



“The First Amendment on Campus: Case Studies for the HR Professional”

Wednesday, October 28 | 1:00-2:00 p.m. ET

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Presenter

Michael E. Norton

University Counsel, Iowa State University

Michael Norton joined Iowa State University in July 2016. In that capacity, he oversees the provision of legal service and representation to the University and its various colleges, departments and offices.

Prior to joining ISU, Mike was a partner in Husch Blackwell where he served for 12 years as a leader in the firm's higher education practice group. Mike has more than twenty years of experience representing clients regarding complex legal issues including labor and employment, risk management, litigation, regulatory compliance, and governance and has had a dedicated focus on advising and representing institutions of higher education.

Mike received a bachelor's degree in political science (1992) from the University of Utah, Salt Lake City; and doctor of law degree (1995) from Drake University, Des Moines.



Agenda

- From the Headlines**
Case studies that could happen anywhere
- The First Amendment**
Is it still relevant today?
- Academic Freedom**
What speech is protected?
- Student First Amendment Rights**
What student speech is protected?



CASE STUDY #1

Big Fees for the Big Cat People

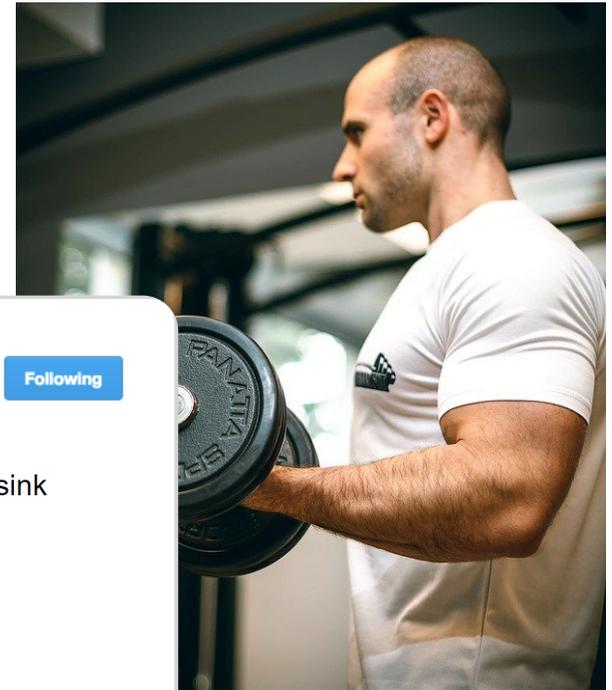
A student organization plans to bring in a well-known figure to speak about a recently released documentary about big cat pets. The university expects large counter-protests from animal rights activists. Because of the anticipated counter-protests, the university bills the Big Cat Student Org \$20,000 for increased security.



CASE STUDY #2

The Tweeting Trainer

An athletic staff member came under fire for using his social media account to disseminate sexist views.



 **TomtheTrainer**
@tweetingtom Following

Females don't belong on the field. They belong behind a sink washing dishes. #keepFBgreat

11:32 AM - 28 Feb 2019

A screenshot of a tweet from the user 'TomtheTrainer' (@tweetingtom). The tweet text reads: 'Females don't belong on the field. They belong behind a sink washing dishes. #keepFBgreat'. The tweet is dated '11:32 AM - 28 Feb 2019'. The user's profile picture shows a person in a white t-shirt. A blue 'Following' button is visible in the top right corner of the tweet card. At the bottom of the tweet card, there are icons for replying, retweeting, and liking.

CASE STUDY #3

The Profane Professor

- Tenured astronomy professor frequently uses profanity in the classroom
- Told students to “enjoy sex while it lasts”
- Offers students condoms, while warning that grades will suffer if they become parents



CASE STUDY #4

Feud over Firearms

- A student changed his Zoom background to a photo of the NRA logo during a virtual class.
- Afterwards, he posted a message on social media political in nature.
- Some comments on his post threatened violence, but the student neither authored nor responded to those comments.



CASE STUDY #5

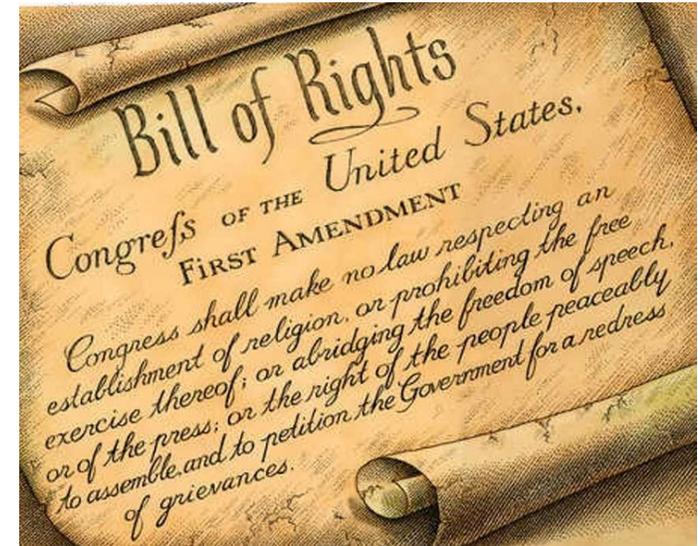
The Kneeling Knights

- Five football players led a silent protest against police brutality by kneeling during national anthem before season opener.
- At the next game, the players were not allowed on the field until after the national anthem played.



THE FIRST AMENDMENT:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



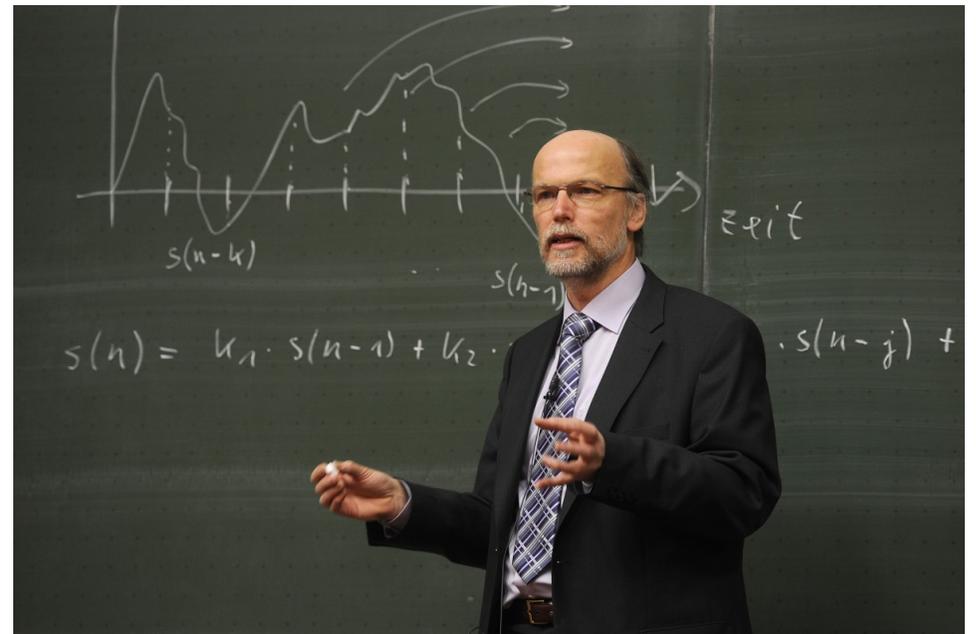
WHAT DOES THIS MEAN FOR PUBLIC INSTITUTIONS?

“Above all else, the First Amendment means that **government** has no power to restrict expression because of its message, its ideas, its subject matter or its content.”



WHAT ABOUT PRIVATE INSTITUTIONS?

Although private institutions are not bound by the First Amendment, many have adopted philosophies that mirror the First Amendment in order to facilitate the free and open exchange of ideas.



FIRST AMENDMENT DOES NOT PROTECT...

- Incitement of imminent lawless action
- Fighting words (triggering an automatic violent response)
- True threats
- Obscenity (including child pornography)



HATE SPEECH?

No exception to First Amendment protection for “hate speech”



HARASSMENT?

SEVERE AND **PERVASIVE** CONDUCT THAT
OBJECTIVELY AND **SUBJECTIVELY** CREATES A
HOSTILE ENVIRONMENT BECAUSE IT
SUBSTANTIALLY INTERFERES WITH AN
INDIVIDUALS EMPLOYMENT OR EDUCATIONAL
PROGRAM.

TIME, PLACE, AND MANNER

- Reasonable Restriction
- Content Neutral
- Viewpoint Neutral
- Consistently Applied
- Examples
 - Facilities use policy
 - Venue reservation policies
 - Dorm rooms



AUDIENCE POLL: Is this speech protected?

Non-campus individuals place posters on windows and sides of buildings.

Posters promote racial unity and harmony.



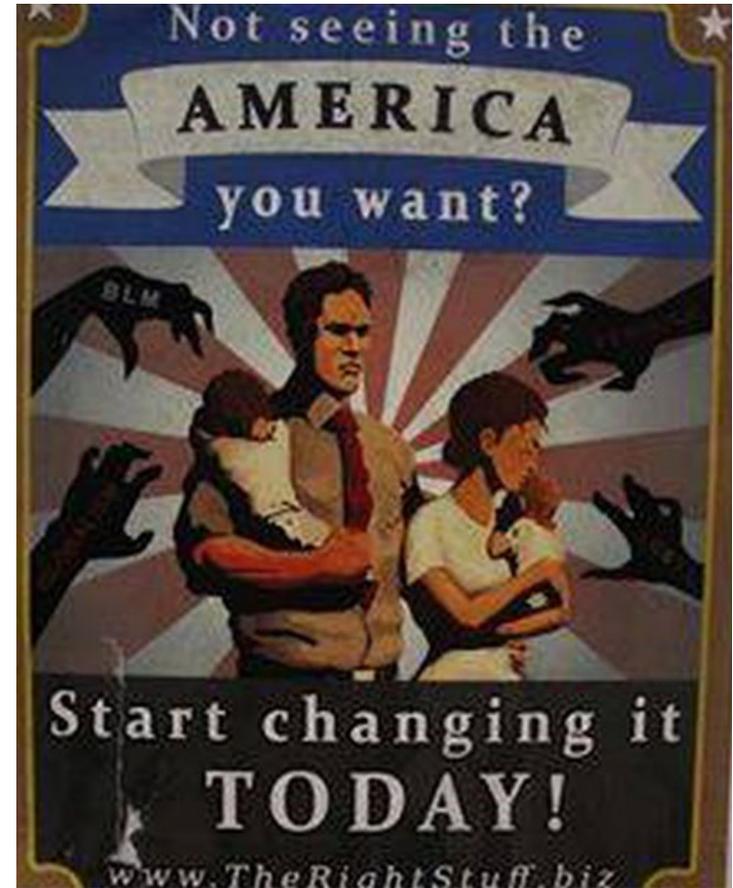
AUDIENCE POLL PLACEHOLDER:

Is this speech protected?

AUDIENCE POLL: Is this speech protected?

Non-campus individuals place posters on public bulletin boards.

Posters promote “white heritage” and use of symbols associated with known white supremacy organizations.



AUDIENCE POLL PLACEHOLDER:

Is this speech protected?

AUDIENCE POLL: Is this speech protected?

Student takes “white heritage” poster and places it on the dorm room door of a student of color along with a racial epithet.



AUDIENCE POLL PLACEHOLDER:

Is this speech protected?

KITTY POSTER RULE

Same enforcement for all messages

Lost Cat



"Mr. Bigglesworth"

Identifying marks: heart shaped spot on his tail, one eye black spot, one eye white.

Answers to his name. She needs medicine right away, family misses her.

Contact (888) 777-3456

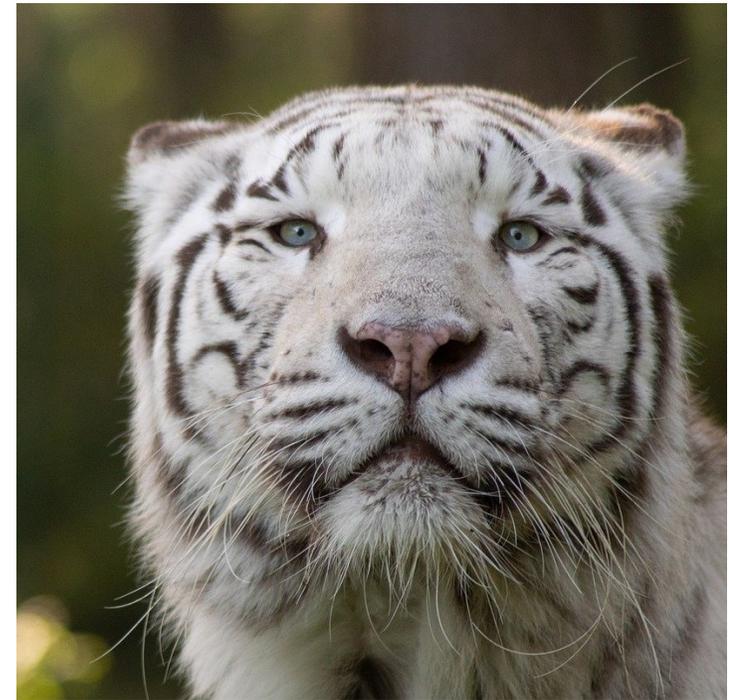
Email: DrEvilCat@gmail.com

The word "MAGA" in white, bold, sans-serif capital letters on a red rectangular background.

CASE STUDY #1 DISCUSSION

Big Fees for the Big Cat People

Was the university justified in charging higher security fees because it expected a large crowd and several counter-protests?



AUDIENCE POLL PLACEHOLDER:

Was the university justified in charging higher security fees because it expected a large crowd and several counter-protests?

CASE STUDY #1 OUTCOME

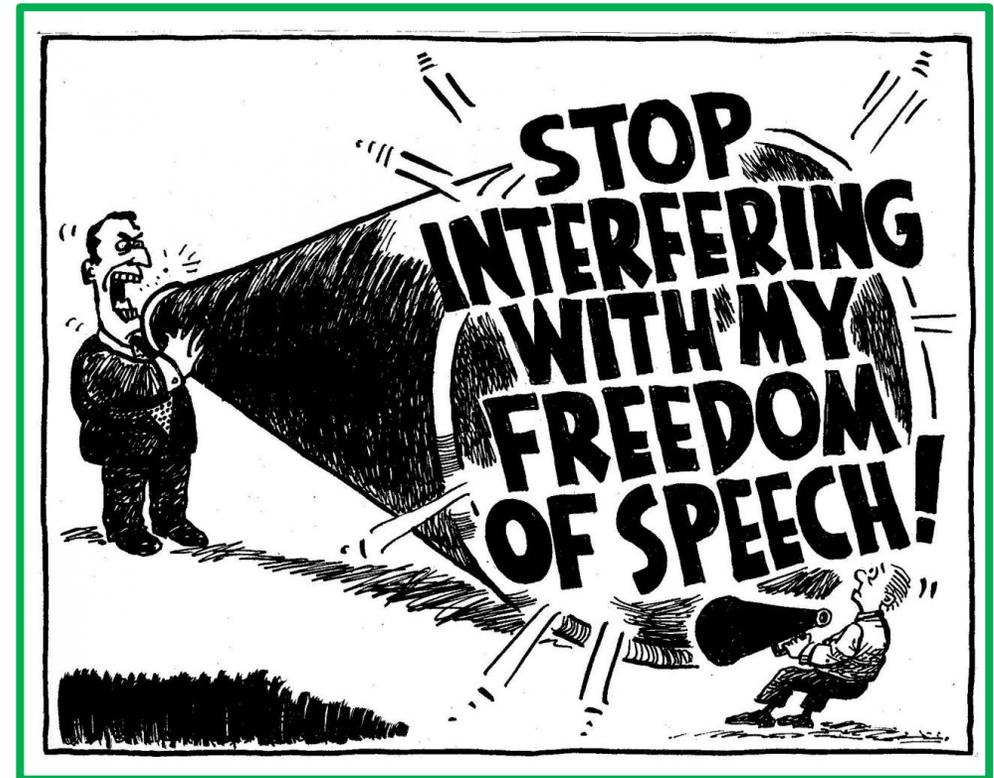
Big Fees for the Big Cat People

- After the student org filed a lawsuit against the university, the matter was settled for \$115,000.
- The university rescinded its policy on assessing fees to student orgs on an individual basis.
- Student orgs will no longer be charged fees based on content or viewpoint of speech or based on community's expected reaction to the speaker.



ACADEMIC FREEDOM AND THE FIRST AMENDMENT

What Faculty Speech is Protected?



ACADEMIC FREEDOM STANDARDS

- Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- Teachers are entitled to freedom in the classroom in discussing their subject, **but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.** Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
- College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their **special position in the community imposes special obligations.** As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should **show respect for the opinions of others,** and should make every effort to indicate that they are not speaking for the institution.

ACADEMIC FREEDOM ANALYSIS

Is the speech germane to the scholarly subject matter and presented by appropriate means?



FREE SPEECH ANALYSIS

“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**.”

FREE SPEECH ANALYSIS

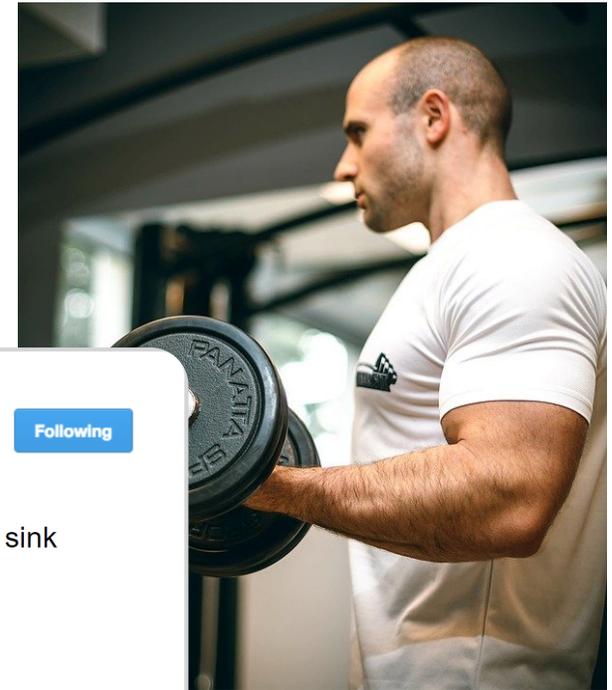
- Is the employee speaking as a private citizen on a matter of public concern?
- Is the employee's speech work related and spoken as part of her professional duties?
- Is the employee's speech academic speech, in the classroom, germane to the scholarly subject matter being taught?



CASE STUDY #2 DISCUSSION

The Tweeting Trainer

Is the trainer's speech protected by the First Amendment?



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@tweetingtom Following

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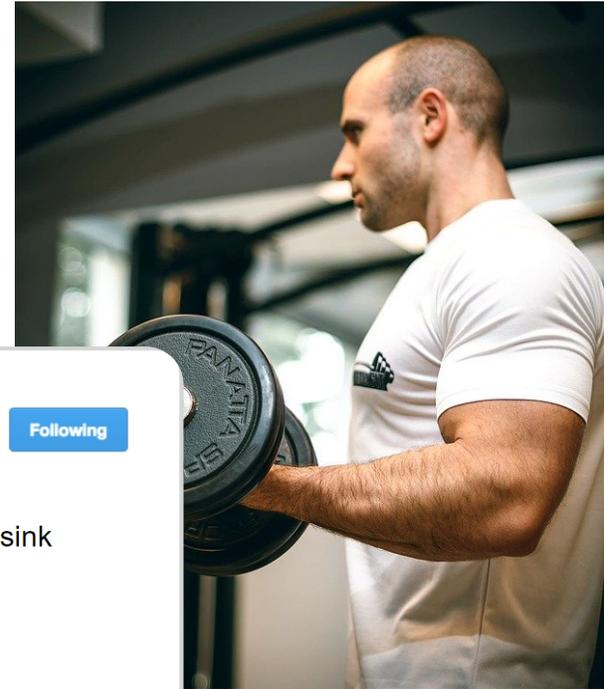
AUDIENCE POLL PLACEHOLDER:

Is the trainer's speech protected by the First Amendment?

CASE STUDY #2 OUTCOME

The Tweeting Trainer

The University calls the post vile and ignorant and admits that staff member has “sexist” views but states he will not be fired “because the First Amendment of the United States Constitution forbids us to do so.”



CASE STUDY #3 DISCUSSION

The Profane Professor

Is the astronomy professor's speech protected by Academic Freedom?

#\$!*

Your grades will fall if you become a parent



Enjoy sex while it lasts

AUDIENCE POLL PLACEHOLDER:

Is the astronomy professor's speech protected by Academic Freedom?

CASE STUDY #3 OUTCOME

The Profane Professor

- The profane professor was terminated based on her comments
- She sued the university for first amendment violations. The termination was affirmed by a federal court, ruling that her speech was not a matter of public concern and interfered with educational opportunities.
- The ruling was affirmed by the Court of Appeals.



STUDENT FIRST AMENDMENT RIGHTS

What Student Classroom Speech is Protected?



STUDENT FREE SPEECH ANALYSIS

- Is the classroom speech restriction reasonable?
- Is the classroom speech restriction content/viewpoint neutral?
- Is the classroom speech restriction consistently applied?



CASE STUDY #4 DISCUSSION

Feud over Firearms

- Can the university stop the student from using a background photo image during a virtual class?
- Can the university limit the student's ability to post on his social media page?



AUDIENCE POLL PLACEHOLDER:

Can the university stop the student from using a background photo image during a virtual class?

AUDIENCE POLL PLACEHOLDER:

Can the university limit the student's ability to post on his social media page?

CASE STUDY #4 OUTCOME

Feud over Firearms

- The university filed 6 charges against the student for the Zoom photo and post on social media including charges for disruptive behavior, discrimination, and cyberbullying.
- After investigation, the university dropped all charges against the student.



CASE STUDY #5 DISCUSSION

The Kneeling Knights

Can the athletic department forbid its athletes from kneeling during the national anthem?



AUDIENCE POLL PLACEHOLDER:

Can the athletic department forbid its athletes from kneeling during the national anthem?

CASE STUDY #5 OUTCOME

The Kneeling Knights

- One of the athletes filed a lawsuit against the university and its leaders.
- The lawsuit was settled for \$145,000.



Have a Question?



Submit questions to our presenters
using the Q&A button.



Thank You

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