Can A University Terminate For Tenured Teacher's Twitter Tweaks?

Insights
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A series of Twitter posts from a tenured Fresno State English professor about former First Lady Barbara Bush has once again sparked a national conversation about how the First Amendment applies in the university setting, and in particular, how it protects provocative university professors.

Professor's Tweets Offend And Mobilize Backlash

The professor, Randa Jarrar, sent the following tweet within an hour after an announcement that Mrs. Bush died on April 17: "Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal. F--- outta here with your nice words." If that was not enough, she then taunted those offended by her tweets by crowing that she was "tenured," made $100,000 a year, and "will never be fired."

"What I love about being an American professor is my right to free speech, and what I love about Fresno State is that I always feel protected and at home here," Jarrar wrote in a final salvo. Her provocation predictably drew national attention and generated calls for her termination. A petition signed by over 60,000 people demanding her termination was presented to Fresno State President Joseph Castro, who described the comments as "disgraceful" and an "embarrassment to the university."

Can The University Terminate For Tactless Tweeting?

A bedrock principle in constitutional law is that the First Amendment only protects people from being punished for their speech when the "punisher" is the government. Private university professors may have free speech rights as a matter of contract or by virtue of protections in a faculty handbook, but they are not protected by the U.S. Constitution. On the other hand, public university professors and employees are protected by the First Amendment *vis a vis* their employer. In such cases, courts rely on the following multi-stage analysis to assess whether an institution can punish an employee for what they say:

- First, they will assess whether the public employee was speaking on a matter of "public concern." If the speech at issue concerns an employee's particular workplace grievances, for instance, that is typically not a matter of public concern and will not be protected by the First Amendment.

- Second, they will ask whether the employee was acting as a private citizen or as part of their job duties. The Supreme Court is reasonably clear that when most public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. However, it is important to note that principles of "academic freedom" unique to public university professors may protect speech both inside and outside of the classroom.
- Third, they will apply a balancing test whereby the interest of the public employee in free speech is balanced against the interest of the public employer in promoting the efficient delivery of public services. This is always a subjective assessment, but generally speaking, courts weigh whether the employee's speech so disrupted the workplace that it interfered with orderly business in a way that outweighs the employee's speech rights.

Correctly applying those constitutional principles, Fresno State's president issued a statement in late April announcing Jarrar would not be disciplined for her tweets. President Castro noted that Jarrar "was acting in a private capacity and speaking about a public matter on her personal Twitter account. Her comments, although disgraceful, are protected free speech under the First Amendment of the U.S. Constitution."

The Constitution Does Not Protect Professors From All Misconduct

In issuing his statement, President Castro was clear in noting that while "Professor Jarrar used tenure to defend her behavior, this private action is an issue of free speech and not related to her job or tenure." Put another way, Fresno State's decision had nothing to do with the fact Jarrar was tenured, and everything to do with the fact that the First Amendment extends protections to all public employees under similar circumstances.

A recent case involving a Florida Atlantic University (FAU) professor illustrates some of the intersections between the First Amendment and tenure, as well as the limits to the protections afforded by the Constitution. In *Tracy v. Florida Atlantic University*, Professor James Tracy claimed his termination was motivated by his personal blog postings on mass shootings, particularly his claim that the Sandy Hook massacre never happened but was actually "staged by the government to promote gun control." Much like Professor Jarrar's tweets, the blog garnered national attention and caused many to call for his termination.

Throughout his employment, Professor Tracy was required to submit a standard conflict of interest form wherein he (and all other professors) were required to document all outside activities and income. He refused and, despite his tenure, the university terminated him. He filed a lawsuit challenging the termination arguing that he was terminated for his controversial blog posts, a violation of the First Amendment.

The case was ultimately tried and the jury agreed that FAU had provided sufficient evidence to demonstrate that the termination was solely because of Tracy's refusal to submit the conflict of

interests form. The professor challenged this verdict claiming it went against the weight of the evidence. On April 24, the court rejected this challenge and concluded that the following facts supported the jury's verdict that the professor was not terminated for his blog postings:

- The professor was at all times permitted to blog without any censorship by FAU;
- There was evidence that another professor who caused a controversy that resulted in massive media attention and the presence of police on campus kept his job at FAU;
- Professor Tracy could point to no other person who failed to fill out the conflict form but was not terminated; and
- There was evidence that Tracy's refusal to fill out the forms was in the context of an actual violation with respect to the outside activities that he refused to report. Specifically, he admitted to receiving compensation through his blog, privately admitted the blog was a reportable activity, and admitted to spending hour after hour on his blog and at times using school equipment to work on his blog.

Parting Thoughts

Never before has it been easier to widely circulate controversial comments about a public matter; never before has it been easier for an upset public to place significant pressure on colleges and universities to "do something" and discipline a professor for incendiary comments. The fact that technology continues to make it easier to spread your thoughts, coupled with engaged ideological factions on both sides of the country's ongoing culture wars, means the issues faced by Fresno State and FAU will continue to bedevil other institutions.

For private institutions not bound by the Constitution, it is a productive exercise to thoughtfully craft, disseminate, and apply rules regarding how you will assess and analyze similar issues. It is prudent to anticipate a professor sending out tweets like Professor Jarrar's and the furious reaction that would inevitably follow, and then consider in advance how your institution would respond in a manner consistent with its values and contractual commitments. "Making it up as you go along" is a recipe for disaster.

For public schools, the Constitution provides clear restraints on how your institution can respond. With that said, and as the FAU case makes plain, a tenured professor's controversial remarks do not insulate them from discipline for other acts of misconduct, especially when your school can demonstrate it provides wide berth for the exercise of free speech by all of its employees.

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