Academic Freedom and the Constitution

Kenneth Conboy, Judge, United States District Court, Southern District of New York

Editor's Note: Judge Kenneth Conboy's opinion, finding for the plaintiff in the recent case of *Levin v. Harleston*, is of considerable legal significance. Professor Michael Levin, of City College of the City University of New York, has expressed controversial views repugnant to many, in response to which the administration of City College permitted disruptions of Levin's classroom, instructed a committee to examine his writings for their controversial content, and established "shadow sections" of his classes, so that students could take his courses from other instructors. Levin sought an injunction against these actions, and Judge Conboy, in granting it, recognized the "chilling effect" of actions that fall short of terminating a professor's contract. Conboy concluded that

> tenure is more than the right to receive a paycheck. Academic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead...without...the corrosive atmosphere of suspicion and distrust...

As Judge Conboy's reasoning about how the First and Fourteenth Amendments protect academic freedom will be of general interest to our readers, we reprint a few key excerpts from his sixty-nine-page opinion substantially upheld on appeal.

Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991)
Kenneth Conboy, District Judge:

This case raises serious constitutional questions that go to the heart of the current national debate on what has come to be denominated as "political correctness" in speech and thought on the campuses of the nation's colleges and universities.

A professor who has had tenure for over sixteen years at one of America's most famous institutions of higher learning, singularly noted for its bracing environment of broad and untrammeled speech, claims that his tenure is in jeopardy, his students drawn away, his classes disrupted, his reputation injured and his speech chilled as a result of the actions of his college's administrators, who are said to be repelled by his views on affirmative action quotas and the relative intelligence of blacks and whites, and who are said to be, by their actions, seeking to suppress those views.

The college officials say that his views are odious, and rightly denounced, and that although he has committed no act of academic misconduct or discrimination against his students, and although there is no complaint by any of his students against him, they are permitted to structure the class schedule to provide alternative professors ["shadow sections"] to "insulate" and "protect" his present and future students from his views.

Professor Michael Levin has brought this action pursuant to federal civil rights law, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

We conclude that Professor Levin has convincingly established his case, that the defendant college officials have sought to and did punish him in retaliation for and solely because of his expressed ideas, that in so doing they have violated his constitutional rights and the civil rights laws of the United States, and that federal injunctive relief is necessary to secure Professor Levin's rights on the campus of City College of the City University of New York. We will now elaborate upon these findings....

...B. Professor Levin's First Amendment Right to Free Expression Was Impermissibly Chilled, Impeded and Abridged.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court decided that a series of New York statutes and regulations designed to weed out "subversive" persons from state employment impermissibly chilled the First Amendment rights of teachers because they failed to narrowly specify *actual conduct* that could legitimately be proscribed by the state. Significantly, at the time of the decision, two of the teacher appellants had not been dismissed under these rules; their continued employment was in doubt because of their stated refusal to sign what were, in effect, certificates about their political beliefs....

...After stressing the importance to our society of freedom of inquiry for teachers, Justice Brennan reiterated the strictness of the standard applicable to regulation of freedom of speech:

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone..." For "[t]he threat of sanctions may deter...almost as potently as the actual application of sanctions." The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

385 U.S. at 604 (citations omitted)....

...Here, precisely that ambiguity was demonstrated at trial, aggravated in this case by several additional factors. First, the Committee's secret deliberations were predicated upon no announced or promulgated criteria or norma-

tive proscriptions. Second, Professor Levin had no way of knowing which of his statements were being reviewed by the Committee; that selection was made by President Harleston, with no notice to Professor Levin. Third, Professor Levin was given no opportunity to appear before the Committee or otherwise to defend those statements. Fourth, even though the Committee concededly made an adverse finding against him in his professional capacity as a tenured faculty member, there is apparently no forum or mechanism for him to challenge this finding. Fifth, though the Committee says it has completed its assigned task, its report invites and indeed recommends further and continuing scrutiny of Professor Levin, albeit in its characteristically elliptical and, we must say, Orwellian doublespeak. Sixth, the Committee endorses the continued use of the shadow sections, without any indication of the danger such a procedure poses in real terms to a college teacher's standing in the college and the world at large.

The result is exactly that predicted in *Keyishian*, 385 U.S. at 601. Professor Levin was forced to "stay as far away as possible from utterances or acts which might jeopardize his living" and therefore declined at least twenty invitations to speak or to write about his views during the nine-month period they were under scrutiny by the Committee. As we have found, Professor Levin had objectively reasonable bases to fear for his job during the nine months of deliberations of the Committee, despite having had tenure for sixteen years. The language of the Committee's charter (with its reference to "conduct unbecoming" a faculty member) was unmistakably, purposefully and admittedly drawn from the University By-Laws and faculty contract provisions governing discipline, including revocation of tenure. President Harleston confirmed that this was the source of that language and that his choice was deliberate. Professor Levin was aware that three of the seven members of the Committee had recently signed a petition condemning him and questioning his suitability as a teacher. President Harleston had recently been quoted in the college newspaper as saying, with reference to Professor Levin, that the process of removing a tenured professor is a complicated one and that "[t]enure is the life-blood of the College. When it works well, it is the life-blood....[Levin's] views are offensive to the basic values of human equality and decency and simply have no place here at City College." President Harleston himself made no effort during the Committee's deliberations, despite a letter from the Professor's counsel seeking a modification of the Committee's charge, and despite the pendency of this lawsuit alleging a threat to his tenure, to assure Professor Levin that his job was and is not in danger....

...In *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563 (1968), a case involving a teacher who wrote a letter to the editor of a local newspaper criticizing school board revenue policies, Justice Marshall made unmistakably clear that the First Amendment protects teachers against such a risk, holding that "absent proof of false statements knowingly or

recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." 391 U.S. at 574....Yet Professor Levin's continued employability (under the "conduct unbecoming" standard) was plainly and exactly what the Committee was charged to evaluate, solely on the basis of his statements on issues of public importance. We note that the state has not shown that Professor Levin's statements were knowingly and recklessly made.

Under the rule thus enunciated in *Pickering*, the threat to Professor Levin's job posed by the Committee was simply illegitimate and not susceptible of justification by claims of other, proper motivation. However, even when we analyze defendants' explanations for their conduct under the authorities which provide guidance on screening constitutionally defective retaliatory actions from defenses based on legitimate state interests, the defenses presented here must fail.

The state must have a compelling state interest in the curtailment of speech when it is the content of that speech which the state aims to interdict. *Police Department v. Mosely*, 408 U.S. 92, 99–101 (1972). In *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977), the Court established a three-step test to measure the propriety of state action where it is claimed that other interests beyond suppression of the speech itself motivate actions taken against the speaker. Step one requires the plaintiff to show that his conduct was constitutionally protected; step two requires proof by him that such conduct was a "substantial" or "motivating" factor behind the adverse action. If the plaintiff makes this showing, the burden shifts to the state, in step three, to demonstrate by a preponderance of the evidence that the adverse action would have been taken against the plaintiff even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

Here, there is no question that the "conduct" of Professor Levin that provoked all of the actions challenged in this suit was protected expression. President Harleston charged the Committee to examine, and the Committee did examine, only his public writings and statements about his views on the relationship between race and test scores and his objections to affirmative action programs, quintessentially "issues of public importance." *Pickering*, *supra*, at 572. Thus, the first *Mt. Healthy* requirement is met. At least as to the portion of the Committee's charge pertaining to him and as to the creation of the shadow sections, there is likewise no dispute on the second step, that Professor Levin's expression of his controversial views was not merely a "substantial" or "motivating" factor, it was the only factor.

Under the *Mt. Healthy* analysis, the burden then shifted at trial to defendants to show that their complained-of actions would have been taken without the protected conduct. This they did not do and could not have done, because the only justification for two of the actions complained of (the Committee investigation of Professor Levin's public statements and the shadow sections)

was premised upon the protected expression: the supposed necessity to protect Professor Levin's students from the claimed harm they might suffer if they thought, because of the expression of his views, that he might expect less of them or grade them unfairly. As we have already observed, the defendants adduced no evidence to support this justification at trial.

Committee chairman Roellig admitted freely that the Committee had neither sought nor obtained any evidence whatsoever to support the three key findings of fact [These are: (1) "statements denigrating the intellectual capability of groups by virtue of race, ethnicity or gender, have the clear potential to undermine the learning environment and to place students in academic jeopardy," DX V; (2) "a teacher's low expectations frequently have a negative effect on student performance," (id.); and (3) "the statements by Prof. Levin alleging the intellectual inferiority of blacks does in our view clearly have the potential to harm the process of education in his classes as discussed above" (id.).] it made about the purportedly harmful impact of Professor Levin's published views on his students. Instead he was reduced to claiming those findings of fact were "self-evident," Tr. 82, and referring vaguely to "perception," his experience with his own children, "various journals" and the *New York Times* magazine section. *Id.*

Specifically, Professor Roellig conceded that the Committee did not review the case of a single student, Tr. 90; did not examine the grades of any of Professor Levin's students, Tr. 89; did not gather any data or make inquiries of the students in the shadow sections, Tr. 91; did not do any analysis of the record or question any student or faculty member, Tr. 93; did not permit communication with persons who sought to address it on the subject of its inquiry, Tr. 93-94; did not solicit the assistance of any experts on pedagogy, Tr. 94. Furthermore, no members had ever taught or received advanced academic training in Professor Levin's field, philosophy, Tr. 95. Far from receiving evidence of any improper treatment of Professor Levin's students, the Committee was aware of Dean Sherwin's statement that he "was aware of no evidence suggesting that Professor Levin's views on controversial matters have compromised his performance as an able teacher of philosophy who is fair in his treatment of students," PX 10, and found nothing to contradict that evaluation. Tr. 85....

...Other courts applying *Mt. Healthy* in the education context have been equally as stringent, even where the improper sanction falls short of dismissal....

It is, therefore, clear that Professor Levin has prevailed on his First Amendment claim.

C. Professor Levin Was Improperly Deprived of Fourteenth Amendment Liberty and Property Interests....

...This case illuminates the fact, recognized by the Supreme Court, that tenure is more than the right to receive a paycheck. Academic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead, the freedom to inquire, to study and to evaluate without the deadening limits of orthodoxy or the corrosive atmosphere of suspicion and distrust warned against in *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957).

Here Professor Levin has been stigmatized in a setting where, as the City College Faculty Senate has recognized, his academic freedom has been infringed by administrative interference with his expression of ideas and his class assignments. PX 27. He has been deprived of the freedom to which he is entitled to write and to speak in the areas of his scholarly interest. He is currently deterred from seeking outside grants to fund research on his "controversial" topic of interest because his grant applications must be reviewed by the defendants in this action. Tr. 67-68. He is currently inhibited from discussing "controversial" topics with his own students, even if they raise them and even if the topics are pedagogically appropriate, because of the threat to his career. Tr. 373-374.

It is, therefore, clear that Professor Levin has prevailed on his Fourteenth Amendment claim.