



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

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## TEACHERS AND FIRST AMENDMENT SPEECH 2012: POLICY IMPLICATIONS

**Overview**

When a person accepts employment as a classroom teacher in a public school system it does not automatically mean that he/she can no longer publicly speak out as a citizen on controversial issues—including issues that impact on education and schools. As my colleague Professor Boshier and I have concluded, "...the condition of being a teacher does not mean that one has to forego his First Amendment rights as a citizen.... As citizens, teachers have the same rights as anyone else." (Vacca and Boshier, 2012)

While over the years public school teachers have been reluctant to openly express their opinions on a variety of issues, the courts have consistently held that public employees (including classroom teachers): (1) do not totally jettison their First Amendment rights to speak out when they accept public employment, and (2) shall not be retaliated against in the work place for speaking out as citizens on matters of public concern. (Vacca, 2007) However, experience teaches us that a public school teacher's right to speak out is not without limitations—especially in the classroom. As experts in education law remind us, "...practical reality requires that government, at certain times and under certain conditions, be able to restrict employees' speech in order to fulfill its responsibilities to operate effectively and efficiently." (Alexander and Alexander, 2012) In other words a balance must be struck and honored by both the employer and the employee. (Russo, 2004)

*The Supreme Court Speaks.* In 1968, the United States Supreme Court handed down Pickering v. Board of Education—a benchmark case involving the dismissal of a teacher (Pickering) who made public statements (in a letter to the newspaper) critical of the board of education that employed him. Seeing value in teachers speaking out on issues, particularly as the issues effect their own profession, the Court held that Pickering's speech was protected by the First Amendment. In the Court's view a teacher should "be able to speak out freely...without fear of retaliatory dismissal." In this case Pickering was speaking out on a matter of public not private concern and the statements were not "false statements knowingly or recklessly made by him." One year later, in Tinker v. Des Moines (1969), the Supreme Court opined that "[i]t can hardly be argued that either students or teachers shed their right to freedom of speech or expression at the schoolhouse gate." In the 1970s courts consistently applied the Pickering (1968) standard.

In 1983, the United States Supreme Court handed down Connick v. Meyers, a non-teacher case involving an employee discharged from her job as Assistant District Attorney in the Office of the District Attorney of New

Orleans. In Connick the Supreme Court held that the dismissed employee's inner-office activities (*i.e.*, she had circulated an inner-office questionnaire among fellow staff members seeking information regarding office morale and other inner-office matters—an activity that her employer viewed as disruptive of office administration) dealt solely with matters of a “private, personal nature” and were not matters of “public concern.” Thus, the First Amendment did not apply.

As a general rule, while several post-Connick courts in the decade of the 1990s affirmed the First Amendment rights of public employees to speak out on a variety of issues, it was not until the United States Supreme Court decided Garcetti v. Ceballos (2006), a non-school case, where a standard similar to the one established in Connick (1983) was crafted and applied in determining whether or not an employee's public comments were, in fact, protected by the First Amendment. Briefly stated the Supreme Court reaffirmed that the First Amendment applies when a public employee speaks out on a matter of “public concern”. However, the Court then added that the First Amendment's protection does not apply when an employee speaks out on a matter “pursuant to his official duties.” In such situations employees who are engaged in discharging their job-related duties “are not speaking as private citizens.”

Recently I came across a decision from the United States Court of Appeals for the Seventh Circuit where a classroom teacher claimed that he was forced to resign in retaliation for exercising his First Amendment right of free speech. What makes this case interesting and instructive is that it involves student/parent-related incidents that occurred inside the school building, advice of a police liaison officer, the filing of a criminal complaint, teacher evaluation, and allegations of constructive discharge.

**Gschwind v. Heiden, et al. (7th Cir. 2012)**

*The Facts:* Gschwind (hereafter referred to as “the teacher”) taught sixth-grade mathematics in a small town public school. On one occasion he met with the parents of one of his students regarding a threat that their child had made to another student. Subsequently, he saw the same student “beat up” another student in the hallway of the school. Again he met with the parents. During the meeting he claimed that the father “threatened” him with a “class action law suit,” and stated that the student aggressor's older brother, who had assaulted the assistant principal, “should have assaulted him (the teacher) instead.”

Several days later the teacher called upon the student in class and asked that he perform his “math karaoke.” The song was a part of an assignment given to the class involving the creation of song lyrics related to something that they had learned in class. In his class performance the student added “I stabbed Gschwind” to the lyrics of the “Gangsta Rap song ‘Boyz in da hood’.” The teacher said that because this “disturbed him” he stopped the class.

The teacher spoke to the school's police liaison officer, principal, and assistant principal (who had been the victim of an assault by the student's older brother) where he talked of filing a criminal complaint. The police liaison officer encouraged him to file the complaint. The officer noted that under the laws of that state “a knowing threat of violence against a person at a school to be a form of disorderly conduct.” He also told plaintiff that “the city feels it's important that this student go in front of a judge and explain his actions.” The principal and assistant principal were not supportive. Three weeks after the song incident plaintiff signed a complaint and the student was charged with disorderly conduct. Also, the student was suspended from school for three days—subsequently reduced to two days.

While the teacher later admitted that he filed the complaint because he was afraid for his safety, he also stated that his fear “coexisted with a desire to report the singing of the song as a crime that had been committed, to help ensure the smooth and safe operation of the school and everyone inside.” In his view the signing of the complaint was to bring to the public light the fact that such an incident (disorderly conduct in a classroom) had occurred—“a matter of public concern.”

The day after the teacher filed the criminal complaint the assistant principal gave him an “unsatisfactory evaluation.” The record shows that all previous evaluations had been “satisfactory” and the teacher had not been warned of any problems. The stated basis for the unsatisfactory evaluation was “lack of interpersonal skills in relating to students, parents, and colleagues.”

Subsequently, school officials informed the teacher that they had come to the conclusion that his employment in the school system “should not continue beyond the end of the school year.” Also, that if he did not resign his teaching position before the next school board meeting the principal would recommend to the board that his contract not be renewed for the following school year. In the teacher’s view because employment decisions made by principals were automatically accepted by the superintendent and board he was being compelled to resign—“constructively discharged.”

*District Court Action.* The teacher filed a civil rights suit in federal district court claiming that he was forced to resign in retaliation for his exercise of First Amendment free speech—*i.e.*, filing the criminal complaint. The United States District Court for the Northern District of Illinois granted summary judgment to the defendants. To the court, the teacher’s complaint about being threatened was not protected because it did not involve a “matter of public concern.” Gschwind v. Heiden (N.D. Ill. 2011) The teacher next took his case to the United States Court of Appeals for the Seventh Circuit.

*Seventh Circuit Rationale and Decision.* In their brief defendants did not deny the constructive discharge allegation; rather, they argued that even if they fired him in retaliation for his complaining to them about the student and particularly for his filing the criminal complaint, the complaining and firing were purely personal acts on his part and thus not an exercise of his right of free speech. The district court judge agreed that the matter involved a private interest—a concern for his “private safety.” However, in the Seventh Circuit Court’s view, “the district judge overlooked the statement in plaintiff’s affidavit that he had filed the criminal complaint in part ‘to help ensure the smooth and safe operation of the school and everyone inside.’” And “to bring to the public light the fact that such an incident had occurred.” Here the Seventh Circuit emphasized that violence in schools is a subject of “high public interest” especially in this case where the father of the student who made the threat “appears to have endorsed it.”

The appellate court next referenced Illinois juvenile law where both law enforcement and court records relating to juveniles are deemed to be confidential and cannot be inspected, unless by court order or strict exceptions. As such, members of the public have no unfettered right to access these records. However, said the appellate court, this does not “preclude the victim of a juvenile crime, or anyone else...from talking about the crime, whether privately or in public.” In this case the incident giving rise to the accusation—“I stabbed Gschwind”—could not be silenced consistent with the First Amendment. It has been and continues to be reported.

The Seventh Circuit Court emphasized that academic administrators are given “... a considerable degree of judicial forbearance in matters of discipline.” However, “[r]ealistically they can’t be indifferent to parental pressure and to the threats and the actuality of suits by indignant (though biased and over-protective and downright unreasonable) parents.” Citing Illinois statutory law the Court reasoned that “Illinois law has

curtailed that discretion in respects directly relevant to this case by requiring that any incident of battery or intimidation (which includes threats...in a school be reported immediately to law enforcement authorities.” In the Court’s view such regulations do not “infringe academic freedom protected by the First Amendment.”

*Decision:* The Seventh Circuit Court held that summary judgment should not have been granted to defendants. The District Court’s decision was reversed and the case remanded.

It is interesting to note that the Seventh Circuit Court then commented on plaintiff teacher’s specific claim that the conduct of school officials violated his right of free speech and his possible success on remand concerning issues of potential liability. In the words of the Court, “The principles on which this suit is based are well settled, which defeats the individual defendant’s claim of qualified immunity. The school district, however, cannot be held liable for the tortuous conduct of the principal and assistant principal under the doctrine of respondeat superior. It can be held liable only for its own conduct or that of its highest official or officials charged with responsibility for making the kind of decision, in this case a termination of employment, that is challenged. In Illinois the school board is the ultimate policymaking body with regard to personnel decisions. The school district’s superintendent, although the highest official of the school district, is not a member of the school board and does not have the ultimate responsibility for such decisions.”

In this case, said the Court, the superintendent authorized the principal to fire the teacher and the board approved that decision. When the teacher complained to the principal about the decision of the principal and assistant principal to force him to resign, the superintendent replied that it was the policy of the school district and board “to ‘allow principals and assistant principals to make evaluation and employment decisions as they see fit with respect to the teachers they supervise and for the school district and Board of Education to follow these decisions and recommendations’.” As the Court then opined, this was “evidence of a policy of the school district of condoning unconstitutional behavior.” In effect giving discretion to lower-level supervisors can foster a system of undisciplined and subjective decision-making and form the basis of Title VII liability. As such, the Court concluded its opinion by saying: “[t]his suit was terminated prematurely.”

## **Policy Implications**

While courts have held that classroom teachers as *private citizens* in the community are free to exercise their First Amendment right to free speech on matters of public concern, teachers also must realize that restrictions and limitations exist when they speak as an *employee* of a local school board. At the same time, courts also have held that teachers and other employees should not fall victim to retaliatory dismissal solely because they have spoken out as citizens in the public square on matters directly related to education and schools.

Gschwind v. Heiden, et al. (7th Cir. 2012) is one court decision. However, as accountability, student discipline, violence in schools, parental engagement, police involvement, and other often emotionally charged subjects continue to raise concerns and stimulate discussions in communities across the country, the Seventh Circuit’s rationale has implications for local school board policy in other jurisdictions. What follow are some suggestions to consider as existing school system personnel policies are revisited and new policies are drafted.

School board policies must make it clear that:

- The Board respects the First Amendment speech and expression rights of all employees.

- The Board is legally responsible for the safe, disruption-free, and efficient management of school system operations and expects all employees to assist and actively work toward the implementation of this responsibility.
- Where public disclosure of school system's official business and matters of internal operation are determined necessary and appropriate, such matters shall be communicated (verbally or in writing) to the community (including the media) by staff members formally and officially designated (by the Board) as the school system's official representatives.
- Employees are expected to utilize the school system's formal/internal channels of communication to convey all job-related concerns and issues.
- All employee job-related concerns and issues (including, but not limited to, official or employee misconduct; violations of law or policy; parental involvement; student discipline) shall be brought (i.e., reported) to the immediate attention of the employee's direct supervisor.
- The Board expects all administrators and supervisors to promptly act to investigate and take appropriate action when in receipt of employee concerns and issues.
- Students and/or parents who exhibit abusive, disrespectful, and/or threatening behavior toward administrators, classroom teachers, other personnel, or other students shall be subject to immediate disciplinary action and, where appropriate, prosecution under the law.

One final observation is in order. The Seventh Circuit Court's summary comments focusing on administrative reliance on and use of teacher evaluation are important to note—especially the implications for school board policy. It will be interesting to see how, on remand, the court analyzes plaintiff's allegation of misuse of the teacher evaluation process as a tool of retaliatory action and constructive dismissal.

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**Note:** The views expressed in this commentary are those of the author.