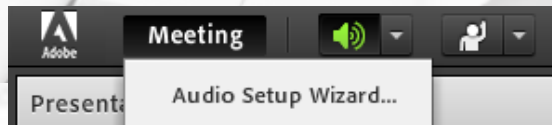


Welcome to Teaching + Learning Tuesdays

March 15, 2016 | 2:30PM

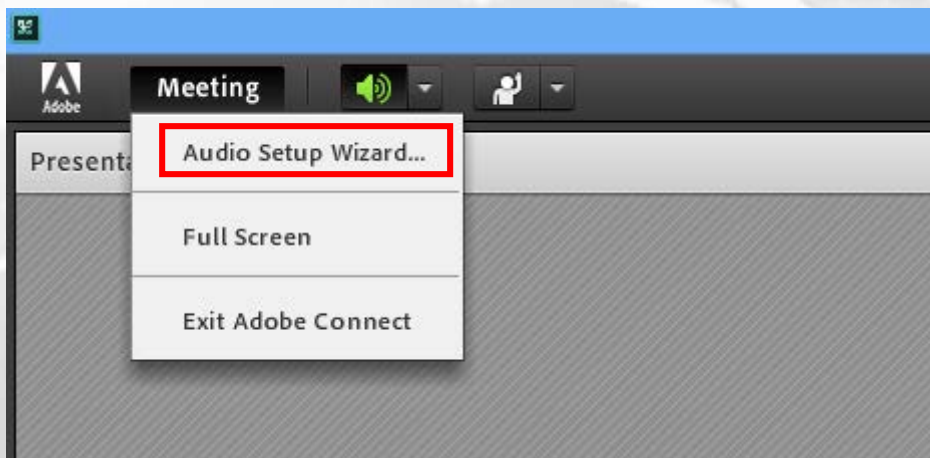
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Teaching + Learning Tuesday



Audio Setup Wizard





Contemporary Legal Issues in Higher Education

James S. Klauber, JD, PhD
President, Calhoun Community College

SACSCOC Winter Meeting 2015
Houston, TX

Let's Talk Relationships!

Respondeat Superior

Latin for "Let the Master Answer"

Generally, institutions will be liable for tortious acts that are committed within the scope of the actor's employment, or otherwise authorized by the institution, or under its control.

○ Certainly the most common test defining the parameters of scope of employment is that stated in section 228(1) of the Restatement (Second) of Agency, which provides:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master. . . .

Section 229 of the Restatement outlines standards to guide courts in identifying what types of conduct fall within the scope of employment, requiring that such conduct "must be of the same general nature as that authorized, or incidental to the conduct authorized."

Basic Types of Tort Liability You Might Encounter

- Negligence



- Premises Liability

- *Lombard v. Fireman's Fund Ins.*, 302 So. 2d 394 (La. Ct. App. 1974)

- Injuries Related to On-Campus Instruction

- *Loder v. State of New York*, 607 N.Y.S.2d 151 (N.Y. App. Div. 1994)



- Liability for Injuries in Off-Campus Courses

- *Gross v. Family Services Agency and Nova Southeastern University, Inc.* 716 So. 2d 337 (Fla. Dist. Ct. App. 1998)

More Types of Liability

- Co-curricular or social activities
 - *Bishop v. Texas A&M University*, 35 S.W.3d 605 (Tex. 2000)
 - See Also, *Guest v. Hansen*, 603 F.3d 15 (2d Cir. 2000)
- Injuries in Outreach Programs
 - *Dimuke v. Quaynor*, 637 So. 2d 555 (La. App. 1994)
- Defamation
 - *Olsson v. Indiana University Board of Trustees*, 571 N.E.2d 585 (Ind. Ct. App. 1991) Opinion privilege
 - *Rom v. Fairfield University*, 2006 Conn. Super. LEXIS 326 (Conn. Super. Ct. January 30, 2006) Quasi-judicial proceedings do not guarantee privilege



What Is Your Defense?

Some Common Tort Case Defenses

- No Duty (because it was not foreseeable or the dangerous condition was obvious)
 - *Pitre v. Louisiana Tech University* 655 So. 2d 659 (La. Ct. App. 1995), reversed, 673 So. 2d 585 (La. 1996)
 - *Shimer v. Bowling Green State University*, 708 N.E.2d, 305 (Ohio Ct. Cl. 1999)



- Assumption of Risk

- *Knight v. Jewett*, 3 Cal. 4th 296 (1992)
- *Wisnia v. New York University* 2008 N.Y. Misc. LEXIS 718 (N.Y. Sup. Ct. January 23, 2008)



- Experience *Niles v. Georgia Board of Regents*, 473 S.E.2d 173 (Ga. App. 1996)
- Can I get a waiver for that?
 - *McCune v. Myrtle Beach Indoor Shooting Range*, 612 S.E.2d 462 (S.C.App. 2005), but see *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (S.C.App. 2003)

- Sovereign Immunity

- Tort Claims Act
- Not available for Private institutions



Liability for Violating Constitutional Rights

42 U.S.C. §1983

- Originally passed to assist African-Americans with civil rights abuses in the South.
- Used very little until the *Monroe v. Pape*, 365 U.S. 167 (1961), decision.
- *Monroe* articulated three purposes:
 - 1) 'to override certain kinds of state laws';
 - 2) to provide 'a remedy where state law was inadequate'; and
 - 3) to provide 'a federal remedy where the state remedy, though adequate in theory, was not available in practice.
- Rarely applying to the private sector, 1983 is one of the most powerful statutes with regards to violations of one's constitutional rights.



Let's Talk Peace, Love, and the Constitution



We're going to talk about the:

Student Speech and the different types of
Forum

Free Speech rights for Faculty/Staff

The Forum

The Public Forum

- The apex of First Amendment protection for student free speech when it is performed in an area of the college traditionally available to students, the campus community, or the public for expression.
- Public forum issues arise when government seeks to regulate “private speech” on its own property. Two salient questions:
 1. Does government’s status as owner, proprietor, or manager of the property afford it additional protection to regulate speech occurring there?
 2. Do free speech rights vary depending on the character of the government property? This is an *access* question. To what extent do private individuals have a right of access to government property for the purpose of expressive activity?

Different Forum Types

- Traditional Public Forum- streets, parks, sidewalks, and town squares. Gov't may restrict "time, place, and manner" as long as those restrictions are content neutral.
- Designated Public Forum (or Limited Public Forum)- Gov't property that has been intentionally designated as a public forum. Includes different kinds of property: town hall, or bulletin boards, publications, student funded activities for expression. May be open, or limited (as in only students on a campus). May be limited as to content.

Exclusions for Traditional and Designated Forums must serve a compelling state interest and is narrowly drawn for that interest.

- Nonpublic Forum- Gov't opens only on a selective basis for individual speakers. Subject to a reasonableness requirement and the viewpoint discrimination limitation

Test Time!



Free Speech vs. Free Expression



Couple protest OCTC art exhibit

By James Mayse

Messenger-Inquirer

Posted: Saturday, September 21, 2013

Regulation of Speech

- You can regulate time, manner and place
- You can regulate content, but only in a content neutral format that is not constitutionally vague.
- In reality, your ability to regulate content looks something like this:



Time, Manner, & Place

- There are several cases defining time, manner, and place.
- Use Free Speech Zones, but use them correctly!
- *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) allowed the Park Service to limit protests. Established a three part test:
 1. Justified without reference to content
 2. Narrowly tailored to meet a significant government interest
 3. Leave an open ample alternative channels for communication and information

Speech in the Classroom

- First Amendment protections apply, but institution has greater strength to regulate decorum and order. A classroom is not generally considered a public forum. *Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991).
- The ability to restrain speech and expression in the classroom also applies to faculty and employees.
 - Institutional academic freedom vs. faculty academic freedom. See *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998) (administration could dictate syllabus content)

Hate Speech

Stop trying to be the thought police!

You are post secondary education, the crucible of thought!

- Regulatory action is usually not successful. (see Slide 12).
- Nonregulatory action can be effective:
 - Regulate behavior or conduct (graffiti, shoving, kicking, spitting, blocking pathways)
 - Regulate time and place (but it must be done in a content neutral format)
 - Add penalties to code of conduct for hate behavior or conduct
- Can prohibit hate speech that furthers a scheme of racial or other discrimination

What about Employees?

- When restraints to First Amendment rights are generated externally, then both public and private faculty have protections.
- When restraints to First Amendment rights are internally generated, then public faculty members generally have protections. Private institution faculty do not.
- Remember, the Constitution generally stops at the gates of the private institution!

Pickering v. Board of Education, 391 U.S. 563 (1968)

- Pickering applies to all public employees. Pickering was dismissed for writing a public letter that was critical of local school district.
- Court applied a 5 part test:
 1. Was there a close working relationship between the teacher and who he criticized?
 2. Is the substance of the letter a matter of legitimate concern?
 3. Did the letter have a detrimental impact on the administration of the educational system?
 4. Was the teacher's performance of their daily duties impeded?
 5. Was the teacher writing in his professional capacity or as an ordinary citizen?

Garcetti v. Ceballos, 547 U.S. 410 (2006)

- Prosecutor wrote an internal memorandum sharply critical of supervisor's decision on a particular case. Employee reassigned and denied promotion.
- Holding was that, “when 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.”
- Court deferred in addressing whether this standard applied to teaching or scholarship.

Garcetti v. Ceballos, 547 U.S. 410 (2006)

- Court's deference creates problems of scope. See *Adams v. University of North Carolina at Wilmington*, 640 F.3d 550 (4th Cir. 2011)
- Courts in subsequent cases have applied *Garcetti* in cases involving governance issues, but have sidestepped issues involving a true scholarship/teaching exception.
- Legal scholars support a U.S. Supreme Court case addressing this point.
- See Sullivan, T. and White, L., *For Faculty Free Speech, the Tide is Turning*, Chronicle of Higher Education, September 30, 2013, retrieved from http://chronicle.com/article/For-Faculty-Free-Speech-the/141951/?cid=at&utm_source=at&utm_medium=en

What is Free Speech on



?

“There’s one way to love ya but a thousand ways to kill ya. I’m not gonna rest until your body is a mess, soaked in blood and dying from all the little cuts.”

He then went on to threaten co-workers, his community, and then wrote this, "Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined," about a local elementary school.

He then posted this disclaimer:

“All content posted to and by this account is strictly for entertainment purposes only and does not represent the views, beliefs or values held by Anthony Elonis, the person, LOL.”

Free Speech?

What is Free Speech on



- Yes, why yes it is.
- It is not enough to convict a man based solely on the idea that a reasonable communication would regard his communications as a threat.
- “Our holding makes it clear that negligence is not sufficient to support a conviction.” – Justice John Roberts, *Elonis v. United States*, 13-983 U.S. ____ (2015).
- Court did not address the larger constitutional standard or even what the standard should be in this case.
- “The First Amendment’s basic command is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable.” – John P. Elwood, attorney for Anthony Elonis.

Transgender Legal Issues- the new frontier

1. Executive Order
2. Equal Employment Opportunity Commission
("EEOC")
3. Department of Education Office of Civil Rights
("DOE") ("OCR")
4. Occupational Safety & Health Administration
("OSHA")
5. The Courts

EXECUTIVE ORDER - JULY 21, 2014

- Prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin.
- Also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

Equal Employment Opportunity Commission- EEOC

- In 2012, the EEOC held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is prohibited under Title VII of the Civil Rights Act of 1964. *Macy v. Department of Justice*, EEOC Appeal (April 20, 2012)

	2013 (final 3 quarters)	2014	2015 (first 2 quarters)
Sexual Orientation	643	918	505
Gender Identity	147	202	112

Department of Ed- OCR

- On October 14, 2014, the U.S. Department of Education's Office of Civil Rights (OCR) approved a resolution agreement in another California case involving a transgender girl who had complained of gender-based peer harassment. Her settlement with the Downey Unified School District affirmed the student's right to use sex-designated facilities "for female students at school... consistent with her gender identity."
 - Complaint about harassment and discriminatory treatment of transgender student (male to female)
 - Verbal harassment by peers and staff
 - Disciplined for wearing make-up, discouraged from speaking about her gender identity with classmates and suggested she transfer to another school
 - Voluntary agreement to resolve complaint included the District agreeing to the following:
 - Engaging a consultant with expertise on child and adolescent gender identity
 - Providing access to sex-designated facilities for female students
 - Ensuring equal access and opportunity to participate in all programs and activities
 - Developing a guide for administrators, faculty, and staff that addresses how the District's gender-based discrimination policies apply to transgender and gender non-conforming students
 - Conducting mandatory training on issues related to gender nonconformance and gender-based harassment for District and school administrators who have the responsibility of investigating or supervising the investigation of gender-based harassment complaints

OSHA- June 1, 2015

- “The core belief underlying these policies is that all employees should be permitted to use the facilities correspond with their gender identity.”
- For example, a person who identifies as a man should be permitted to use men’s restrooms, and a person who identifies as a woman should be permitted to use women’s restrooms. The employee should determine the most appropriate and safest option for him or herself.
 - The best policies also provide additional options, which employee may choose, but are not required, to use. These include:
 - Single-occupancy gender-neutral (unisex) facilities; and
 - Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.
 - Regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees.
 - Under these best practices, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee’s worksite.

The Courts

- *Johnston v. University of Pittsburgh*, 3:13-213, (W.D. of Pa.) March 2015
- The plaintiff was a transgender male (born female) who claimed that the University discriminated against him based on his sex and his transgender status by prohibiting him from using sex-segregated locker rooms and restrooms that were designated for men.
- The court granted the University's motion to dismiss the claim and reasoned:
 - "At the heart of the case are two important but competing interests. On the one hand is Plaintiff's interest in performing some of life's most basic and routine functions, which take place in restrooms and locker rooms, in an environment consistent with his male gender identity. On the other hand is the University's related interest in providing its students with a safe and comfortable environment for performing these same life functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex."

Johnston v. University of Pittsburgh - Continued

- Here, the University's "policy of segregating its bathroom and locker room facilities on the basis of birth sex is 'substantially related to a sufficiently important government interest Specifically, [the University] explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts."
- The court also held that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination.

Johnston v. University of Pittsburgh - Continued

- The court quoted the following regulations regarding Title IX:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

- “We are not unsympathetic with [the plaintiff’s] desire to have an expanded freedom of choice, but its cost should not be overlooked. If [he] were to prevail, then all [sex-segregated rooms and locker rooms] would have to be abolished.”

Kastl v. Maicopa County Community College, 2009 WL 990760 (9th Cir. April 14, 2009)

- The plaintiff (born male) claimed that the college required her to use the men's restroom facilities and subsequently terminated her when she refused to comply.
- The Court of Appeals held that safety a legitimate, nondiscriminatory justification under Title VII to ban Plaintiff's use of the women's restroom.
- "The plaintiff does not dispute the fact that in October 2001 [the college] received complaints from minor students regarding a man using the women's restroom in the student halls" and that the "students expressed concerns regarding their privacy and/or safety."

Restrooms

- The use of restrooms by transgender students requires colleges to consider numerous factors, including, but not limited to:
 - protecting student privacy
 - the protection, safety and comfort of other students
 - the transgender student's preference

- Some transgender individuals feel safer and more comfortable using a single-stall restroom.

- Some suggestions to consider:
 - Make a list/map of single-stall restrooms on your campus available.
 - Provide gender-neutral restrooms (single-stall, lockable, unisex restrooms) in existing and newly constructed buildings – particularly in the most frequented campus buildings.
 - NOTE: According to Lambda Legal, transgender students have the right to use restrooms on campus in accordance with their gender identity pursuant to Title IX.

Campus Housing

- According to Lambda Legal, transgender students have a right to be placed in campus housing according to their gender identity as long as the college is subject to Title IX and has not specifically exempted him or herself from this requirement.
- Some examples of other colleges and universities housing policies:
 - The University of Minnesota developed a policy that respects the gender identity a student establishes with the university and strives to provide accommodations when possible.
 - The University of California Riverside emphasizes the principle of “reasonable accommodations” when the University is notified in a timely manner.
 - Co-ed housing facilities – may be divided by suites, hallways, or floors.
 - Private bathrooms and showers, lockable stalls rather than just curtains.

Student Records

- The college can use a “preferred name” in the course of college business and education.
- A legal name change or sex change for purposes of college records should to happen through the person’s legal state residence.
 - Alabama Code Section 22-9A-19(d): “Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed, the certificate of birth of the individual shall be amended as prescribed to reflect the changes.”

Student Records

- Establish a procedure for students to change their name and/or gender designation on their campus records, ID cards, listings in the directory, financial aid, registrar's office, health care facility.
- Transgender students can ask to have their records changed after they have graduated and want to amend their records to ensure that anyone who requests those records (potential employers, other colleges) see their correct name and gender marker on their transcript.
- School personnel should NOT disclose information that may reveal a student's transgender status. Under the Family Education Rights Privacy Act (FERPA), only those school employees with a legitimate educational need should have access to a student's records or the information contained in those records.
- Disclosing confidential student information to other employees, students, parents or other third parties may violate privacy laws, including but not limited to FERPA.
- Transgender students have the ability, as do all students, to discuss and express their gender identity and expression openly and decide when, with whom, and how much of their private information to share with others.

Some Things to Consider

- Consider drafting policies and procedures that outline the process for changing names and gender that are easily accessible
- Train faculty and staff about diversity and inclusion
- Consider providing co-ed housing
- Consider providing gender-neutral and inclusive bathrooms (map or list available on website)
- Discuss these issues with legal counsel

That Darn Catalog!

- At what point does your catalog make promises to your students that you cannot keep?
- It is a matter of contract, and I am sure you have the standard disclaimer, but... contract law may not be the right answer.
- You can be sued under a tort standard

That Darn Catalog!

- Beware of the possibility of fraudulent representation.
- See *Dizick v. Umpqua Community College*, 599 P.2d 444 (1979)
- Admittedly, it is an old case, but it shows that you can be held to a tort standard if you commit promissory fraud.

Questions?

Thank you for attending!

Many Thanks to Ms. Stephanie H. Mays, attorney at Maynard Cooper Gale in Birmingham, AL for help with transgender slides and material!

April TLT Session

April 19, 2016

2:30 pm

Technology Topic TBA

Presenter TBA

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