

WHEN PROFESSORS GO VIRAL: **Extra-mural academic freedom and off-duty conduct**

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Extra-mural academic freedom

“The most theoretically problematic aspect of academic freedom is extramural expression.... Freedom of extramural expression refers to speech made by faculty in their capacity as citizens, speech that is typically about matters of public interest and that is unrelated to scholarly expertise or institutional affiliation.”

- M.H Finkin and R.C. Post, *For the Common Good: Principles of American Academic Freedom* (2009)

Contemporary controversies

- Politicians call for dismissal of Professor A for referring to Quebec as a “low-trust society” in an on-line opinion column.
- Professor B tweets support for a Canadian Senator who claims there were “positive” aspects to the residential school system.
- On an anonymous blog, Professor C is critical of EDI initiatives and states Canada is not a racist society.
- A university administration is urged to act against Professor D for tweeting views questioning the efficacy of COVID-19 vaccines.

Test for Off-Duty Conduct: Millhaven Fibres (1967)

- i. The conduct of the grievor harms the Company's reputation or product;
- ii. The grievor's behaviour renders the employee unable to perform duties satisfactorily;
- iii. The grievor's behaviour leads to refusal, reluctance or inability of other employees to work with them;
- iv. The grievor has been guilty of a serious breach of the Criminal Code and thus rendering their conduct injurious to the general reputation of the Company and its employees; and
- v. [The conduct] places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

Dismissal of Prof. B (2018)

“Your decontextualized social media postings, engagement of free speech supporters, and your gratuitous criticism of the University are all cause for concern....This conduct has seriously damaged the environment in your department, the overall reputation of the University, student learning and our trust in you as a member of this academic community.”

Ross v. New Brunswick School District No. 15, (SCC 1996)

Para 43: “Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community’s perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community’s confidence in the public school system as a whole.”

Para 44: “The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond.”

Application of *Ross* to university and college teachers?

- 1) Trust and influence: University and college students are arguably not as vulnerable or impressionable as public-school students.
- 2) Commonly understood meaning of academic freedom requires that “reputational harm” of off-duty expression and conduct should be invoked extremely rarely (if at all).
- 3) Collective agreement language on academic freedom gives specific contractual right to extra-mural expression of academic staff.

The “special obligations” of academics?

“As a man [sic] of learning and educational officer, [a professor] should remember that the public judge his profession and his institution by his utterances. Hence, he 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 he is not an institutional spokesman.”

- *AAUP 1940 Statement of Principles on Academic Freedom and Tenure, cited in Concordia University Faculty Association and Concordia University, 2014.*

“The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his or her position. Extramural utterances rarely bear upon the faculty member’s fitness for the position.”

- *AAUP 1964 Statement on Extramural Utterances.*

Institutional reputation

“Academic freedom is a central, arguably *the* central value, of university life. Anything which interferes with it has to be justified by reference to prior or higher values. I can think of very few, other than perhaps the protection of human life: certainly not institutional solidarity; certainly not institutional reputation.”

- H. W. Arthurs, *Academic Freedom: When and Where.*”

“The university is not supposed to be a workplace like any other, where the administration's authority over institutional governance or concern for the employer's public reputation trump the right of academics to freedom of expression on either matters of general public concern or the operation of the post-secondary institution itself.”

- M. Gabbert, *Academic Freedom: Freedom of Expression's Vulnerable Child*” (2021)

Collective agreement provisions

Broad: “Academic freedom includes the freedom of an employee to criticize the University or society at large; and to be free from institutional censorship.”

Limited: “Academic freedom is the freedom to examine, question, teach, and learn, and it involves the right to investigate, speculate, and comment without deference to prescribed doctrine, as well as the right to criticize the University and the Association in a lawful and non-violent manner, and to criticize society at large.... The right to academic freedom carries with it the duty to use that freedom in a responsible way.”

Collective agreement provisions (cont'd)

Article XX: “In extraordinary circumstances, the President may suspend a member, with or without salary, for a period of fifteen (15) days, for a stated cause involving gross misconduct, which shall arise from serious threats or physical acts to person(s) or property at the University, or actions that seriously undermine the reputation of the University.”

Conclusions

- The bar for discipline arising from off-duty conduct must be set higher for academic workplaces because of academic freedom which grants academic staff the right to intervene in public debates without retaliation from the employer.
- “Reputational damage” should rarely if ever be used as justification for disciplining academic staff for their extramural expression.
- Exceptions would be restricted to cases where the law was violated or in rare cases where the content revealed egregious professional incompetence.
- Collective agreement language should ensure robust and unambiguous protections for extra-mural academic freedom.