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

**Hardy v. Jefferson Community College, 260 F.3d 671** (6th Cir., 2001)

*Kenneth Hardy had been teaching communications for three years with good evaluations at the Jefferson Community College in Kentucky. In the summer of 1998, he was teaching a class on introduction to interpersonal communication, which included a section on how language can be used to marginalize groups in society. As part of the discussion, Hardy asked students to provide examples of such language, and they suggested a variety of common slurs that were then discussed in the class. An African-American student later complained that the class session had violated the policy on the syllabus, which stated that “there will be no abusive (i.e., sexist, racist, otherwise derogatory) language in discussion.” The student enlisted the aid of a local civil rights activist, who met with the president of the community college, Richard Green, and demanded that action be taken. Acting Dean Mary Besser then met with Hardy and told him that his teaching exercise was threatening enrollment at the school. At the end of the summer, Hardy was told that the three classes he had been assigned to teach in the fall had been reassigned and his services would no longer be needed at the college.*

*In the summer of 1999, Hardy filed suit in federal district court arguing that his First Amendment rights had been violated. The university administrators moved to have the case against them dismissed on the grounds that free speech in the classroom was not a clearly established constitutional right (and thus they had qualified immunity from personal legal liability for their actions), and the trial court denied the motion. They appealed to the federal circuit court. The circuit court affirmed the trial court’s ruling, concluding that Hardy’s in-class speech was constitutionally protected, that the school did not have a legitimate interest in suppressing that speech, and that the college administrators should have known that they could not punish Hardy for such constitutionally protected speech.*

JUDGE GILMAN.

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Hardy alleges that Green and Besser violated his First Amendment right to freedom of speech when they failed to renew his contract in retaliation for his in-class discussion of "socially controversial words." The district court found that the use of the racial and gender epithets in an academic context, designed to analyze the impact of these words upon societal relations, touched upon a matter of public concern and thus fell within the First Amendment's protection. Green and Besser contend, however, that Hardy's use of "racially vulgar words" presented no issue of public concern and therefore enjoyed no constitutional protection.

The Supreme Court has long held that a public employee retains his First Amendment right to comment on matters of public concern without fear of reprisal from the government as his employer. *Pickering v. Board of Education* (1968). Furthermore, an employee's untenured status will not defeat constitutional claims. A public employee may "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Board of Education v. Doyle* (1977).

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To determine whether an employee's speech addresses a matter of public concern, the court must look to the "content, form, and context of a given statement, as revealed by the whole record." Speech that relates "to any matter of political, social, or other concern to the community" touches upon matters of public concern. Furthermore, the court must determine "the *point* of the speech in question ... [because] [c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection."

Relying on this court's recent decision in *Bonnell v. Lorenzo* (6th Cir. 2001), Green and Besser argue that Hardy's use of "racially vulgar words" failed to touch upon a matter of public concern, and therefore was not entitled to protection under the First Amendment. The college professor in *Bonnell,* however, was disciplined for his gratuitous in-class use of the words "pussy," "cunt," and "fuck," which had given rise to a sexual harassment complaint filed by one of the professor's students. Because Bonnell's offensive language was "not germane to the subject matter," the court concluded that he did "not have a constitutional right to use [these terms] in a classroom setting." Unlike Bonnell's frequent in-class use of gratuitous profanity and offensive language, however, Hardy's speech was germane to the subject matter of his lecture on the power and effect of language. The course was on interpersonal communications, and Hardy's speech was limited to an academic discussion of the words in question.

This case is similarly distinguishable from the facts in *Dambrot v. Central Michigan University* (6th Cir., 1995)*,* where the court held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker-room peptalk. The *Dambrot* court found it significant that "Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed." Dambrot's argument that his speech was protected by academic freedom was rejected because it failed to "advance[] an idea transcending personal interest or opinion which impacts our social and/or political lives." Unlike Dambrot's motivational use of the "N" word removed from any academic context, Hardy's in-class use of the objectionable word was germane to the subject matter of his lecture on the power and effect of language. Moreover, this and the other offensive words were suggested by the students in the context of the discussion, not gratuitously used by Hardy in an abusive manner.

Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of "public concern." Hardy's lecture on social deconstructivism and language, which explored the social and political impact of certain words, clearly meets this criterion. Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern — race, gender, and power conflicts in our society. . . .

. . . . We therefore turn to . . . balancing Hardy's right to speak on a matter of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." . . .

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In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools. As the Supreme Court proclaimed more than thirty years ago:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

*Keyishian v. Board of Regents* (1967). . . .

In light of these precedents, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. . . .

We next focus on the College's interest in promoting efficiency in the educational services that it provides and in avoiding disruption to its operations. *Pickering* counsels that courts should consider whether an employee's comments meaningfully interfere with the performance of his duties or with the employer's general operations, undermine a legitimate goal or mission of the employer, create disharmony among coworkers, undercut an immediate supervisor's discipline over the employee, or destroy the relationship of loyalty and trust required of confidential employees.

The discussion of the offensive words at issue was limited to a single lecture in Hardy's class. Despite the presence of nine African-Americans and one student of Asian descent, only one student objected. Hardy continued teaching his courses throughout the semester without any conflict, and all of his students but the one in question provided positive feedback on his classroom instruction. There is no indication that the lecture undermined Hardy's working relationship within his department, interfered with his duties, or impaired discipline.

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Green and Besser, however, rely on *Hetrick v. Martin* (6th Cir. 1973), to support their assertion that the College had an absolute right to evaluate Hardy's method of instruction. In *Hetrick,* this court found that no First Amendment interests were implicated when a state university did not renew the contract of a nontenured professor because her pedagogical style and teaching methods did not conform to the university's standards. But *Hetrick* is easily distinguishable because the district court had made significant findings of fact related to the administration's dissatisfaction with Hetrick's teaching methods and ability. Numerous students had complained about "their inability to comprehend what she was attempting to teach them or what was expected of them." Significantly, the court noted that had Hetrick been able to "adequately corroborate" her claim that the nonrenewal was based on statements made in class related to the Vietnam War and the military draft, relief might have been proper.

As further justification for Hardy's termination, Green and Besser point to the potential disruption in school operations and enrollment that might have occurred had Reverend Coleman become more involved in the matter. The Supreme Court, however, in *Terminiello v. City of Chicago* (1949), pronounced that a function of the First Amendment "is to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment."

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There is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights. For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. . . .

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*Affirmed*