral

restrictions on time, place, and manner of expression that are consistent with this Article and that are necessary to achieve a significant institutional interest, provided that these restrictions are clear, published, and provide ample alternative means of expression. Students and faculty shall be permitted to assemble and engage in spontaneous expressive activity as long as such activity is lawful and does not materially and substantially disrupt the functioning of the constituent institution, subject to the requirements of this section.

(5) Access to campus for purposes of free speech and expression shall be consistent with First Amendment jurisprudence regarding traditional public forums, designated public forums, and nonpublic forums, subject to reasonable time, place, and manner restrictions.

(6) Consistent with First Amendment jurisprudence, including any reasonable time, place, and manner restrictions adopted by a constituent institution, campuses of the constituent institutions are open to any speaker whom students, student groups, or members of the faculty have invited.

(7) The constituent institution shall implement a range of disciplinary sanctions for anyone under the jurisdiction of a constituent institution who substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity when the expressive activity has been scheduled pursuant to this policy or is located in a nonpublic forum.

(8) In all student disciplinary cases involving expressive speech or conduct, students are entitled to a disciplinary hearing under published procedures, including, at a minimum, (i) the right to receive advance written notice of the charges, (ii) the right to review the evidence in support of the charges, (iii) the right to confront witnesses against them, (iv) the right to present a defense, (v) the right to call witnesses, (vi) a decision by an impartial arbiter or panel, (vii) the right of appeal, and (viii) the right to active assistance of counsel, consistent with G.S. 116-40.11.

"§ 116-301. Committee on Free Expression.

(a) The Board of Governors of The University of North Carolina System shall establish the Committee on Free Expression and appoint 11 individuals from among its membership to the Committee. The members of the Committee on Free Expression shall elect a chair from the members of the Committee. Each member of the Committee on Free Expression shall serve on the Committee at the pleasure of the Board of Governors. Each member's term shall be equal to the remainder of the member's respective term on the Board of Governors. In the event of a vacancy on the Committee, the Board of Governors shall appoint a replacement from among its membership.

(b) All employees of The University of North Carolina System and all State agencies shall cooperate with the Committee on Free Expression by providing information requested by the Committee.

(c) The Committee on Free Expression shall report to the public, the Board of Governors, the Governor, and the General Assembly by September 1 of every year. The report shall include all of the following:

(1) A description of any barriers to or disruptions of free expression within the constituent institutions.

(2) A description of the administrative handling and discipline relating to these disruptions or barriers.

(3) A description of substantial difficulties, controversies, or successes in maintaining a posture of administrative and institutional neutrality with regard to political or social issues.

(4) Any assessments, criticisms, commendations, or recommendations the Committee sees fit to include.

The requirement of reporting to the public may be met by publishing the report on The University of North Carolina System's Web site.

"§ 116-302. Freshman orientation.

All constituent institutions of The University of North Carolina shall include in freshman orientation programs a section describing the policies regarding free expression consistent with this Article.

"§ 116-303. Guidelines and additional policies authorized.

The Board of Governors, and the constituent institutions of The University of North Carolina subject to approval of the Board of Governors, may adopt additional policies and guidelines to further the purposes of the policies adopted pursuant to this Article. Nothing in this Article shall be construed to prevent institutions from regulating student speech or activity that is prohibited by law. Except as further limited by this Article, constituent institutions shall be allowed to restrict student expression only for expressive activity not protected by the First Amendment, including all of the following:

(1) Violations of State or federal law.
(2) Expression that a court has deemed unprotected defamation.
(3) Unlawful harassment.
(4) True threats, which are defined as statements meant by the speaker to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.
(5) An unjustifiable invasion of privacy or confidentiality not involving a matter of public concern.
(6) An action that substantially disrupts the function of the constituent institutions.
(7) Reasonable time, place, and manner restrictions on expressive activities, consistent with G.S. 116-300(4).
(8) Speech that interferes with the treatment of patients.

"**§ 116-304. Limitations on liability.**

Nothing in this Article shall be construed to make any chancellor, officer, employee, or member of a board of trustees of a constituent institution or the President, officer, employee, or member of the Board of Governors of The University of North Carolina personally liable for acts taken pursuant to their official duties."

SECTION 2. The Board of Governors shall develop a policy that requires each constituent institution to identify the officer, office, or department with responsibilities for ensuring compliance with this act and for answering any related questions or concerns. This policy shall require that any officer with these responsibilities receive training on ensuring compliance with this act. Such training shall be developed and provided by the University of North Carolina School of Government.

SECTION 3. This act becomes effective June 30, 2017. The initial annual report of the Committee on Free Expression is due by September 1, 2018.

In the General Assembly read three times and ratified this the 29th day of June, 2017.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

This bill having been presented to the Governor for signature on the 29th day of June, 2017 and the Governor having failed to approve it within the time prescribed by law, the same is hereby declared to have become a law. This 31st day of July, 2017.

s/ Karen Jenkins
Enrolling Clerk