

Communication Studies 172: Free Speech in the Workplace
University of California, Los Angeles
(Winter 2009)

Time and Location: Thursday, 5:00 – 7:50PM in Perloff # 1102

Instructor: Professor Keith A. Fink

Course Objectives:

This course will focus on the concept of Freedom of Expression in the Workplace. Primary focus will be on how the First Amendment, case law and federal and state statutes affect one's ability to speak at work. The course will spend a good deal of time focusing on the conflict between discrimination law and the ability to speak freely at work as well as the meaning and limits of academic freedom.

The course is aimed to stimulate debate as we cover many novel and controversial topics. Here are some illustrative issues to be discussed:

- Does an employer who owns his own business have a right to use foul language at work such as calling women by use of derogatory language?
- Can an employer prohibit an employee from wearing a button at work that says "Vote Obama 2008"? Can an employee be made to discuss support for a union only off the work premises?
- Can a college professor tell his students without fear of being disciplined that the Holocaust never happened? Can a professor state on campus that the 9-11 attacks were a good thing for this country? If the professor made the above statements as a private citizen and not as a Professor, can the University fire the Professor for such statements?
- Can an employee who is Sikh and works for McDonalds be required to put a McDonald's logo on his turban or else be terminated? Can an employee who believes in states' rights be fired for putting a confederate flag sticker on his work locker?
- Can someone be denied a job if she has a pierced tongue? Does it matter if the piercing is a religious requirement?
- Does a university have the right to preclude a campus organization from having a guest speaker come and speak on campus? What if the guest speaker's lecture is likely to lead to a violent demonstration?
- Does a university abridge both a student's and teacher's rights by precluding them from dating?
- Can an employee fire an employee if he finds out the employee is a USC alumnus and not a UCLA graduate?

Grading and Attendance:

The grade for this course will be based on a midterm (33% of the grade) and a final examination (67% of the grade). The exams will consist solely of multiple choice questions. Students who participate in class can earn extra credit points that may increase

the final grade by one grade higher. Extra credit points means if your final grade is a B and you participated in class and earned the minimum extra credit points, your grade will have gone from a B to a B+. If you earned the maximum extra credit points, your grade will have gone from a B to an A. Extra credit points can only help a student. Students who do not participate in class will not be disadvantaged from this policy as a bell curve is not used in this class. If all students do work that justifies grades of either an “A” or “B” then I will not force a distribution that requires the lowest score to receive a “C”. Any midterm grading questions must be resolved before the final.

This class is not your standard course where the professor will lecture each session. The class will largely be taught using the Socratic Method. Through class discussions and debates you will learn the various principles covered in this class and the arguments on both sides of many cutting edge issues that we will explore. Students are expected to read the assigned cases **before** class and then be prepared to discuss the material in class in the context of applying the cases to hypotheticals. Those portions of the class that consist of a lecture the professor will teach you many concepts not covered in any assigned written material.

Office Hours:

Off-Campus: My office is close to campus at 11500 Olympic Blvd., Suite 316. My phone is 310-268-0782 and e-mail is kfink@finklawnfirm.com. You are free to e-mail with any questions or call me at my office. You are also welcome to set up an appointment to meet me at my office. I also can be found early in the morning at Peets in Brentwood reading the WSJ.

On Campus: I will stay after each class and answer all questions. I also will be available to meet students in Rolfe Hall 2317 before class. Other times I will be on campus I will determine early during the course and announce in class.

Disclaimer about the Material This Course Will Cover:

If you are sensitive this may not be the class for you. While I do not believe any of the material this course will cover is offensive or inappropriate I caution all students that this course will address emotionally charged topics. In addition my teaching style is aimed at provoking debate and discussion of the ideas we cover. Questions and hypotheticals posed in the class do not necessarily reflect my beliefs or opinions (and in fact my opinions are irrelevant). I am at times a devils advocate, posing questions to stimulate thought of the concepts covered. The course will also cover sexual topics which include graphic sex acts and foul language when sexual harassment is covered. Discussions of sexual topics are designed not to titillate but to teach.

Biographical Information:

I am a UCLA alumnus who spent most of his time at UCLA in the then Speech Department debating for the school. While I am a litigator who specializes in

employment law, I have taught for many years in the areas of Civil Rights & Civil Liberties. My website www.finklfirm.com can give you some more background information on me.

Course Outline and Reading Assignments

WEEK ONE: Employment-at-Will and its Exceptions

1. At-Will Rule and its Origins
 - California Labor Code, § 2922;
 - Wood's Rule (discussed in class);
 - Payne v. Western & Atl. R.R., 81 Tenn. 507: 519-520 (1884) (discussed in class);
 - Arguments For & Against At-Will Employment (discussed in class);
2. Implied in Fact Contracts and the Implied Covenant of Good Faith and Fair Dealing
 - Pugh v. See's Candies, 116 Cal.App.3d 311 (1981)
3. Public Policy Exceptions
 - Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184 (1959);
 - Korb v. Raytheon, 410 Mass. 581 (1991);
 - Drake v. Cheyenne, 891 P.2d 80 (1995)
4. Human Resource Principles such as Progressive Discipline That May Impact the Employment Relationship. (Lecture no reading on this topic. Class handout of sample section from an employee handbook.)
5. References & Defamation: Libel and Slander (California Civil Code, § 45, 46 & 47)
6. Intentional Infliction of Emotional Distress: Defamation & Constructive Discharge Impact on At-Will Employment (discussed in class)

WEEK TWO: Speech and the Internet; State Action & Free Speech: Does the First Amendment Reach Speech Restrictions Imposed in Company Towns? Does it Apply to Restrictions in Shopping Centers?

1. Speech and the Internet: Blogging, E-mailing, and Social Networking (discussed in class)
2. Historical Underpinnings of State Action
 - Text of the First Amendment;
 - The Civil Rights Cases, 109 U.S. 3 (1883)
3. Speech on "Private Property": The Public Function Test
 - Marsh v. State of Alabama, 326 U.S. 501 (1946)
4. Shopping Center Cases
 - Hudgens v. National Relations Board 424 U.S. 507 (1976);
 - Pruneyard Shopping Center v. Robbins 447 U.S. 74 (1980)

WEEK THREE: Sexual Harassment and the First Amendment: Seinfeld's Junior Mints, Southpark's Panda and Friends

1. What is Sexual Harassment? Hostile Work Environment and Quid Pro Quo
 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986);
 Harris v. Forklift Systems, Inc. 510 U.S. 17 (1993);
 Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998);
 Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959 (8th Cir. 1993);
 Robinson v. Jacksonville Shipyards, Inc. 760 F.Supp. 1486 (M.D. Fla., 1991)

WEEK FOUR: Civil Rights: Religious Expression

1. Can Speech of a Sexual Nature be Limited at Work?
 Lyle v. Warner Brothers Television Productions, 38 Cal. 4th 264 (2006);
 Mackenzie v. Miller Brewing Company, 608 N.W.2d 331 (Wis.App., 2000);
 Aguilar v. Avis Rent A Car Systems Inc., 980 P.2d 846 (1999);
 Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) –
 dress code, grooming standards, and expression
2. Religious Expression
 Title VII – 42 U.S.C. § 2000 C-2;
 29 CFR 1605.1;
 Trans World Airlines v. Hardison, 432 U.S. 63 (1977);
 Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004)

WEEK FIVE: Private Sector Speech

1. Midterm (90 minutes)
2. Private or Public?
 Holodnak v. Avco Corp., 514 F.2d 285 (2nd Cir. 1975);
 George v. Pacific-CSC Work Furlough, 91 F.3d 1227 (9th Cir. 1996)
3. Section 7 and Whistleblowing
 NLRA Section 7
4. Lifestyle Discrimination
 Hougum v. Valley Memorial Homes, 574 N.W.2d 812 (1998);
 Marsh v. Delta Airlines, 952 F.Supp. 1458 (1997);
 Dixon v. Coburg, 369 F.3d 811 (4th Cir. 2004);
 California Labor Code, § 96K

WEEK SIX: Public Employee Speech: Loyalty Oaths & Subversive Speech

1. Subversive Speech
 Adler v. Board of Education, 342 U.S. 485 (1952);
 Wieman v. Updegaff, 344 U.S. 183 (1952);
 Keyishian v. Board of Regents., 385 U.S. 589 (1967)
2. Pickering & Speech of a Public Concern
 Pickering v. Board of Education, 391 U.S. 563 (1968)

WEEK SEVEN: Public Employee Speech: What Is Speech of a Public Concern?

1. The Meaning of Public Concern

Connick v. Myers, 461 U.S. 138 (1983);
Rankin v. McPherson, 483 U.S. 378 (1987);
Waters v. Churchill, 511 U.S. 661 (1994)

2. Sex & Public Concern

San Diego v. Roe, 543 U.S. 77 (2004)

We will discuss the Ward Churchill and Leonard Jeffries cases in class. Students may want to skim “The Professors: The 101 Most Dangerous Academics in America” by David Horowitz (2006) and see the views of Amiri Baraka, Dana Cloud, Hamid Dabashi, and Gil Anidjar.

WEEK EIGHT: Academic Freedom: Classroom Teaching Methods and Curricula Choices

1940 Statement of Principles on Academic Freedom and Tenure; Sources of Rights:

Sweezy v. New Hampshire, 354 U.S. 234 (1957)

Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir 2001);

Axson-Flynn v. Johnson, 151 F.Supp.2d 1326 (D. Utah, 2001);

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006);

Mayer v. Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2007)

WEEK NINE: Hate Speech and Campus Speech Codes

Chaplinski v. New Hampshire, 315 U.S. 568 (1942);

Brandenburg v. Ohio, 395 U.S. 444 (1969);

Cohen v. California, 403 U.S. 15 (1971)

RAV v. City of St. Paul, 505 U.S. 377 (1992);

KKK v. Cincinatti, 72 F.3d 43 (6th Cir 1995);

Corry v. Stanford, No. 740309 (Feb. 27, 1995)

FIRE'S Guide to Free Speech on Campus

Online Reading: <http://www.thefire.org/pdfs/free-speech.pdf>

To order a free hard copy, go to:

<https://www.thefire.org/guides.order.php>

WEEK TEN: Final Review

I will buy dinner for the class and have it delivered to class. I will outline the course materials covered in the class and respond to questions.