

# HANDBOOK OF FREE SPEECH ISSUES



**OFFICE OF THE GENERAL COUNSEL  
FLORIDA ATLANTIC UNIVERSITY  
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The First Amendment of the United States

Four commonly recognized categories of protected speech include: political, religious, corporate and commercial. Political and religious speech, which are at the core of our historical and constitutional ideas of liberty, receive the greatest protection. Corporate and commercial speech, which generally relate to products, and not ideas, receive a lesser degree of protection.<sup>7</sup> Speech that is “de minimis”-- *e.g*

- Expression that constitutes criminal or severe harassment;<sup>14</sup>
- Defamation (falsehoods that harm a person's reputation);
- Obscenity (appeals to carnal interests that are clearly offensive, and without redeeming social value);
- Commercial speech or advertising that is false or misleading;
- The use of public resources for partisan political activities; and
- Speech by public employees pursuant to official duties or related to matters not of public concern as a citizen.<sup>15</sup>

Speech that is otherwise protected may not be disallowed solely because the audience finds the message offensive, even where members of the audience react to the speech in a disruptive manner. In such circumstances, while there may be a legitimate need to take action against the disruptive members of the audience, the speech itself must be allowed to continue.<sup>16</sup>

Other content-based



Under the United States Supreme Court's forum analysis, although there is no legal requirement to make a public university's facilities available to the public for uses other than for normal educational and administrative functions, as a practical matter, almost all universities designate some non-public property for free speech and expressive activities. Examples of such designations include university facilities held open for meetings of student groups or other organizations, and the designation of a university hall as a free speech or reserved free speech area. Once the government opens non-public property to the public for expressive activity, then such property becomes a designated public forum, open for that particular designated use.<sup>26</sup>

Once designated, speech in a designated public forum is subject to reasonable time, place and manner regulations, so long as those regulatech

forums for individuals, organizations, and guest speakers.”<sup>30</sup> The Act defines outdoor areas of campus as “generally accessible areas of campus of a public institution of higher education in which members of the campus community are commonly allowed, including grassy areas, walkways, or other similar common areas. The term does not include outdoor areas of campus to which access is restricted”<sup>31</sup> In essence, the Act prevents Florida’s public universities from creating “free speech zones” in outdoor common areas, and limits the creation and implementation of policies that restrict expressive activities to particular outdoor areas of campus.

Under the Campus Free-Expression Act, p



Time, place, and manner policies must consider all of the following:

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Furthermore, the AAUP, in its Statement on Academic Freedom and Outside Speakers (<http://www.aaup.org/AAUP/comm/rep/A/outside.htm>) provides:

"Because academic freedom requires the liberty to learn as well as to teach, colleges and universities should respect the prerogatives of campus organizations to select outside speakers whom they wish to hear. The AAUP articulated this principle in 1967 in its Fifty-third Annual Meeting, when it affirmed 'its belief that the freedom to hear is an essential condition of a university community and an inseparable part of academic freedom,' and that





particular facts. Employer policies may restrict the exercise of religion in the workplace to

upheld, notwithstanding the fact that the letter was distributed just prior to an election regarding future union representation of the employees.<sup>51</sup> The court stated: “An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer... It is difficult to perceive of a situation that is further beyond the protected concerted activities of the [Labor] Act than this denunciation of the employer.”<sup>52</sup>

A letter of warning issued to an employee was also upheld where a co-worker complained that the employee repeatedly approached her about filling out a union authorization card during her work hours.<sup>53</sup> Because management had received a complaint, the NLRB determined that the warning not to subject coworkers to “harassment of any kind” was appropriate and did not impinge on the employee’s union rights.

#### **D. Matters of Public vs. Private Concern**

If the speech in question does not fall into any of the three categories discussed above, to be protected the employee’s speech must involve a “matter of public concern” and the employee’s interest in expressing themselves as a private citizen must outweigh the campus’ interests in promoting workplace efficiency and avoiding workplace disruption.<sup>54</sup>

Whether a particular matter is of public concern “must be determined by the content, form and context of a given statement, as revealed by the whole record.”<sup>55</sup> To qualify for protected status, the speech must “relate to matters of overwhelming public concern – race, gender and power conflicts in our society,”<sup>56</sup> or be that which is “fairly considered as relating to any matter of political, social, or other concern to the community.”<sup>57</sup> Speech is usually considered to be of public concern if it helps citizens “to make informed decisions about the operation of their government.”<sup>58</sup> Speech is not of public concern when it “deals with individual personnel disputes and grievances [that] would be of no relevance to the public’s evaluation of performance of governmental agencies.”<sup>59</sup> A personal complaint or grievance that

The U.S. Supreme Court recently made clear that when public employees make statements as part of their official duties, they are not protected as private citizens, even if the subject is of public concern. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a deputy district attorney was disciplined because he wrote in a memorandum and testified in court that he believed a police affidavit used to obtain a critical search warrant contained serious misrepresentations. The Court





speech alone. For example, students wearing black armbands to school in protest of the Vietnam War constituted “symbolic speech” that was deemed protected.<sup>70</sup> Other examples include “sit-ins” (where students occupy an area on campus), rallies, boycotts of classes or events, wearing a common item (ribbons, jeans, berets, etc.) or color, etc. Disciplinary action may be taken under the student conduct procedures where the symbolic speech in question crosses the line into conduct that materially and substantially disrupts the educational process.<sup>71</sup>

### **C. Student Classroom Speech**

Students’ right of free expression is not without limits in the classroom. The classroom is not an open forum and is, therefore, subject to reasonable speech regulation.<sup>72</sup> Students do not have a right to insist that a class be viewpoint neutral;<sup>73</sup> *e.g.*, students may be required to write papers expressing a particular point of view with which they may not agree as long as the assignment promotes legitimate pedagogical interests.<sup>74</sup>

Student behavior that “materially disrupts class work or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantee of freedom of speech.”<sup>75</sup> Faculty are in charge of their classrooms and can expect students to comport themselves in a manner that is consistent with a healthy learning environment. If a student continues after fair warning to engage in disruptive behavior, it may be necessary to involve the Division of Student Affairs and pursue possible discipline.

### **D. Student Groups<sup>76</sup>**

The right to express a particular viewpoint necessarily includes the right to associate with others who share that view. “An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>77</sup>



there were disagreement with the message of the student groups, then, “[other] students and faculty are free to associate to voice their disapproval of the [student organization’s] message.”

