



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,
5TH FLOOR
LOS ANGELES, CALIFORNIA 90045
T: (310) 981-2000
F: (310) 337-0837

135 MAIN STREET,
7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
T: (415) 512-3000
F: (415) 856-0306

5250 NORTH PALM AVENUE,
SUITE 310
FRESNO, CALIFORNIA 93704
T: (559) 256-7800
F: (559) 449-4535

550 WEST "C" STREET,
SUITE 620
SAN DIEGO, CALIFORNIA 92101
T: (619) 481-5900
F: (619) 446-0015

400 CAPITOL MALL
SUITE 1260
SACRAMENTO, CALIFORNIA 95814
T: (916) 584-7000
F: (916) 584-7083

COMMUNITY COLLEGE LEAGUE OF CALIFORNIA (CCLC) 2018 ANNUAL CONVENTION

First Amendment, Academic Freedom and Harassment


11/15/2018

PRESENTED BY:

Lorraine Y. Jones & Pilar Morin


First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

LCW LIEBERT CASSIDY WHITMORE



First Amendment, Academic Freedom and Harassment
Community College League of California
(CCLC) 2018 Annual Convention
November 15, 2018

Presented By: Lorraine Y. Jones & Pilar Morin




Agenda



- Constitutional Free Speech Law
- Free Speech: Public Forum Principles
- Electronic Communications Policies
- Harassment Policies
- Employee and Student Free Speech
- Academic Freedom
- Limiting Use of Facilities

2 | LCW LIEBERT CASSIDY WHITMORE


Constitutional Free Speech



- “Congress shall make no law . . . abridging the freedom of speech, or of the press”

– U.S. Constitution, First Amendment


3 | LCW LIEBERT CASSIDY WHITMORE

Constitutional Free Speech 

- “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”

– *California Constitution, art. I, section 2.*


4 | LCW LIEBERT CASSIDY WHITMORE

District Policies and Procedures 

Board Policy and Administrative Regulation

- Speech: Time, Place and Manner
 - For Example:
 - Hour restrictions (not at night)
 - Noise restrictions (limit sound amplification)
 - Physically touch, strike or impede the progress of passersby
 - Solicit donations or sell items


5 | LCW LIEBERT CASSIDY WHITMORE

On-Campus Speech Issues 

Common topics that can create controversy on campus - although District must be viewpoint-neutral

- Religious messages critical of protected groups
- Speech relating to violence and weapons
- Graphic displays on abortion
- Protests
- Speech on LGBTQ issues
- Speech targeting or bullying members of community (students, faculty, employees)
- Groups whose strategy is to violate District procedural policies to provoke a response

6 | LCW LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE 

**Free Speech:
Public Forum Principles**

Free Speech – Introduction 

- Some rules on free speech regulation
 - Protected speech can be restricted with sufficient justification
 - Depends on “forum”
 - High protection of political speech
 - Less protection for commercial speech
 - Viewpoint-neutrality is very important
 - Focus on conduct (Ex. Burning trash cans as part of protest)


8 | LCW LIEBERT CASSIDY WHITMORE

Free Speech – General 

- Certain speech is not protected
 - “Substantially disrupts” college/university operations; or
 - Speech that is not protected by the First Amendment.
 - Defamation
 - “Fighting words” (“where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”)
 - “True threats” (“a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another”).
 - Unlawful harassment/discrimination.
 - Obscenity

9 | LCW LIEBERT CASSIDY WHITMORE

First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

DOES NOT Include Right to: 


- Incite actions that would harm others (e.g., “[S]hout[ing] ‘fire’ in a crowded theater.”);
- Make or distribute obscene materials; and
- Burn draft cards as an anti-war protest.

10 | LCW LIEBERT CASSIDY WHITMORE

(Protected) DOES Include Right to: 

1. Not speak;
2. Of students to wear black armbands to protest a war;
3. To use certain offensive words and phrases to convey political messages;
4. To use certain offensive words and phrases to convey political messages;
5. To advertise commercial products and professional services (with some restrictions); and
6. To engage in symbolic speech (e.g. burning the flag in protest).

11 | LCW LIEBERT CASSIDY WHITMORE

On-Campus Speech 

- A community college campus does not consist of a single forum, but rather can be “subdivided” into four different types of forums:
 - Traditional public forum
 - Designated public forum
 - Limited public forum
 - Non-public forum

12 | LCW LIEBERT CASSIDY WHITMORE

First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

Free Speech – General 

- What type of public forum is at issue:
 - Traditional
 - Sidewalks, streets, student union areas, and parks
 - Designated
 - Opened up for any speech
 - Limited
 - Only certain groups or topics
 - Non-public forum
 - Administrator and faculty offices and college electronic billboard, letterhead, internal mail systems

13 | LCW LIEBERT CASSIDY WHITMORE

Free Speech – General 

- Traditional and Designated Public Forums
 - Restrictions on content must have
 - Compelling interest
 - Be narrowly tailored
- Non-Public and Limited Public Forums
 - Reasonable
 - Viewpoint-Neutral

14 | LCW LIEBERT CASSIDY WHITMORE

Forum Analysis – College Campus 

- Generally Courts Find:
 - Free Speech Zones = Designated Public
 - Offices, classrooms = Non-Public
 - Other areas = Limited Public or Non-Public
 - College policy can specify all areas as non-public forum, except free speech zones
 - Caution: subject to challenge; courts can disagree with college’s designations

15 | LCW LIEBERT CASSIDY WHITMORE

Forum Analysis – Free Speech Zones

- Allocated for expressive activities (students, outsiders, employees)
- Courts will approve if
 - Large areas of campus
 - Sufficient number of areas
 - Close to wide audience (foot traffic, etc.)
- Caution: Some courts skeptical of speech zones
- Law in area is developing

16 | LCW LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE

Harassment Policies

17 | LCW LIEBERT CASSIDY WHITMORE

Sources of Law

- Federal Law
 - Title VII of the 1964 Civil Rights Act
 - Age Discrimination in Employment Act (ADEA)
 - Americans with Disabilities Act (ADA)
 - Title IX of the Education Amendments of 1972

18 | LCW LIEBERT CASSIDY WHITMORE

Sources of Law

- California Law
 - Fair Employment and Housing Act (FEHA)
 - Education Code
 - Labor Code
- Your District’s policy against harassment, discrimination, retaliation, and abusive conduct

19 | LCW | LIEBERT CASSIDY WHITMORE

Protected Classifications

- Religious Creed
- Marital Status
- Race/National; Origin/Ancestry/Color
- Disability/Medical Condition
- Military and Veteran Status
- Genetic Information
- Sex (Gender, Pregnancy, Gender Expression, Gender Identity, etc.)
- Sexual Orientation
- Age
- Opposition to Harassment
- Association/Perception


20 | LCW | LIEBERT CASSIDY WHITMORE

Harassment Policies




- Need to prohibit unlawful harassment (based on protected classifications)
- BUT prohibition cannot suppress speech if:
 - Not viewpoint-neutral
 - Overbroad and chills speech
 - Overly vague

21 | LCW | LIEBERT CASSIDY WHITMORE


LCW LIEBERT CASSIDY WHITMORE 

Employee and Student Free Speech

Free Speech – Employees 

- Individuals are deemed to give up some free speech rights when they come to work for the Government
- But speech of “public concern” by indiv. speaking as a citizen is entitled to First Amendment protection – *Pickering Test*


23 | LCW LIEBERT CASSIDY WHITMORE

Employee Speech: Is It Protected Speech? 

The Two Part Test:


Is the District Employee Speaking:

1. As a private citizen?
2. On a matter of public concern?




24 | LCW LIEBERT CASSIDY WHITMORE

First Amendment, Academic Freedom and Harassment
 Community College League of California (CCLC) 2018 Annual Convention
 November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

**Employee Speech:
 The *Pickering* Balance** 

Interest of employee, as a citizen, in commenting on matters of public concern
 vs.
 Interest of public employer in promoting efficiency of the public services


25 | LCW LIEBERT CASSIDY WHITMORE

Case Study – Limited Forum 

The College assigns each employee an email address. There are also lists such as "All College," and "All Faculty," which people use to trade recipes, report traffic, solicit donations, etc. Prof. Smith sends a mocking email to "All Faculty" on Columbus Day, extolling it as a Great White Holiday; he opines that Caucasian people and Christian values are superior to others in the United States. This sets off a torrent of angry responses from Latino and Native American faculty followed by even nastier ones from Prof. Brown.

Latino and Native American faculty demand that Prof. Brown be punished. Can the College do so?

26 | LCW LIEBERT CASSIDY WHITMORE


Case Study – High-Level Policymaking Employee Speech 

An associate VP of Human Resources at a college writes a letter to a local newspaper challenging a story's comparison of gay rights to civil rights, and taking the religious position that homosexuality is a matter of "choice." The VP uses her name/photo but does not mention the college. The letter is published and the college discharges her because of it.

Free speech violation?

Dixon v. University of Toledo, 702 F.3d 269 (6th Cir. 2012)

27 | LCW LIEBERT CASSIDY WHITMORE

Student Free Speech 

- A student may express his or her opinions at school, even on a controversial subject, if he or she does so without materially and substantially interfering with appropriate discipline in operation of the school and without colliding with the rights of others.

Tinker v. Des Moines Independent Community School District, (1969) 393 U.S. 503

28 | LCW | LIEBERT CASSIDY WHITMORE


Student Free Speech: Threats 

- A student jokes repeatedly with her friends on campus about planning a campus-wide massacre and posts her ideas on Facebook. The date of planned massacre is the anniversary of Columbine. She later claims it was all a joke.

Free speech?

Wynar v. Douglas County School District


29 | LCW | LIEBERT CASSIDY WHITMORE

Education Code and Student Free Speech 

- District policies and procedures cannot interfere with the right of students to exercise free expression including, but not limited to,
 - The use of bulletin boards,
 - The distribution of printed materials or petitions, and
 - The wearing of buttons, badges, or other insignia

Ed. Code section 76120


30 | LCW | LIEBERT CASSIDY WHITMORE

Education Code and Student Free Speech 

- Exceptions - where that expression is:
 - Obscene, libelous or slanderous according to current legal standards, or
 - Which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or
 - The violation of lawful community college regulations, or
 - The substantial disruption of the orderly operation of the community college

Ed. Code section 76120


31 | LCW LIEBERT CASSIDY WHITMORE

Education Code and Student Free Speech 

- Governing boards and administrators cannot make or enforce any rule subjecting any student to disciplinary action based solely on:
 - The student's speech or
 - Other communication that would otherwise be constitutionally protected speech when engage in outside of campus
- Districts cannot place prior restraints on student speech

Ed. Code section 66301

32 | LCW LIEBERT CASSIDY WHITMORE


Case Study – Student Organizations 

The District promulgates a rule that it will not support any student clubs that exclude anyone who wishes to join – all are welcome. Victor, an outspoken liberal seeks to join the conservative student club “the Silent Majority.” The club suspects he wants to cause trouble, and denies him admission. Victor cites the “all-comers” District rule and demands admission.

Does the District’s “all comers” policy violate the club’s First Amendment rights?

--See *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010).


33 | LCW LIEBERT CASSIDY WHITMORE

Student Speech 

Remember that even offensive speech can be protected speech.

Education Code § 66301

34 | LCW LIEBERT CASSIDY WHITMORE

“Hate Speech” 

- “Hate speech” thought to include protected classifications, including ancestry, national origin religion, race, gender, sexual orientation, etc.
- No “hate speech” exception to First Amendment.
 -- *RAV v. St Paul*, 505 U.S. 377 (1992) (Scalia, J.).
- Potential exception if targets individual, actually violates rights to employment or education.
- Many institutions punish and take First Amendment risk.
- But institution can refrain from punishing, and use First Amendment to protect from liability.
 -- *Rodriguez v. Maricopa CCD*, 605 F.3d 703 (9th Cir. 2010) (Kozinski, J.).

35 | LCW LIEBERT CASSIDY WHITMORE

Case Study – Academic Freedom

Dr. Smith teaches an introductory class in contemporary art. As part of his teaching style, he persistently uses profanity and sexual themes to underscore the “shock art” that predominates his curriculum. One day a student complains to the administration. The District admonishes Dr. Smith that he can teach the same pieces of art, but cannot use and vulgarities in his class.

Violation of free speech and academic freedom?

36 | LCW LIEBERT CASSIDY WHITMORE


First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

Academic Freedom Issues 

- Faculty have academic freedom rights
 - Through policies and contract
 - Through First Amendment right to academic freedom in “scholarship and teaching.”
- Colleges are likely to see increased concerns
 - Students recording in class
 - Social media
 - Protecting political speech
 - Example: Professor Watchlist <http://www.professorwatchlist.org/>

“Students, parents, and alumni deserve to know the specific incidents and names of professors that advance a radical agenda in lecture halls.”

37 | LCW | LIEBERT CASSIDY WHITMORE

Academic Freedom Issues 

- Colleges also have recognized institutional right to academic freedom.

38 | LCW | LIEBERT CASSIDY WHITMORE

Case Study

- Instagram group created by student with handle, @yungcavage, giving access to other students;
- Only those who were part of the group could see, follow, comment, or like;
- About 40 posts about school students and school personnel with racist and derogatory comments, often with a picture identifying the target.

39 | LCW | LIEBERT CASSIDY WHITMORE

First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

Case Study

- The postings were derogatory and racist, for example:
 - A “Ku Klux starter pack” featuring a noose, a burning torch, a black doll, and a white hood.
 - A school student and basketball coach, both of whom are African-American, with nooses drawn around their necks.

40 | LCW | LIEBERT CASSIDY WHITMORE

Case Study

- One female student borrowed a follower’s phone after hearing about it and copied photos to her own phone;
- News spread around school;
- By lunchtime some of the targeting students gathered in the hallway, distraught, some crying; and
- Eventually the creator of the posts shuts it down.

41 | LCW | LIEBERT CASSIDY WHITMORE

Case Study

- School disciplines
 - The creator of the posts and site; and anyone who followed.
- Questions:
 - Do you think all who commented should be punished?
 - How about those that hit like?
 - Does it matter if some posts were generically racist, i.e. not targeting anyone?

42 | LCW | LIEBERT CASSIDY WHITMORE

Court's Ruling

- School argued the conduct substantially disrupted the school and infringed on the rights of other students.
- Court found:
 - Liking the post is expression; analyze under First Amendment;
 - Follower of post who did not comment or like; also protected under First Amendment.

43 | LCW | LIEBERT CASSIDY WHITMORE

Court's Ruling

- Those who liked and commented posts targeting specific students:
 - The court found that their behavior “meaningfully contributed” to the campus disruptions; their discipline was justified under rules.
 - The online denigration of a student’s race or ethnicity and the threat of violence and any likes and comments expressly supporting those posts- interfere with a student’s right to be left alone.


44 | LCW | LIEBERT CASSIDY WHITMORE

Court's Ruling

- Those who liked and commented on posts with generic racist posts:
 - Court found likes and comments favoring generally offensive, racist, or hateful speech that did not target specific student or employees is protected under the First Amendment and does not constitute harassment or bullying.
 - The court also found the school violated the speech rights of students who only followed the account, but did not like or comment.
 - *Shen v. Albany Unified School District*, 2017 WL 5890089

45 | LCW | LIEBERT CASSIDY WHITMORE

First Amendment, Academic Freedom and Harassment
Community College League of California (CCLC) 2018 Annual Convention
November 15, 2018
Presented by: Lorraine Y. Jones and Pilar Morin

Case Study - Limiting Use of Facilities 

- A band of citizens erect tents outside the Administration Building as part of a political protest. The College does not allow overnight camping in any public area and asks the Occupiers to leave. The Occupiers claim camping is their expressive First Amendment right.

Is it?

46 | **LCW** LIEBERT CASSIDY WHITMORE

Thank You!

Lorraine Y. Jones
District Compliance Officer
Riverside Community College District
951.328.3874 | Lorraine.jones@rccd.edu

Pilar Morin
Partner | Los Angeles Office
310.981.2000 | pmorin@lcwlegal.com
www.lcwlegal.com/our-people/pilar-morin

47 | **LCW** LIEBERT CASSIDY WHITMORE
