

# Welcome to Teaching + Learning Tuesdays

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Teaching + Learning Tuesday



*The very basics of  
higher education law  
that EVERY community  
college employee  
should know*

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# Topics Covered Today

- Tort Liability
- Liability as an advisor to student organizations, clubs, and groups
- Children on campus
- Restrooms and Records
- The Public Forum and Academic Freedom
- Whose Academic Freedom is it anyway?
- Other rights to consider

# Institutional Tort Liability

## What is a Tort?

A civil wrong, other than a breach of contract, for which courts will grant a remedy.

A Tort claim involves a claim that the institution, or its agents, owed a duty to one or more individuals to behave according to a defined standard of care, and that standard was breached, and the breach caused the injury.

# Scope of Employment

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."

# Common Defenses

## Some Common Tort Case Defenses

- ◎ Assumption of Risk
- ◎ Experience *Niles v. Georgia Board of Regents*, 473 S.E.2d 173 (Ga. App. 1996)
- ◎ Sovereign Immunity
  - > Can't sue the King!
  - > Not available for Private institutions
- ◎ The Eleventh Amendment
  - > Chisolm v. Georgia
  - > Does not stop state court litigation. Only applies to suing states in Federal Court

# S.C. Tort Claims Act

Codified at S.C. Code Ann. §15-78-10  
*et seq.*

There are 40 exceptions to liability!!  
See S.C. Code Ann. §15-78-60

S.C. Tort Claims Act provides maximum liability amounts of: \$300,000 per claim, \$600,000 per occurrence.

# 42 U.S.C. §1983

## **Civil Rights Act of 1871:**

“Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

# 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.

# 42 U.S.C. §1983

Protections under 1983 are limited in two ways:

1. Liable only for actions “under color of any statute, ordinance, regulation, custom, or usage, of any State...”
2. Imposes liability on a “person”

# Liability for Student Organizations

Colleges can be held liable for acts of student organizations if:

1. There is a supervisory relationship between the college and the organization
2. The college had a legal duty to supervise the organization

# Liability for Injury Related to Outreach Programs

- Children on campus- summer camps, attending events, dual enrollment students, students visiting library, etc...
- College does have a duty to protect children enrolled in its programs (i.e. summer camps, dual enrollment, etc...)
- College does have a greater supervisory duty.

# 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 Lamda Legal, transgender students have the right to use restrooms on campus in accordance with their gender identity pursuant to Title IX.

# 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.

# 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.

# 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

# Academic Freedom

- ◉ At a private institution: Administration is only limited by faculty contract, or perhaps custom and usage.
- ◉ At a public institution: Must distinguish between professional vs. legal concepts of academic freedom

# The BIG Difference

- Public Institution- The Constitution controls behavior
- Private Institution- The Constitution stops at the Gate of the private college, and the contract controls behavior

# Professional/Legal Distinctions

- ⦿ Professional- National customs formed by AAUP. However, it can be overlapped by customs or usage at local institution
- ⦿ Legal- Founded through the courts, and are binding, while the professional ones are not.

# Free Speech and the Public Forum

- **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-** 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

# Public Forums and Academic Freedom

While the college campus may be a public forum for students, it is not generally one for employees. The campus is a workplace.

- ◉ *Tucker v. State of California Dept. of Education*, 97 F.3d 1204 (9<sup>th</sup> Cir.1991) (employee offices and workspace not a public forum)
- ◉ *Bishop v. Aaronov*, 926 F.2d 1066 (11<sup>th</sup> Cir. 1991) (classrooms not a public forum during class time)
- ◉ *Piarowski v. Illinois Community College District*, 759 F.2d 625 (7<sup>th</sup> Cir. 1985) (campus art gallery used for displaying faculty art not a public forum)
- ◉ But See, *Giebel v. Sylvester*, 244 F.3d 1182 (9<sup>th</sup> Cir. 2001) (certain campus bulletin boards designated open public forums for the public)

# Whose Academic Freedom?

Cases suggests that when it comes to academic freedom, the beneficiary is really the institution:

1. Institutions - who may teach, what may be taught, how it will be taught, and who is admitted to study. *Sweezy v. New Hampshire*, 354 U.S. 214 (1957)
2. Faculty - Faculty have broad authority, but state has an interest too: maintain discipline among co-workers, need for confidentiality, need to curtail bad conduct, need to encourage a close relationship with employer/superiors. *Clark v. Holmes*, 474 F.2d (7<sup>th</sup> Cir. 1972)

# Academic Freedom in Private Life

Compare:

Firing of Jeannette Quilichini Paz at Catholic University  
of Puerto Rico

And

*Hander v. San Jacinto Community College*, 519 F.2d  
273 (5<sup>th</sup> Cir. 1975)

The old saying rings true between public and private:  
“It’s just different.” One is constitutional, the other,  
contractual.

# Other First Amendment Freedoms

- Public faculty DO have a right of freedom of association
- Public faculty have a right to petition, and protection from retaliation if they file grievances or lawsuits against their institution or administrators
- Public faculty have some reasonable expectation to privacy in their offices/files, but not the internet/email.

## 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.

## *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.

# Questions?

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Thank you!

# Upcoming TLT Sessions

**October 17, 2017** – Student Engagement Beyond the Classroom: A Unique Perspective on the First Year Experience

Tomeika Bennett & Amber Morgan, Greenville Technical College

[Register](#)

**November 21, 2017** – TBD

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