

When It Comes to Free Speech, Is a Professor Just Another Government Employee?

CASE IN POINT: Hong v. Grant (2007)

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A case pending in a federal court of appeals in California may clarify a surprisingly murky question: Do faculty members at public universities enjoy a special privilege to speak freely about institutional matters, or, as far as the First Amendment is concerned, are they just another category of government hirelings?

Juan Hong, a professor of chemical engineering and materials science at the University of California at Irvine, sued the university after he was denied a merit salary increase in 2005. The denial was in retaliation, Hong alleges, for his history as a self-described "outspoken critic of university administrators on their mismanagement of their administrative responsibility."

In one incident, Hong complained that too much teaching in his department was being done by lecturers rather than tenured professors. In another, he criticized his chair and dean for extending an informal employment offer to an assistant professor before a faculty vote. Hong also mounted campaigns accusing one colleague of a grant-related conflict of interest and another of misrepresenting his academic credentials.

Hong claims that by denying him a raise, the university retaliated against him for exercising his free-speech rights. (The university says the decision was based on his research record.)

Status: A federal judge ruled last September that because participation in governance is part of an Irvine professor's "official duties," Hong's speech wasn't entitled to First Amendment protection. Hong has appealed to the U.S. Court of Appeals for the Ninth Circuit, which will hear arguments later this year.

Implications for higher education: Hong's case represents one of the first applications in higher education of the Supreme Court's 2006 decision in *Garcetti v. Ceballos*. In *Garcetti*, the court distinguished between speech that a government employee engages in "pursuant to his official duties" (such as writing a work-related report) and speech that, while it may *arise from* the employee's job, is not part of her formal responsibilities (such as a teacher who criticizes the school board in a letter to the editor).

Although the latter may be protected if it involves a "matter of public concern," *Garcetti* said the former is not protected. Essentially, the court held that the workaday speech of government

employees as such — including complaints they make to superiors — is of no concern to the Constitution.

Garcetti underscored the principle that a government entity, for instance a public university, may penalize an employee in ways it cannot penalize an ordinary citizen. The theory is that the government has an interest in maintaining an efficient workplace in the same way any other employer would. Otherwise, every employee grievance could become a constitutional lawsuit.

Does that mean that for First Amendment purposes, a public-university professor is no different than a clerk at the DMV? The district court in Hong's case essentially said the answer was yes — at least in the context of faculty governance, which it equated to the sort of ordinary workplace speech from which *Garcetti* stripped any protection. The university, the district court said, "allows for expansive faculty involvement in the interworkings of the university, and it is therefore the professional responsibility of the faculty to exercise that authority."

The district court's analysis would seem to put faculty members in a Catch-22: They are expected to participate in governance, but if their opinions rankle administrative sensibilities, they can be punished without First Amendment recourse.

Hong was not doing committee work but simply acting as a departmental citizen. Thus, by the court's logic, a professor could be penalized for resisting a curriculum change, advocating rights for transgendered colleagues, or opposing affirmative action in campus hiring.

That said, First Amendment law is highly contextual, and whether speech is confined to co-workers or directed to the world at large can be a critical distinction. For example, a professor who takes up a megaphone at a campus rally almost certainly could not be disciplined for such speech, regardless of whether the topic was some parochial campus tempest or the war in Iraq.

In February another federal appeals court considered the case of a nonacademic staff member at the University of Texas Health Science Center at Houston who alleged retaliation for a letter of complaint she had written to two senior administrators. The letter made three points: that the staff member's investigation of pornography on employees' computers was being stonewalled, that the institution discriminated on the basis of race and gender, and that it had created too many highly paid vice presidents.

The appeals court concluded that the first point merited no First Amendment protection because it was an internal communication about the staff member's official duties, but that the latter two points might be protected because they were akin to criticisms any citizen might make. (The litigation continues.)

Back at Irvine, perhaps the most alarming questions raised by Hong's case are its potential implications for the speech a professor utters in a lecture or a scholarly journal. After all, teaching courses and writing articles are as much a part of a faculty member's "official duties" as participating in governance. Under the logic of *Garcetti*, are they also unprotected?

The scholarly and teaching dimensions of faculty work are often assumed to enjoy special solicitude under the First Amendment — even though support for that proposition in Supreme Court case law is surprisingly thin, and consists mostly of rhetorical flourishes in a few isolated cases rather than foursquare legal holdings.

Although *Garcetti* did not concern an academic workplace, the court, anticipating that lower courts might confront a college case, touched on the issue only to reserve it for another day. As Justice Anthony M. Kennedy's majority opinion observed cryptically, "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." (In defending against Hong's suit, the University of California at Irvine will undoubtedly note that Justice Kennedy did not mention governance activities.)

But faculty work is multidimensional. Public intellectuals also sit on tenure committees. Teachers also advise students. Researchers discuss their work in the news media. Whether those different roles merit different legal protections remains an open question.

The American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression, in a friend-of-the-court brief in Hong's case, urged the Ninth Circuit to recognize that faculty members are simply different from other government workers. "The speech of university professors," they write, "merits a special degree of protection not only to facilitate an uninhibited pursuit of truth and advancement of knowledge, but equally to encourage scholars to speak candidly and fearlessly as they convey sometimes unwelcome or unsettling truths to government and citizens."

Put another way, the fate of academic free speech may depend on the extent to which a federal appellate court can be persuaded that the public university is not just another government job site, but that it remains a unique institution in American life.

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