NATE BORK AND THE RIGHT TO TEACH

By Steve Mumme

On October 24, 2016 the AAUP announced its intent to launch a Committee A investigation of the Community College of Aurora. A Committee A investigation is the most serious action the AAUP can take against a college or university, and may lead to institutional censure depending on the findings. Of hundreds of cases brought to AAUP’s attention annually only a handful will rise to a level of policy importance justifying such an inquiry.

Such an investigation to my knowledge has never been mounted in the state of Colorado. It is unprecedented. The decision also reflects the persistent advocacy work of the AAUP’s Colorado Conference which raised this matter with the national organization in a letter written September 19, 2016.

The case in question involves the dismissal of an adjunct professor of philosophy, Nate Bork, a masters graduate of the CSU philosophy department, who had the temerity to question a new teaching protocol at CCA. Nate, who has successfully taught at CCA for six years, was summarily dismissed two weeks into the fall semester after raising concerns with the protocol with CCA administrators. The official reason given for his dismissal was his lack of effectiveness in implementing a required curriculum redesign for the philosophy class he was teaching.

The curriculum redesign as described in the AAUP’s news release involved “reducing course content; raising the prescribed student success rate; reducing the number of writing assignments; employing a standing paper grading rubric; and using small group instruction in every other class.” The dismissal came the day after he approached CCA administrators with his proposal to raise concerns with officials of the Higher Learning Commission, CCA’s accrediting body, who were slated to visit the campus in October.

Bork’s dismissal raises fundamental academic freedom issues and highlights the vulnerability of adjunct professors at colleges and universities statewide, and nationally, which is the principal reason that AAUP chose to examine his case. CCA’s new teaching
protocol quite arguably violates a cardinal supporting principle for the practice of academic freedom, the freedom to teach. The AAUP Statement on the Freedom to Teach says this:

*The freedom to teach includes the right of the faculty to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance ... without having their decisions subject to the veto of a department chair, dean, or other administrative officer. In a multisection course taught by several faculty members, responsibility is often shared... [for assigned texts and syllabi] ...but [common standards]should not be imposed by departmental or administrative fiat.*

More pointedly, his summary dismissal while under contract violates the AAUP principle that “dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.”

The AAUP investigation will gather facts from Bork’s fellow adjuncts, administrators, and students and weigh the evidence carefully before arriving at any determination regarding CCA’s dismissal decision. If violations are found the college’s administration will be given the opportunity to rectify these errors. If violations are not corrected then and only then will institutional censure be considered.

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But whatever the outcome of the Committee A investigation, the Bork case has implications that go well beyond one community college. The new teaching protocol at CCA that worried Bork is on the march at Colorado community colleges and likely to make its appearance elsewhere, at least in modified form. Adjunct faculty are particularly vulnerable to these recent shackles on the freedom to teach if for no other reason than that they currently teach nearly 80 percent of all classes in the Colorado community college system and half of the courses or more at Colorado’s universities.

The adoption of new teaching protocols at the community colleges is driven by pressure for enhanced student access, retention, graduation, and transfer rates system-wide. These are important concerns and valid goals provided they do not comprise the quality of instruction. That quality of instruction impacts four year colleges and research universities like CSU which are currently obligated to accept “C” level passing grades under the statewide General Transfer-Pathways program.

In sum, the Nate Bork investigation has far reaching implications. It promises to spotlight due process protections for adjunct faculty statewide and nationally. And it highlights the need to honor the freedom to teach, for regular faculty and adjuncts, statewide and nationally. And it points to the stakes for Colorado’s community colleges, four colleges, and research intensive institutions in insuring that academic freedom and academic quality are not compromised by the GT-Pathways program.

**FREE SPEECH IS GREAT, IF YOU CAN GET IT**

By Ray Hogler

The legal regime in the US consists of three operative domains. One is constitutional law, where rules are made up by the Supreme Court. A recent example is the Court’s discovery that same-sex marriage is entitled to the same protection as heterosexual ones. A second dimension is positive law in the form of federal, state, and local
legislation. For example, in North Carolina, transgender individuals are statutorily required to use bathrooms consistent with their gender at birth. The third regime is common law. If Donald Trump sues the women who accused him of sexual assault, he will rely on the common law of defamation. Each set of rights is accompanied by appropriate remedies.

In public sector employment, such as a university, constitutional rights apply because “state action” is present. In the case of *Garcetti v. Ceballos*, 547 US 410 (2006), the Supreme Court announced the rule about workplace speech, holding that it is only protected when it is a matter of public interest. The “gang of four” – Scalia, Thomas, Roberts, and Alito -- was joined by the vacillating Anthony Kennedy to hold 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.” In other words, talking about work is not talking about free speech.

The application of the rule is nicely demonstrated by the case of Nathanial Bork, an adjunct faculty member at the Community College of Aurora. Bork, who taught a philosophy course, was directed to participate in an initiative called “Gatekeeper Intervention Strategies.” Under this guidance, Bork was to reduce the content of his course by 20 percent and to achieve a “student success rate” of 80 percent. Bork refused and threatened to take the issue to the state Higher Learning Commission. The administrators fired him in September 2016. The institution paid his total compensation for the semester, which amounted to the grand sum of $2,599.

In theory, Bork has legal claims based on his First Amendment rights and the contract between him and the institution. The constitutional claim falls within the *Garcetti* rule. Since he complained about a matter directly related to his duties as a teacher, his opposition to the new teaching mandate was not a matter of public concern, but of private workplace issues. Most likely his speech was not constitutionally protected as a matter of law.

Even if Bork pursued this theory, the system would overpower him with vastly superior resources. Occasionally, a successful constitutional litigation can generate substantial damages along with attorney fees for a prevailing plaintiff. In *Hulen v. Yates*, 322 F.3d 1229 (2003), a College of Business professor at CSU sued the university claiming a violation of his rights of speech and due process. The Tenth Circuit upheld various elements of Hulen’s claims, and the university decided to settle with him. The final amount was hidden behind a confidentiality clause, but it was probably in the mid-seven figures, almost as much as CSU’s football coach is paid annually. The case took several years to wind its way to a conclusion, and fortunately Hulen recovered his attorney fees. For someone in Bork’s condition, finding a lawyer to take the case on contingency and to pursue it for years based on shaky facts is an unrealistic dream.

With regard to Bork’s contract claim, the common law doctrines of contract make the case decidedly unattractive. The college’s clever lawyers paid Bork the entire amount of his contract, which is all he is entitled to for the breach, because he has no right of continued employment as a contingent faculty member. If he proceeded to court, he would get no back pay remedy and would be out the amount of attorney fees. Although the national level of the Association of American Professors has taken up Bork’s case, litigation is probably the most unappealing option available to them.

At Colorado State, the *Faculty Manual* offers slightly better odds of mounting a free speech case. Since the *Hulen* decision, the Manual is considered a binding contract between covered employees and the university. A provision in the Manual covers precisely the gap in protection under the Constitution. It reads, with the important language italicized:

> As an academic community, Colorado State University embraces certain foundational principles that guide our behaviors. Foremost among these is academic freedom for the faculty, a longstanding cornerstone of public higher education in our country. Academic freedom is the freedom of the faculty to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative
expression, to speak or write on matters of public concern as well as on matters related to professional
duties and the functioning of the University.

The inclusion of protection for speech dealing with “professional duties” effectively nullifies the Garcia limitation for CSU faculty. Unfortunately, the remedies for violations of the Manual are sketchy at best.

Assume that a regular faculty member speaks out on a highly controversial subject like environmental
degradation, and the faculty member is a researcher in the area of climate change. Her remarks are offensive to
powerful people in the mineral extraction industry, who mount a vendetta that leads to termination of
employment. Her constitutional claims could probably be defeated because the speech was directly related to
her professional duties.

Under the principles announced in our Faculty Manual, she could claim a contract violation of her rights of
academic freedom and free speech. The Manual, however, stipulates that prior to legal action, an aggrieved
employee must first exhaust internal procedures for redress. That means filing a grievance, going before a
grievance panel, and then awaiting further review of the claim. The review stops at the president’s office, where
he can uphold or deny the findings and recommendation of the panel.

“The inclusion of protection for speech dealing with ‘professional duties’ effectively nullifies the Garcia limitations for CSU faculty. Unfortunately, the remedies for violations of the Manual are sketchy at best.”

If the faculty member then proceeds to court, her claim will be one of contract because the Manual goes beyond
the constitutional case law. She might win the case, but the damages could be small and she would have to pay
her lawyer out of any award. Given the high opportunity costs and the small payoff, the better option might simply be to get a job somewhere else.

To sum up, rights of free speech for university employees are somewhat ephemeral. The right is only as good as
its enforcement, and enforcement is time-consuming, expensive, and uncertain. Since the Manual offers the
broadest speech protections for employees, we should demand an effective remedy such as third-party
arbitration, where a neutral arbiter makes a binding resolution in a dispute. Anything less is just an illusory
promise blowing in the wind.

**RISA LIEBERWITZ ON AAUP’S TITLE IX REPORT**

By Steve Mumme

The AAUP Colorado Conference was pleased to have Dr. Risa Lieberwitz address its annual meeting held
October 15 on the University of Colorado, Boulder campus. Lieberwitz is Professor of Labor and Employment
Law in the Cornell University School of Industrial and Labor Relations and General Counsel of the American
Association of University Professors (AAUP) where she has also served as a member of AAUP Committee A on
Academic Freedom and Tenure.

The theme of Lieberwitz’s speech was the AAUP’s recent report on problems related to Title IX in the area of
sexual harassment. The AAUP report, entitled The History, Uses, and Abuses of Title IX, was approved and
released this past summer. Lieberwitz chaired the joint committee that wrote the report.

Lieberwitz noted at the outset that the report the AAUP proceeded on the basis of three guiding assumptions in
developing the report: 1) that it was imperative to uphold academic freedom; 2) the Title IX is part of a
systemic process of improvement in the status of women; and 3) that faculty should be always involved in the
process of Title IX implementation on campus.
Unfortunately, she noted, sexual harassment issues have more recently overshadowed other aspects of Title IX implementation raising serious due process issues that AAUP needed to address. At the core of the matter is the need for fair and reliable standards for establishing the occurrence of sexual harassment. The issue of sexual harassment, she argued, is no different from any other form of harassment from the standpoint of due process protection, and the burden of proof rests on the institution.

Risa Lieberwitz

Lieberwitz emphasized that the problem with Title IX in this area is not with the original guidance published by the U.S. Department of Education’s Office of Civil Rights in 2001, but with its more recent 2011 Dear Colleague Letter that borrowed its “hostile environment” definition from other legislation and failed to adequately distinguish between speech and conduct, in effect muddying the implementation waters on campus in the area of protected speech. The mandatory reporting requirements exerted a chilling effect on faculty speech by leaving the de facto determination of harmful environment in the hands of accusers and encouraging (though not requiring) universities to define all employees as “responsible employees” with a duty to report all possible violations. The OCR also employed the looser “preponderance of evidence” standard for determining violations rather than adopting the stricter “clear and convincing” standard commonly used in civil litigation.

The AAUP report, she said, aimed to rectify these errors by affirming the need to include academic freedom protection in campus regulations and urging the adoption of a clear and convincing standard of evidence in determinations of sexual harassment. The AAUP also called on faculty to assert themselves in demanding a role in the determination of regulatory and due process guidelines.

Lieberwitz concluded her remarks by urging faculty to become acquainted with the new report which, she said, seeks to strengthen and defend Title IX gains for American women while defending academic freedom. To read the AAUP report go to: https://www.aaup.org/report/history-uses-and-abuses-title-ix.

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