AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Dambrot v. Central Michigan University, 55 F.3d 1177** (6th Cir., 1995)

*In 1991, Keith Dambrot became the head coach of the Central Michigan University men’s basketball team. The team was mostly composed of black players, but the coaching staff (including Dambrot) was predominantly white. In 1993, Dambrot used the word “nigger” in during a locker room talk during halftime in a game that the team ultimately lost. Dambrot said that he intended to use the word in a “positive and reinforcing” way by saying that he wanted more such players on his team, whom he regarded as “fearless, mentally strong and tough.” Dambrot had used the term on other occasions as well, including an instance in which he encouraged his players not to act that way in the classroom after some of them were reportedly “abrasive” with a math instructor. The locker room incident, however, became known beyond the team itself and Dambrot was eventually suspended by the university. The suspension itself further publicized the event and Dambrot became the subject of student protests, leading to his dismissal as head coach.*

*Dambrot filed suit in federal district court contending that his dismissal violated his First Amendment rights and academic freedom, and several players joined the suit arguing that the university’s harassment policy that justified Dambrot’s dismissal also infringed on their First Amendment rights. The trial court concluded that the harassment policy as written was unconstitutionally overbroad, but found that Dambrot was not protected from dismissal for his locker room speech. On appeal, a federal circuit court affirmed that ruling. The circuit court concluded that Dambrot’s motivational speech was not a matter of public concern, and as result his speech was subject to discipline by his employer even though his employer was a public university.*

JUDGE KEITH.

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The overbreadth doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to "chill" the exercise of free speech and expression. *Broadrick v. Oklahoma* (1973). A statute is unconstitutional on its face on overbreadth grounds if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. . . .” *Members of the City Council v. Taxpayers for Vincent* (1984).

The CMU policy, located in the Plan for Affirmative Action at Central Michigan University, states discriminatory harassment will not be condoned. Racial and ethnic harassment is defined in the policy as

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by ... (c) demeaning or slurring individuals through ... written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.

The first step in analyzing an overbreadth claim is to "determine whether the regulation reaches a substantial amount of constitutionally protected speech." The language of this policy is sweeping and seemingly drafted to include as much and as many types of conduct as possible. On its face, the policy reaches "a substantial amount of constitutionally protected speech."

CMU argues the policy does not present a "realistic danger" of compromising First Amendment rights because 1) there is no enforcement mechanism and 2) the university enforces the policy with respect for First Amendment rights. Defendants' first argument is not persuasive. Although there are no formal mechanisms of enforcement, it is clear from the sanctions imposed on Dambrot that the university can pursue violations to the policy.

Secondly, CMU argues any concerns the policy will reach constitutionally protected speech have been abated by language in the policy which states: “The University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals right to free speech.”

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In the instant case, there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy's language presents a "realistic danger" the University could compromise the protection afforded by the First Amendment.

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The next step in analyzing an overbreadth claim is to determine whether the policy is "substantially overbroad and constitutionally invalid under the void for vagueness doctrine." . . . As the district court notes "[i]n the instant case, both problems — fair notice, and unrestricted delegation — are present." In order to determine what conduct will be considered "negative" or "offensive" by the university, one must make a subjective reference. Though some statements might be seen as universally offensive, different people find different things offensive. The facts of this case demonstrate the necessity of subjective reference in identifying prohibited speech under the policy. Several players testified they were not offended by Dambrot's use of the N-word while student Norris and affirmative action officer Haddad were extremely offended. The CMU policy, as written, does not provide fair notice of what speech will violate the policy. Defining what is offensive is, in fact, wholly delegated to university officials. This "unrestricted delegation of power" gives rise to the second type of vagueness. For these reasons, the CMU policy is also void for vagueness.

Defendant CMU argues the policy is a prohibition of "fighting words." Assuming, *arguendo,* CMU is correct, the policy is still constitutionally prohibited. In *R.A.V. v. St. Paul* (1992), . . . the Supreme Court held the First Amendment does not allow the imposition of "special prohibitions on those speakers who express views on disfavored subjects." . . . CMU's policy prohibits "written literature, ... symbols, [epithets] or slogans that infer negative connotations *about the individual's racial or ethnic affiliation.*" Under *R.A.V.,* the CMU policy constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech.

*R.A.V.* also held the St. Paul ordinance constituted viewpoint discrimination because it prohibited fighting words used against persons because of their racial or ethnic affiliation but did not prohibit fighting words which could be hurled in response to a race or ethnic-based attack, even if the fighting words were the same. The ability to use certain words depended on the identity and affiliation of the speaker. This impermissible viewpoint discrimination could easily occur under the CMU policy as the identity of the speaker and the target are important in determining whether there has been a violation.

Because the CMU discriminatory harassment policy is overbroad and void for vagueness and because it is not a valid prohibition against fighting words, the CMU discriminatory harassment policy violates the First Amendment of the United States Constitution. . . .

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The Supreme Court has held a government employee retains her First Amendment right to comment on matters of public concern without fear of reprisal from the government as employer. *Connick v. Myers* (1983). . . .

The *Pickering v. Board of Education* (1968) Court developed a balancing test which weighed "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." . . .

In *Connick*, the Supreme Court incorporated the *Pickering* test into a two-step analysis for determining when the discharge of a public employee violates the First Amendment. "The threshold question ... is whether [the employee's] speech may be `fairly characterized as constituting speech on a matter of public concern.'" Second, if the speech is found to touch upon a matter of public concern, the court must then apply the *Pickering* balancing test. If the employee's free speech interests outweigh the efficiency interests of the government as employer, the employee's First Amendment rights have been violated.

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The *Connick* court describes speech upon matters of public concern as "relating to any matter of political, social, or other concern to the community." . . .

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Focusing on the "content, form and context" of Dambrot's use of the word "nigger," this Court can find nothing "relating to any matter of political, social or other concern to the community." Dambrot's locker room speech imparted no socially or politically relevant message to his players. The *point* of his speech was not related to his use of the N-word but to his desire to have his players play harder. Like the use of profanity in *Martin v. Parish* (5th Cir. 1986), Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed. . . .

Dambrot argues *Connick* is not applicable to his claim but instead the court should recognize his constitutionally protected right to academic freedom because he "was terminated because of the purported `public outcry' that arose over what he said to his players, *when he was instructing them about how they should be playing basketball and about how they should behave in the classroom.*"

The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character. In *Swank v. Smart* (7th Cir. 1990), a police officer was terminated from his employment based on a coworker's report that he picked up a young college student and gave her a ride on the back of his motorcycle. During the ride the officer and the student talked about numerous topics including her coursework, the motorcycle and her former boyfriend. After his dismissal the officer sued the town alleging, the termination had violated his free speech rights guaranteed by the First Amendment. The Seventh Circuit held that conversations between the police officer and the young woman did not touch a matter of public concern and merited no First Amendment protection. . . .

The principle of academic freedom emphasizes the essentiality of free public expression of ideas. . . . The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.

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Dambrot's use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher. Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot's role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach's will is paramount. Moreover, the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place.

. . . . The First Amendment protects the right of any person to espouse the view that a "nigger" is someone who is aggressive in nature, tough, loud, abrasive, hard-nosed and intimidating; someone at home on the court but out of place in a classroom setting where discipline, focus, intelligence and interest are required. This same view has been and is held about African Americans by many who view the success of Black athletes as a result of natural athletic ability and the success of Black executives as the result of affirmative action.

What the First Amendment does not do, however, is require the government as employer or the university as educator to accept this view as a valid means of motivating players. An instructor's choice of teaching methods does not rise to the level of protected expression. *Hetrick v. Martin* (6th Cir.). Assuming but not deciding, Dambrot is subject to the same standards as any teacher in a classroom (as opposed to a locker room setting), Dambrot's speech served to advance no academic message and is solely a method by which he attempted to motivate — or humiliate — his players. In the instant case, the University has a right to terminate Dambrot for recklessly telling these young men to be athletically ardent but academically apathetic in his attempt to boost athletic performance. The University has a right to terminate Dambrot for telling his players that success on the basketball court is not premised on the same principles of discipline, focus and drive that bring success in the classroom. The University has a right to disapprove of the use of the word "nigger" as a motivational tool just as the college in *Martin* was not forced to tolerate profanity. Finally, the University has a right to hold Coach Dambrot to a higher standard of conduct than that of his players. Dambrot's resort to the First Amendment for protection is not well taken.

For the foregoing reasons, Dambrot's speech cannot be fairly characterized as touching a matter of public concern. Thus, there is no need to reach the *Pickering* balancing of government efficiency interests and the employee's interest in expression. Moreover, there is no need to reach the question of whether the speech was the primary reason for the termination or whether CMU had other reasons for terminating Dambrot. Neither does Dambrot's speech raise any academic freedom concerns.

*Affirmed*.