

## Free Speech: What's the Real Cost?

To speak out on issues and principles in which one truly believes has always been the American way. It is no coincidence that free speech is guaranteed in the *First* Amendment to our U.S. Constitution. While free speech is the epitome of American rights, speaking out against what is wrong is, if possible, even more American. Speaking out against wrongs is deeply rooted in our history. Unfortunately, the oppression of those who speak out is almost as deeply rooted in American history. In fact, it was the suppression of free speech by the British Crown which, in part, ignited the revolution which resulted in our independence.

In today's world, there is still much retaliation against those who speak out. Surprisingly, even on university campuses—widely thought of as fonts of free speech and thought—there is much oppression in the form of retaliation against faculty and staff who dare to speak out against the institution's policies and practices (I think we still call this exercising academic freedom!). There is also much retaliation on university campuses going on against those who fight for someone else's rights. Those who speak out or assist others in asserting their rights often find themselves targeted. Their jobs become harder. Their evaluations suddenly drop. Or worst of all, they suddenly find themselves facing termination.

Unfortunately, such ill-motivated retaliation often goes without redress. The good news is that, more and more, Congress and state legislatures have recognized this injustice and have taken steps to right the wrong of retaliation. Congress, as a general rule, can only legislate as to public employers while state legislatures can regulate as to private employers as well. Thus, for those who work in a public university there are numerous laws which bestow rights and causes of action to vindicate the wrongful retaliation. For those in the private sector, there is some protection, but far less than that available in the public sector. For the professor at a private university your employment contract supplies you with most of your protection.

If you find yourself being targeted for having spoken out on a matter of public concern, then

the First Amendment itself will protect you. Provided you work for a public university, then the First Amendment prohibits the university from retaliating against you for exercising free speech. The key is that you must have actually spoken out on a matter of public concern, a concept which has been defined and redefined by the courts. There is no First Amendment protection for speaking out on issues which are of no, or little, import to the public at large. For example, speech on issues which effect only an individual, such as just your parking space, is not protected; whereas, the use or misuse of public funds, for instance, usually will be a matter of public concern.

I cannot write about the protection of the First Amendment without mentioning that the First Amendment protects free association as well as free speech. My firm tried such a case successfully where a professor had been terminated in retaliation for exercising his right to associate. The professor involved was organizing a chapter of the Texas Faculty Association (TFA) on campus, and the jury found that his TFA activities were a substantial motivating factor in the decision to terminate him. Note that the gravamen of the complaint involved the retaliation by the university administrators.

There are also protections for making or assisting others in making claims or complaints of sexual harassment and most forms of discrimination. There are Federal statutes commonly referred to as Title VII and Title IX which, along with prohibiting discrimination and harassment, provide a cause of action for those who are retaliated against for making the complaint. It has been my experience that often the claim of retaliation is more likely to succeed than the actual claim of discrimination or harassment. In a recently decided case, a professor was unsuccessful in his claim that his university racially discriminated against him in denying his tenure, but succeeded in his claim that the university retaliated against him for making the claim in the first place. My firm handled a similar case where we did not prove that a university employee was terminated because of her race or gender, but prevailed on a claim that she was fired in retaliation for helping others make claims of sexual harassment and discrimination. The difficulty in such cases arises because while it is usually clear that the individual is being wronged, it is not as clear why the official(s) are taking the action. It is a requirement in all causes of action to prove the linkage between the protected activity and the adverse employment action. That is why it is usually wise to assert causes of action

to cover every potential illegal motive and then, through the course of litigation, attempt to narrow the case as more and more evidence is uncovered of the actual motivation behind the wrongful action. Sometimes it is more than a single motive that engendered the retaliation in which case the jury decides, as they did in my second example cited above, the retaliation is the malefactor.

Another area of protection about which our Texas Legislature has spoken involves whistle blowing. If you think some activity is illegal and you report it, you cannot be retaliated against for making your report. The cap of \$250,000 in damages for a wronged whistle blower is arbitrarily low, but a state university faculty member who in good faith believes an activity is illegal (it does not actually have to be illegal) and reports it to an authority who can do something about it, or stop it (like a Board of Regents) invokes the protection of the law for this kind of speaking out. The time limits for *complaining* about retaliation for blowing the whistle are tight. You have to file suit in state court within 90 days of any retaliation in which an adverse personnel action has occurred. If you do not file suit you lose your right to complain. Private university faculty do not fare as well in being protected for their whistle blowing. There exists some protection for private whistle blowers, but it involves very limited situations.

While this is not, of course, an exhaustive list or discussion of the rights and remedies which exist to protect those who speak out, the bottom line is that our laws and our legal system is there to protect you from retaliation so that if you find yourself suddenly being targeted for having spoken out against wrongs: (1) you are in the good company of our forefathers, and (2) you do not have to take retaliation lying down.

Protecting yourself from retaliation for exercising your free speech rights is often a lonely prospect. Not only have you been retaliated against for your expression, or association, once you complain, officially, through a lawsuit, you become branded as not being collegial and even worse, as being that professor who dragged a lawyer into academia, where cooler heads should prevail.

I often tell my clients “to complain or not to complain” is the real question. The cost, not only in dollars spent, but in focus lost can be extreme, with no happy resolution guaranteed. But after all, what good are protections if we choose to not assert them? What cost, I should add, is too

much to preserve our freedoms?

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