



August 4, 2017

Mark J. Fleming, J.D.
University Counsel
Montclair State University
229 College Hall
Montclair, New Jersey 07043

Sent via Electronic Mail (flemingm@mail.montclair.edu)

Dear Mr. Fleming:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned for the state of freedom of expression and academic freedom at Montclair State University (MSU) following its termination of Kevin Allred, an adjunct instructor in Montclair's Gender, Sexuality, and Women's Studies program, as a result of Allred's tweets expressing hope that President Trump would be assassinated. While caustic, Allred tweets are protected by the First Amendment and cannot be the basis for his termination. Further, MSU's claim that it did not terminate Allred because it never hired him in the first place is belied by substantial evidence to the contrary. MSU must reverse its unwise and unconstitutional mistake immediately.

I. FACTS

The following is our understanding of the facts. Please inform us if you believe we are in error.

i. Montclair State Hires Allred

Kevin Allred first inquired about an adjunct position at Montclair in January of 2017. Dr. Julie Farnum, then-Director of Montclair's Gender, Sexuality, and Women's Studies Program, told Allred via email that she "could use someone to teach another section of WMGS 102," an introductory course in Women's and Gender Studies, in the fall semester.

On January 30, Farnum told Allred that she would “put [Allred] in for [the course on Wednesday] nights 5:30 – 8:00 pm,” explaining the hiring process that would later play out:

There is an official hiring process that will be done in late Spring or early Summer where you will have to have official transcripts of your degrees (undergrad and grad) mailed to the university, you will have to come to Human Resources in person to fill out the I9 and tax information, and you will need to have two letters of recommendation emailed to me. I will send you more details on that as we get closer to doing the adjunct hires for Fall.

On January 31, Farnum, responding to an inquiry from Allred concerning the rate of pay, shared with Allred “the pay scale negotiated by our Adjunct Union” and identified both the amount per credit and the number of credit hours that Allred would receive.

On May 9, Farnum reiterated via email that Allred would be teaching at MSU in the coming fall semester: “I have you down for teaching WGMS 102 at Montclair State in Fall 2017.”

On May 17, Allred emailed Farnum to select the dates and times for his courses. He also asked whether Farnum “needed anything from me to finalize things for fall” or if he needed to “sign anything.” Farnum responded the same day, explaining that she “will put [Allred] down for” the dates and times selected and that there would be “some paperwork” to complete the process, which would be coordinated by the program assistant.

On June 2, Cherlyn Sayles, a program assistant in the Gender, Sexuality, and Women’s Studies program, emailed Allred to complete the paperwork for his employment, just as Farnum told Allred in January. Sayles’ email identified “the documents that we need to complete your hiring for Fall.”¹ These included the federal and state W4 forms, as well as a pension questionnaire requiring that Allred provide the “Employee Name” and “Employee Signature.” On June 5, Allred emailed Sayles noting that he was “working on all the new hire paperwork,” but needed a new form to provide his direct deposit information.

Allred was also directed to visit MSU’s Human Resources office in person to fill out Form I-9, which establishes an employee’s eligibility for employment. That form requires an “employee” to present an “employer” with documents establishing her or his identity, requires the employer to identify the “first day of employment” and requires signatures of both “employer” and “employee.” Federal regulations require employers to “ensure that the employee “[c]ompletes . . . Form I-9 at the time of hire[.]”² Additionally, the Department of Homeland Security cautions that where the parties anticipate a future start date in connection with Form I-9, a “prospective employee MUST have accepted an employment

¹ These documents are among those provided on the Montclair Human Resources website, on the pages dedicated to “New Employee[s].” *New Employee*, MONTCLAIR STATE UNIV., <http://www.montclair.edu/human-resources/employment/new-employee/get-started/> (last visited August 3, 2017).

² Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2(b)(1)(i).

offer before you may complete Form I-9[.]”³ Allred completed the form on June 28 and was provided with a receipt.

On June 19, Dr. Fawzia Afzal-Khan emailed Allred to introduce herself:

I’m the current director of the Gender, Sexuality and Women’s Studies Program at MSU and wanted to introduce myself as I know you’ve been hired to teach some of our courses starting this fall.

On June 28, Allred traveled to Montclair and met with Afzal-Khan. The following day, Afzal-Khan emailed Allred noting her “high hopes for your courses and having you be part of our program.” Afzal-Khan indicated that the relationship would extend beyond the fall term, inviting Allred to teach, during the spring semester, a course he developed that uses the career and work of Beyoncé as a means to explore gender, race, class, and sexual politics: “If you could send me a syllabus for your Beyoncé course, and its title, I can put it in as our Special Topics course for next spring” on Wednesday evenings between 5:30 and 8:00.⁴

On July 6, Sayles emailed Allred and asked him to “provide me, as soon as possible, with a copy of the syllabus for the . . . course you will be teaching in the Fall[.]”

On July 10, Allred emailed Afzal-Khan with a copy of his biography, along with a photograph of himself, for the MSU website. Allred also shared with Afzal-Khan copies of “the syllabi for the two courses you requested.” Allred added that he was “excited . . . to be part of Montclair’s program” and “very excited to be on board and teaching in the program[.]” Afzal-Khan responded that she would “forward to our web manager” or to Sayles in order to ensure that the photograph and bio were uploaded to the MSU website.

On July 11, Afzal-Khan informed Allred of a “mandatory” fall meeting on September 13, where “we can talk about pressing issues-- and faculty can meet.”

Allred’s biography and photograph were uploaded to MSU’s website, which stated that Allred was “excited to be a new adjunct instructor” at MSU and that he would be teaching the WMGS 102 and GLQS 100 courses. Allred was also provided a montclair.edu email address (allredk@montclair.edu) and added to the faculty and student listservs.

³ *Hire Date*, USCIS, available at <https://www.uscis.gov/e-verify/about-program/e-verify-enhancements/hire-date> (last visited August 3, 2017).

⁴ That Allred’s employment would continue into the spring semester was not the errant suggestion of one wayward director. On May 9, Farnum also explained that in addition to having Allred teaching during the fall term, Farnum was also working on the Spring 2018 schedule and “wanted to know if you would also like to teach during that term.” By June 2, Farnum had scheduled Allred to teach “two sections of the Intro to Women and Gender Studies for Spring 2018,” and inquired as to whether Allred would also be interested in teaching a higher-level course on Queer Theory in the spring semester.

ii. Allred's Tweets Are Assailed in the Media

Allred maintains a personal Twitter account, @KevinAllred, which he uses to discuss current political events. The account does not identify an affiliation with any particular institution and links to his personal website. His tweets immediately following the November election caused controversy, but did not stray into any category of speech unprotected by the First Amendment.⁵

On July 28, 2017, Allred tweeted via his personal Twitter account:

Trump is a fucking joke. this is all a sham. i wish someone would just shoot him outright.

Allred also tweeted the word “mood:” followed by a controversial photograph of comedian Kathy Griffin holding a faux bloody mask depicting the head of President Donald Trump. Ahead of that evening’s Senate vote on a controversial healthcare bill, Allred tweeted a similar sentiment concerning Senator John McCain, recently diagnosed with brain cancer:

you better believe i will wish death on John McCain if he votes yes on this bullshit bill after all that meaningless speechifying. (and i can't wait til Campus Reform writes yet ANOTHER article about how mean i am to John McCain.)

This tweet referenced an article by the conservative *Campus Reform* criticizing professors at various institutions for using Twitter “to once again trash” Senator McCain following an “inspiring speech.”⁶ The article included Allred’s tweet criticizing McCain for “eagerly voting to take away insurance from millions.”

Allred’s tweets received substantial coverage from conservative media outlets beyond *Campus Reform*, including *Fox News*,⁷ *The Washington Times*,⁸ *Breitbart*,⁹ and *The College Fix*.¹⁰

⁵ Adam Steinbaugh, *Rutgers Professor Detained and Suspended Following Post-Election Tweets and Comments*, FIRE, Nov. 22, 2016, <https://www.thefire.org/rutgers-professor-detained-and-suspended-following-post-election-tweets-and-comments/>.

⁶ Anthony Gockowski, *Profs heap even MORE vitriol on McCain after health care vote*, CAMPUS REFORM, July 26, 2017, <http://www.campusreform.org/?ID=9495>.

⁷ *Professor Who Taught 'Beyonce' Classes Calls for Someone to 'Shoot' Trump*, FOX NEWS INSIDER, July 31, 2017, <http://insider.foxnews.com/2017/07/31/professor-calls-trump-be-shot-kevin-allred-montclair-rutgers-beyonce>.

⁸ Bradford Richardson, *Women's studies professor wants Trump shot*, THE WASHINGTON TIMES, July 31, 2017, <http://www.washingtontimes.com/news/2017/jul/31/kevin-allred-womens-studies-professor-wants-donald/>.

⁹ Tom Ciccotta, *College Professor: 'I Wish Someone Would Just Shoot' Donald Trump*, BREITBART NEWS, Aug. 1, 2017, <http://www.breitbart.com/tech/2017/08/01/college-professor-i-wish-someone-would-just-shoot-donald-trump/>.

¹⁰ Michael Jones, *Women's studies scholar says of Trump: 'I wish someone would just shoot him outright'*, THE COLLEGE FIX, July 31, 2017, <https://www.thecollegefix.com/post/35045/>.

iii. Responding to Allred's Tweets, Montclair Terminates Allred's "Potential" Employment

On July 31 at 1:11 P.M., Allred emailed Afzal-Khan to warn her that media outlets “are trying to push a narrative about me and publishing stories to rile up Trump’s base.” Allred explained that media outlets were “claiming I’ve directly threatened the president now, which isn’t true at all.”

At 6:44 P.M., Dean Robert Friedman emailed Allred:

This is in response to your e-mail earlier today to Fawzia Afzal-Khan regarding your potential employment as an adjunct professor at Montclair State. Please be advised that the University will not be extending you a formal offer of employment as an Adjunct Professor. Thank you for your interest in the position.

In response to media inquiries, MSU took the position that Allred “has never been an employee of Montclair State University, is not one at this time, and the university has not made any formal offer of employment to him.”¹¹ When questioned about Allred’s biography being posted on MSU’s website, MSU claimed that “[p]osting Mr. Allred’s information to our website was an error made by a University employee,” and that “[w]e were made aware of the error and corrected it.”¹²

II. ANALYSIS

Montclair State University’s position that it had not hired Allred lacks credibility. Accordingly, Montclair’s termination of Allred is inconsistent with the university’s obligations under the First Amendment, which protects offensive expression, including—as the Supreme Court has directly held—expressions of mere “hope” that someone might assassinate the president.

i. After Telling Allred That He Was “Hired” and Holding Him Out As A Member of its Faculty, Montclair Cannot Now Claim that Allred Was Never Hired

Montclair State University contends that it never employed Allred. All available evidence stands firmly to the contrary.

¹¹ Eric Kiefer, *MSU: Lecturer Who Allegedly Made ‘Shoot Trump’ Tweet Never Worked There*, PATCH, Aug. 1, 2017, <https://patch.com/new-jersey/newarknj/msu-lecturer-who-allegedly-made-shoot-trump-tweet-never-worked-here>.

¹² Terence Cullen, *Ex-Rutgers professor claims Montclair State fired him after he tweeted about a Trump assassination*, DAILY NEWS, Aug. 2, 2017, <http://www.nydailynews.com/news/national/professor-claims-university-fired-wishing-trump-shot-article-1.3378326>.

Over the course of seven months, two directors of MSU's Gender, Sexuality, and Women's Studies program worked with Allred to determine which classes he would teach, the times and dates they would be scheduled, and how much Allred would be paid for his efforts. MSU solicited syllabi from Allred for the courses he was to teach and asked him which books should be ordered and made available in the student bookstore for his classes.

MSU was itself sufficiently satisfied that its employment of Allred was a *fait accompli* that it published a biography of Allred, holding Allred out to the public as a MSU lecturer and identifying the specific courses Allred would teach. This was the result of action by multiple employees, contrary to MSU's claim that it was the result a mistake made by "a University employee."

In addition to that "mistake," MSU also provided Allred with an official email address, added him to the faculty listserv, asked him to provide identification documents required of new hires, asked him to provide his bank account information in order to receive payment, and informed him of the mandatory faculty meeting. None of this is consistent with merely prospective employment, nor can it be explained as an isolated "mistake."

If these indicia of employment were not alone sufficient, Montclair's *express* promises are conclusive. For example, Director Afzal-Khan told Allred—in writing—that "you've been hired to teach some of our courses starting this fall." Further, when Allred asked Farnum what the process would be, Farnum described the "official hiring process" as beginning in "early summer" and consisting of "paperwork" that would be provided to him by a program assistant. That "official" process played out as described: In June, Allred was given the paperwork by a program assistant and completed it.

How can this "official" process be squared with MSU's late-blooming claim that it had not made a "formal" offer of employment? Montclair held Allred out as an employee, told him he was an employee, provided him with official resources reserved for employees, and asked him to begin work on specific courses he was to teach. The claim that Allred was "never" employed by MSU is dubious, at best.

ii. Even If Allred Were Not "Formally" Hired, He Had A Reasonable Expectation of Government Benefits

Even assuming Montclair's premise were correct, the lack of a "formal" employment offer would not defeat the creation of a property interest in employment. "Legitimate and reasonable reliance on a promise from the state can be the source of property rights under the Due Process Clause and the civil rights statutes." *Vail v. Bd. of Educ. of Paris Union Sch. Dist. No. 95*, 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd*, 466 U.S. 377 (1984). Even where a prospective employee is aware of formal requirements that would bar him from eligibility for the position, conduct by officials of a public university contrary to that policy may "vest in [the employee] a cognizable property interest in the form of a reasonable expectation of future and continued employment." *Soni v. Bd. of Trustees of Univ. of Tenn.*, 513 F.2d 347, 350 (6th Cir. 1975).

Here, Allred inquired as to what steps, if any, were necessary to complete his employment, was informed of the “official” process by a director ostensibly knowledgeable of the university’s hiring processes, complied with that process, and began preparing his course material. Even in the absence of a “formal” employment contract, Montclair’s conduct has established an abundantly reasonable expectation of employment and, as a result, Montclair must act in accordance with the Constitution before depriving Allred of that interest.

iii. Allred’s Tweets Are Protected by the First Amendment

Allred’s tweets are unequivocally protected by the First Amendment—they amount to neither “true threats” nor incitement under the exacting standards established by decades of U.S. Supreme Court precedent. Moreover, the Supreme Court has expressly held that expressions of mere *hope* that a president is assassinated are political speech immune from government regulation. Nor is there any doubt that MSU’s about-face was the result of Allred’s tweets, as Dean Friedman’s email withdrawing Allred’s “potential” employment was expressly “in response to” Allred’s email alerting MSU to the controversy.

It has long been settled law that the First Amendment is binding on public colleges like MSU. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

The law is also well-established that employees of government institutions like MSU retain a First Amendment right to speak as private citizens on matters of public concern and may not be disciplined or retaliated against for their constitutionally protected expression unless the government employer demonstrates that the expression hindered “the effective and efficient fulfillment of its responsibilities to the public.” *Connick v. Myers*, 461 U.S. 138, 150 (1983). These protections extend to untenured faculty members. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]his Court has specifically held that the nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights We reaffirm those holdings here.”) (internal citations omitted).

Certain well-defined categories of speech are excluded from the protection of the First Amendment, including “true threats” and speech intended to, and likely to cause, imminent unlawful conduct. Allred’s tweets do not fall into either category. Political speech is accorded the highest protection under the First Amendment, and our system grants considerable deference to even threatening language posed in a political context. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (“The language of the political arena . . . is often vituperative, abusive, and inexact. . . .”). Courts approach “with extreme care” claims that “highly charged political rhetoric lying at the core of the First Amendment” amounts to unlawful threats or incitement. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

In the United Kingdom, it was high treason to “imagine” the death of the sovereign King. *Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas, J., concurring). Under this law, citizens were convicted—and subsequently drawn and quartered—for joking about killing the king (said the “merry” innkeeper to his son, “Tom, if thou behavest thyself well, I will make thee heir to the CROWN”)¹³ and for hoping that the ruling elites would all kill one another off so that commoners “might live the better.” *Id.* at 709–10. As Justice William Douglas noted in his concurrence in *Watts*, the United States has chosen, through the First Amendment, to prohibit the government from using the “old, old device” of suppression of speech as a means of penalizing unpatriotic sentiment and expression. *Id.* at 712.

The First Amendment requires a far more exacting standard be met before a statement can be said to be an unlawful “true threat.” A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

There is no exception to the First Amendment for speech about presidents. To the contrary, the Supreme Court has repeatedly held that while true threats may be punished, rhetorical hyperbole remains protected political speech. In *Rankin v. McPherson*, for example, the Supreme Court was confronted with the comment by a police department employee who, upon hearing a news report that President Reagan had been shot, criticized Reagan’s welfare policies and said, “shoot, if they go for him again, I hope they get him.” 483 U.S. 378, 381 (1987). The Supreme Court observed:

While a statement that amounted to a threat to kill the President would not be protected by the First Amendment . . . McPherson’s statement did not amount to a threat . . . that could properly be criminalized at all. *See [McPherson v. Rankin]*, 786 F. 2d 1233, 1235 (5th Cir. 1986)] (“A state would . . . face considerable constitutional obstacles if it sought to criminalized the words that were uttered by McPherson on the day the President was shot”); . . . The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Rankin at 386–87.

Likewise, in *Watts*, an investigator for the Army Counter Intelligence Corps heard the defendant remark:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I

¹³ Compounding the travesty, the innkeeper wasn’t even referencing the monarch: “CROWN” was the name of the inn. JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND: FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD TENTTERDEN* 147 (1858).

want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers.

Watts, 394 U.S. at 706. The Supreme Court held the speech remained protected by the First Amendment because it did not amount to a true threat. The Court acknowledged that the government “undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.” *Id.* at 707. However, the Court warned that “[w]hat is a threat must be distinguished from what is constitutionally protected speech,” including “political hyperbole” like that “indulged” in by the speaker, because of the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 707–08. Thus, the defendant’s “very crude offensive method of stating a political opposition to the President” did not amount to a true threat, and remained protected speech. *Id.* at 708.

Allred’s tweets are not true threats and are protected by the First Amendment. Unlike even the statement in *Watts*, Allred’s tweets did not purport to announce an intent to take any action at all. Rather, he expressed his mere *hope* that harm might come to Trump. Wishing ill upon another is a far cry from communicating a serious intent to cause that ill, or from asking another person to cause the ill. Indeed, Allred’s tweet is nearly identical to the *McPherson* statement expressing hope that harm might come to the president.

Nor do Allred’s tweets—expressing hope that *someone* might assassinate Trump—amount to incitement unprotected by the First Amendment. “[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.” *Claiborne Hardware Co.*, 458 U.S. at 927 (emphasis in original). Rather, to punish speech as “incitement,” it must have been “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Additionally, where speech is “not directed to any person or group of persons” in particular, it cannot be said to be directed at commanding or urging any person to take action. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973). Allred’s tweets are not directed to any person in particular, nor do they ask his readers to undertake any specific action at all. Even if Allred did intend to incite his readers to assassinate the president, it is doubtful that any one of his handful of readers would be in a position to take “imminent” action in conformity with that intent. The First Amendment does not permit restrictions on speech on the basis that some theoretical person might someday act unlawfully.

Because Allred’s tweets do not amount to true threats or incitement, there is no basis to withdraw them from protection under the First Amendment. That Allred’s tweets offended a wide audience is insufficient. The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends. *See, e.g., Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670

(1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

Further, courts have rejected the argument that a college can discipline a faculty member because their expression aroused anger, alarm, or concern. Rejecting a college’s argument that intervention by a local civil rights activist after an adjunct instructor used gendered and racial slurs as part of a classroom discussion posed an actionable risk of disruption to the school’s operations, the U.S. Court of Appeals for the Sixth Circuit adhered to the principles set forth in *Terminiello v. Chicago*, 337 U.S. 1 (1949), explaining:

Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy’s lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with “avoiding the discomfort and unpleasantness that always accompany” a controversial subject. On balance, Hardy’s rights to free speech and academic freedom outweigh the College’s interest in limiting that speech.

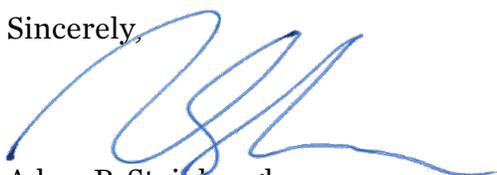
Hardy v. Jefferson Comm. Coll., 260 F.3d 671, 682 (6th Cir. 2001) (internal citation omitted).

III. CONCLUSION

Allred’s tweets are unequivocally protected by the First Amendment, particularly in light of the Supreme Court’s observations in *McPherson*. A public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Montclair State University must reverse its termination of Kevin Allred immediately, and make clear to the campus community that faculty members will not face administrative retaliation for engaging in constitutionally protected expression.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. We request a response to this letter by August 18, 2017.

Sincerely,



Adam B. Steinbaugh
Senior Program Officer, Individual Rights Defense Program

Cc: Susan A. Cole, Ph.D., President