

# Holding Conversations Around Race: Overview of Legal Parameters

LIEBERT CASSIDY WHITMORE

## HARASSMENT *VERSUS* FREE SPEECH—AN OVERVIEW

### ➤ Political speech is highly protected.

- “The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high.” *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010), See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).
- “There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010), quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001); see also *United States v. Stevens*, 559 U.S. 460 (2010).

### ➤ Speech that rises to the level of harassment based on protected status is not protected speech.

- Public employees are entitled to be free from purposeful workplace harassment on the basis of protected status. *Alaska v. EEOC*, 564 F.3d 1062, 1069 (9th Cir.2009) (*en banc*); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir.1994); *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 707 (9th Cir. 2010).
- Employers who become aware of workplace harassment are required to take reasonable steps to make it stop.

### ➤ When does speech become misconduct or harassment?

- Each complaint should be carefully reviewed to determine whether the speech meets the threshold of harassment, and whether the district or college should intervene.
- Warning: objections to speech based on the speaker’s point of view cannot lawfully be silenced on the basis that the ideas it promotes are thought to be offensive. *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969); *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596–97 (5th Cir. 1995). *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010)

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Leading Racial Equity Conversations on Campus: Promoting Meaningful Conversations ... While Simultaneously  
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## TIPS FOR NAVIGATING CLAIMS OF HARASSMENT & FREE SPEECH

### EVALUATE, INVESTIGATE, RESPOND

- **Evaluate speech on a case-by-case basis.** Consider factors, including but not limited to:
  - Is an individual being targeted? Is a person named?
  - Is there a direct threat of harm?
  - Did the complainant/recipient initiate a discussion or otherwise indicate desire to communicate on the topic?
  - Is the complainant offended by the speaker's *point of view*?
  - Has the speaker been informed that the recipient does not want to be engaged by the speaker?
  - Is the speech occurring inside or outside the workplace? Does it involve use of District technology? Is it impacting the workplace?
  - Is the speech persistent and pervasive?
  - Does the speech deprive the recipient access, benefits or opportunities?
  - Does the speech violate some other viewpoint neutral computer use policy?
- **Determine what level of investigation is required.** Some speech may require internal review, whereas other instances may warrant external investigation or support. Consult with your legal counsel if you have questions.
- **Respond to the complainant.** If the district determines that the speech is not harassment, explain that. If an investigation commences, follow district processes, and respond properly and thoroughly. Consider that even where speech may not be suppressed or disciplined, remedies may be appropriate such as training, access to EAP or other services, or schedule modifications.

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## LEGAL PRINCIPLES OF THE LIMITED PUBLIC FORUM—AN OVERVIEW

- **A district may convene a forum for limited and specific purposes.**
  - In a “limited forum,” a district may reserve discussion for certain groups or of certain topics. This may include both physical and virtual spaces, and other digital fora.
  - “A State establishing such a forum is not required to and does not allow persons to engage in every type of speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 98–99 (2001).
  
- **What speech may a district control in a limited public forum?**
  - Generally, reasonable time, place and manner restrictions are allowable if narrowly tailored to advance the purpose of the forum.
  - Content or subject matter restrictions are permissible if they preserves the purpose of that limited forum. In contrast, viewpoint discrimination is impermissible. “The restriction must not discriminate against speech based on viewpoint, . . . and must be reasonable in light of the forum's purpose.” *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99, 121 S. Ct. 2093, 2096, 150 L. Ed. 2d 151 (2001).
  - Once opened however, a district must not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum” . . . nor may it discriminate against speech on the basis of view point.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829(1995); see also *Seattle Mideast Awareness Campaign v. King Cty* 781 F.3d 489, 496 (9th Cir. 2015.)

## TIPS FOR NAVIGATING PUBLIC FORA

- Be transparent with participants about institutional purpose/goals of the forum.
- Make clear the subject matter restrictions of the forum.
- Establish view-point neutral protocol.

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## DISTRICT SPEECH, MISSION AND VALUES—AN OVERVIEW

- **Community college districts need not be content-neutral themselves.**
  - While government agencies must be neutral in their regulation of speech, they may convey their own viewpoints that express positions on controversial issues.
  - Districts have missions and values that may run counter to viewpoints of speakers on their campuses. A district may express its viewpoints, even if the beliefs are in conflict with the speech of others. This includes expressing a District's commitment to diversity, inclusion, and equity; recognition of institutionalized racism; and support for purposeful activities to unlearn racism.
  - Vocal opposition by districts to racist or offensive speech is permissible, and may help insulate a district from hostile work environment claim.



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