

## **Protecting Faculty Jobs, and Academic Freedom and Other Rights, in Tough Times A Conversation with Attorney Frank Hill**

These are tough times for Texas faculty. Proposals now before the Texas Legislature threaten to reduce further tenure protections, extend state control over what faculty teach and research, and weaken faculty senates. In the face of threats to long-standing faculty rights, TFA asked employment attorney Frank Hill for advice on how to protect our rights, such as our right to Academic Freedom, and our jobs.

Mr. Hill is managing director of the law firm Hill Gilstrap, P.C. He began his career as a civil rights lawyer in the U.S. Department of Justice and has defended many Texas educators in court. This conversation features faculty questions from the First Higher Education Summit in September 2024 and monthly Zoom presentations organized by TFA.

### ***What are some examples of faculty speech that are protected under current law?***

Faculty do not give up their rights as citizens to free speech “at the schoolhouse gate” or by virtue of their public employment. A faculty member’s free speech includes the right to Academic Freedom in the classroom and in discussing institutional business as professors, and their right to speak on matters of public concern as citizens, provided their interest in exercising their right to free speech is not outweighed by the public university/college’s interest in running an efficient institution. For example, as a faculty member at a public institution of higher education, you have the right to criticize bad administrative practices to your departmental colleagues or supervisors, to file grievances, to report violations of accreditation principles to SACSCOC, to report incidences of discrimination to the EEOC, to speak before your Board of Trustees or Board of Regents as a private citizen, to speak before the state Legislature as a private citizen, to truthfully report infringement on faculty rights to the press, and to post your opinions about academic and other matters of public concern on your own social media platforms.

### ***Can my institution compel me to require specific materials in my syllabi, lesson plans, or other course materials?***

Private colleges and universities can. However, public institutions cannot infringe on the Academic Freedom of faculty. The institution can require that certain boiler plate passages are included in all syllabi, such as institutional statements of the Student Code of Conduct, Disability Services, etc., and can require that state-approved Student Learning Outcomes for the course are included in the syllabus of all professors teaching that course. The institution cannot compel the professor to change how they grade or teach those learning outcomes (or how those grading and teaching methods are described in the syllabus), as that would be an infringement on Academic Freedom, which is a special concern of the Free Speech clause of the 1st amendment of the U.S. Constitution. There is little case law on this issue, but test cases are likely coming soon. In many cases the government, including public universities, has a legal right to tell employees what to do at work.

***What's your advice for faculty organizers who want to avoid negative attention or threats from administrators or anti-faculty groups?***

Follow your heart, be brave, and be careful. Faculty have the right to free association, free speech, and the right to petition a governing body under the 1st amendment of the U.S. Constitution. This includes a faculty member's right to join and be active in faculty unions that do not claim the right to strike. Texas law also prohibits a public institution from interfering with an employee's right to join a labor organization (union) that does not claim the right to strike. That law also prevents the institution from requiring that an employee join a particular labor organization, prevents the institution from entering into any contracts or collective bargaining with a labor organization, and prevents the institution from favoring one labor organization over another. Colleges and universities also have rights under Texas law, including the right to regulate university/college processes, so it is wise to conduct union activities off campus and outside regular working hours, and best to communicate using personal email and non-university/college phones, software, computers, and internet service.

***Do faculty members at community colleges have the same rights as those at four-year institutions?***

All faculty have the same rights as citizens from a legal perspective. However, universities within the University of Texas (UT), Texas State University (TSU), and Texas A&M University (A&M) systems are considered to be arms of the Texas state government, which means they have sovereign immunity under the 11th amendment of the U.S. Constitution to most monetary claims for violation of state statutes and even for violation of rights under the U.S. Constitution. There are a few state claims in which sovereign immunity is automatically waived, such as the Texas whistleblower law and the Texas Open Meetings Act (TOMA). However, individual persons, such as individual administrators, can be held personally financially liable for violating a faculty member's Constitutional rights as citizens, such as free speech (including Academic Freedom) or due process.

Public community colleges are considered to be "state actors," as opposed to arms of the state, and thus the community colleges cannot claim sovereign immunity, unlike the UT, TSU, and A&M universities. This actually makes it easier to recover damages in lawsuits against community colleges than it is in lawsuits against public universities. Community colleges, in addition to their individual administrators, can be held liable for knowingly violating faculty U.S. Constitutional rights, as well as state statutes.

All universities and colleges in Texas that receive federal funds can be held liable for violations of some federal laws, such as Title VII/IX. In the case of private colleges and universities, they aren't held to the same standards as public ones, and thus lawsuits against private universities and colleges rely heavily on violations the institution did of its own policies and procedures, or violations of federal laws, such as Title VII or the ADA.

***Why is it important to document interactions with administrators?***

It is important to try to think down the road for worst-case scenarios, such as a matter eventually ending up in court. In such cases, written and recorded interactions with administrators can become important evidence in court, or at least provide valuable information and insight for your attorney. If you are being targeted for a disciplinary inquiry or action, an administrator may try to get you on the phone or talk to you in the hallway to avoid documentation of the conversation. If you are at a public university or college, you have the right to have a representative, such as a designated union representative, colleague, or lawyer, present with you who can to speak on your behalf if you are presenting a complaint/grievance to a supervisor, or if you are being called into a disciplinary meeting against you. Texas is a one-party state, so both parties have the right to record any conversation they are within earshot of. It is always a good idea to follow-up any meeting you are called into with an email to the administrator documenting what the meeting was about and what was concluded. This could become valuable for an internal grievance hearing or an external legal battle down the road. Always document everything offline on your own personal computer and software. If you are ever put on leave or terminated, your access to your emails may be suddenly shut off.

In situations where a case leads you to seek legal remedies, your lawyer will likely greatly rely on the body of documentation (such as email threads) you have of your interactions with administrators. Not only will that documentation help to create a vital timeline of events, but can often reveal patterns of actionable claims, such as a claim of discrimination under Title VII, and often the body of evidence can reveal retaliatory acts by administrators for you having raised a claim of discrimination or exercising other rights. Such retaliation would be illegal and constitute an actionable claim.

If you are called into a potentially disciplinary meeting by an administrator, keep the administrator talking and write everything down because it may help you in the long run. Administrators will often try to get you to talk so they can use or twist your words against you, or in the institution's defense, in the future. You must always cooperate in an investigation, but you do not need to give more information than is asked. However, you can often get the talkative administrators to give clues as to what the motivation is behind their questions, which could become valuable in a legal proceeding.

Another thing to keep in mind regarding actionable claims is that timing is important. Many legal claims have short statutes of limitations (for example, the statute of limitations for a claim under the state whistleblower law may be as short as 30 days, while claims for Constitutional violations are two years; a breach of contract claim is 4 years). It is important to not wait too long to seek legal advice if you feel your rights have been infringed. Waiting too long to take action could affect your ability to take legal action.

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