FIRE
Foundation for Individual Rights and Expression

July 13, 2023

Llatetra Brown Esters
Dean of Students
University of Baltimore
1420 North Charles Street
Baltimore, Maryland 21201

URGENT

Sent via U.S. Mail and Electronic Mail (lesters@ubalt.edu)

Dear Dean Esters:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by the University of Baltimore's investigation and reprimand of student Makeba Dower for posts in a class discussion forum. While some students took offense to Dower's comments, and one filed a complaint against her, that is not a legitimate basis for initiating an investigation or disciplining a student at a public university bound by the First Amendment. UB therefore must rescind its reprimand of Dower immediately and revise its discriminatory harassment policy, which relies on an unconstitutionally overbroad definition of discriminatory harassment.

I. UB Punishes Dower for Online Class Discussion Posts

On September 11, 2022, when Dower was a student in Professor Betsy Yarrison's Archaeology of Language course—a large component of which was online interaction between class sessions—a discussion about names and gender occurred in the class forum,[2] during which Dower referred to transgender persons as "transformers" and transwomen as a "transformative simile sub-category" of women, distinguished natal females from transwomen, and expressed a dislike of the term "cisgender."[3] In response, classmates accused Dower of transphobia and asked her to stop using discriminatory language, with Joshua Cole,

[1] For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

[2] Interview Summary – B. Yarrison, Oct. 25, 2022 (on file with author). The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

[3] Letter from Llatetra Brown Esters to Joshua Cole, Dec. 15, 2022, at 3 (on file with author).

a transman in the class, saying he would submit a formal complaint about Dower's comments and urging others to do the same.[4] Dower expressed disappointment that no one was considering her feelings or trying to understand her argument.[5]

Dower emailed Yarrison to apologize for her posts, explaining that the views she expressed did not reflect her real views, but she had instead adopted a role as "aggressive poster" to test whether the forum would indeed be a civil and safe space to discuss controversial topics.[6] Dower asked Yarrison if she could use the first few minutes of the next class to explain herself to her classmates because "I don't want to leave the impression of being a bigot. They might feel uncomfortable working with me if I left that impression."[7] Cole also contacted Yarrison before the next class to request that she remove Dower's "offensive" posts from the forum, but Yarrison declined, citing free speech.[8]

On September 14, class began with Cole presenting a prepared statement about the conversation on the class discussion board.[9] According to Yarrison, Cole's statement was a direct personal attack on Dower.[10] Dower then spoke to the class and explained that her posts were an experiment to test whether sensitive conversations could indeed take place.

On September 15, Cole filed the promised complaint with your office against Dower for her classroom discussion posts, leading to your September 22 interview with him about the incident during which he reiterated a desire to pursue a formal complaint against Dower.[11]

Over the course of October and November, you investigated Cole's complaint, conducting interviews with Dower, Yarrison, and another student in the class, Meriah Welch.[12] You ultimately found Dower "responsible" under UB policy for the use of "discriminatory language" that assertedly "led to the creation of a hostile environment," and on that basis issued her a reprimand.[13]

---

[4] *Id.*

[5] *Id.*

[6] Email from Makeba Dower to Betsy Yarrison, (Sept. 14, 2022, 12:49 AM) (on file with author).

[7] Email from Dower to Yarrison, (Sept. 14, 2022, 3:16 AM) (on file with author).

[8] Interview Summary – B. Yarrison, *supra* n. 2 at 1.

[9] *Id.*

[10] *Id.*

[11] Letter from Esters to Cole, *supra* note 3, at 1.

[12] Email from Llatetra Esters to Dower, (Oct. 21, 2022, 10:43 AM) (on file with author).

[13] Letter from Esters to Cole, *supra* note 3, at 5. On December 16, Dower appealed the reprimand. Email from Dower to Nicole Marano, (Dec. 16, 2022 8:54 AM) (on file with author). In parallel with the proceedings against her, Dowell filed a complaint against Cole, and later, an appeal of dismissal that complaint, as well as complaints against you and Cole based on the former's classroom speech and complaint against her, and on your imposition of the reprimand. While indicating that UB's punishment of Dower's speech remains unresolved, the progress of the complaints and/or appeal Dower filed is not directly relevant here.

II. The First Amendment Bars UB from Punishing or Investigating Dower for Her Class Discussion Posts

It has long been settled law that the First Amendment binds public universities like UB,[14] such that its actions and decisions—including pursuit of disciplinary sanctions,[15] investigations of students and faculty,[16] and maintenance of policies implicating student and faculty expression[17]—must respect constitutional limits. Relevant here, the Supreme Court has repeatedly, consistently, and clearly held government actors may not restrict speech on the basis that others find it to be offensive or even hateful.[18]

Courts have applied this principle to protect a parody ad depicting a pastor losing his virginity to his mother in an outhouse,[19] "racially-charged emails" to a college listserv,[20] and student organizations that the public viewed as "shocking and offensive."[21] In *Iota Xi Chapter of Sigma Chi v. George Mason University*, a federal appellate court held that even the "low grade entertainment" of a fraternity's "ugly woman contest" was protected speech, and the First Amendment precluded the university satisfying its obligation to protect female and minority students from sexism and racism by punishing speech based on the views expressed.[22]

To discipline students based on "offensive" views, therefore, constitutes unconstitutional viewpoint discrimination. This principle applies with particular strength to universities, dedicated to open debate and discussion. For a university to "cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life."[23] And if authorities could punish expression

---

[14] *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).

[15] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

[16] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

[17] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

[18] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (refusing to establish a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground"); *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding insulting signs outside of soldiers' funerals was protected by the First Amendment because "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[19] *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[20] *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member's use of system-wide listserv to send "racially-charged emails" was not unlawful harassment, as the First Amendment "embraces such a heated exchange of views," especially when they "concern sensitive topics like race, where the risk of conflict and insult is high").

[21] *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

[22] 993 F.2d 386, 388–92 (4th Cir. 1993).

[23] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

deemed hateful, it would imperil a broad range of political speech and academic inquiry, and such an exception would undoubtedly be used against those it would be intended to protect. For example, when the University of Michigan briefly enacted an unconstitutional prohibition against hate speech, it was almost universally used to punish students of color who offended white students.[24]

Likewise, even an investigation into constitutionally protected speech can itself violate the First Amendment, even if that investigation concludes in favor of the speaker. The question is not whether formal punishment is meted out, but whether the institution's actions in response "would chill or silence a person of ordinary firmness from future First Amendment activities[.]"[25] Investigations into protected expression may meet this standard because they can implicitly threaten discipline, creating a chilling effect cognizable as First Amendment harm.[26] In this case, it was possible to determine from the face of Cole's complaint that it concerned nothing more than protected speech. Further investigation of Dower was therefore inappropriate and risked unnecessarily chilling her future speech.

Note that Professor Yarrison correctly performed this threshold First Amendment analysis when Cole asked her to remove Dower's posts.

While the First Amendment precludes UB from punishing Dower's comments simply because others found the comments offensive, none of this shields Dower or her comments from criticism by students, faculty, or the broader community. The criticism Dower received from classmates in response to her comments is an example of that. Criticism is a form of "more speech," the remedy to offensive expression that the First Amendment prefers to censorship.[27] However, the First Amendment limits the *types* of consequences that may be imposed and who may impose them.

III. UB's Discriminatory Harassment Policy Violates the First Amendment

Nor may UB investigate or reprimand Dower on the asserted ground that her speech constituted discriminatory harassment, because it did not rise to the high standard for this narrow category of unprotected conduct. To the extent UB's discriminatory harassment policy, under which Dower was disciplined, encompasses more expression than the constitutional standard, it is overbroad and unconstitutional.

---

[24] "[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression." Thomas. A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 514 (1995) (citing Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 557–58 (1990)); *see also Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (invalidating the university's speech code as unconstitutional).

[25] *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

[26] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

[27] *Whitney v. California*, 274 U.S. 357, 377 (1927).

UB defines discriminatory harassment, in relevant part, as:

> verbal, physical, electronic, or other conduct based on an individual's Protected Status [that] interferes with that individual's educational or work environment, participation in a University program or activity, or receipt of legitimately requested services and when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance, i.e., it is sufficiently severe or pervasive to create a hostile working, academic, or social environment (commonly referred to as "Environmental Discriminatory Harassment").[28]

In *Davis v. Monroe County Board of Education*, the Supreme Court established a strict definition of student or peer harassment that requires expression to be unwelcome, discriminatory on the basis of gender or another protected status, and "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school."[29] The United States Department of Education's Office of Civil Rights has clarified that discriminatory harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."[30]

Dower's comments do not approach this high bar and thus cannot serve as a basis for any reprimand, because use of the words "transformer" or "transformative simile subcategory" in general reference to trans individuals, during a single online classroom discussion in a course about language, is not so severe, pervasive, and objectively offensive as to deprive anyone of educational opportunities or benefits UB provides (that she later apologized to the class does not necessarily change this analysis, but does reflect that offense was not intended). As some courts have held, a single instance of even "sufficiently severe one-on-one peer harassment" still cannot be "pervasive."[31] But even courts that recognize actionable harassment on the basis of a single instance do so only if it is "vile enough" or "severe sexual harassment,"[32] which the academic discussion of semantics here, not directed at any specific individual, clearly were not.

It appears, moreover, that UB's investigation of and resulting reprimand to Dower reflect that its discriminatory harassment policy falls short of the constitutional standard. The definition,

---

[28] I-2.6 Non-Discrimination Policy and Procedures – Complaints of Discrimination Against Students, UNIV. OF BALT., at 2, Nov. 18, 2020, https://www.ubalt.edu/policies/administrative/Non-Discrimination%20Policy%20and%20Procedures%20Student%20Respondents%2011.18.2020%20FINAL.pdf [https://perma.cc/G7A3-3GVB].

[29] 526 U.S. 629, 650 (1999).

[30] U.S. Dep't of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights (July 28, 2003), https://www2.ed.gov/about/offices/list/ocr/firstamend.html [https://perma.cc/9DCA-XMFD].

[31] *See, e.g., Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 620 (6th Cir. 2019); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist.* No. 14J, 208 F.3d 736, 740 (9th Cir. 2000).

[32] *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273–74 (4th Cir. 2021).

as block-quoted above, captures in relevant part, "conduct [with] the purpose or effect of unreasonably interfering with an individual's work or academic performance, i.e., it is sufficiently severe or pervasive to create a hostile working, academic, or social environment."[33] Yet the *Davis* standard requires not "severe or pervasive" conduct (including speech), but that which is severe *and* pervasive. And it does not encompass speech that merely "unreasonably interferes" with someone's education—it requires "effectively depriv[ing]" access to education opportunities at the school.[34] This is a meaningful distinction. Here, discussion in an online class forum of the use and etymology of particular terms related to gender and gender identity, which included one person mentioning and defending terms others found offensive "deprives" no one of an education.

While UB has an obligation to protect students and faculty from discriminatory harassment, including that on the basis of sex and gender, that does not license UB to investigate and discipline a student for her expression on the basis of any standard short of the high bar for actionable discriminatory harassment.

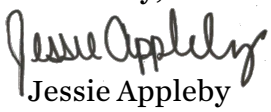
Again, when faced with a complaint like the one implicating Dower, UB must conduct a threshold analysis querying whether the alleged conduct could constitute alleged misconduct. If, as here, it is clear the complaint arises only from protected speech, UB's analysis must end there. The university can provide support to the complainant but must not notify a student accused of nothing more than exercising their First Amendment rights, as doing so will unconstitutionally chill campus speech.

IV. Conclusion

UB must immediately rescind Dower's reprimand for her comments in the class discussion forum. Dower's posts were wholly protected expression, and UB erred in first initiating an investigation and then issuing a reprimand based solely on her protected classroom speech. UB must also amend its non-discrimination policy because it relies on an unconstitutionally overbroad definition of discriminatory harassment, thus sanctioning discipline of student expression that falls well short of the constitutional standard in *Davis*.

We request a substantive response to this letter no later than the close of business on Thursday, July 27, 2023, confirming that UB will rescind Dower's reprimand and amend its non-discrimination policy.

Sincerely,



Jessie Appleby
Litigation Fellow

Encl.

---

[33] I-2.6 Non-Discrimination Policy and Procedures – Complaints of Discrimination Against Students, *supra* note 28, at 2.

[34] *Davis*, 526 U.S. at 650.

Authorization and Waiver for Release of Personal Information

I, Makeba Dower, born on 02/17/1992, do hereby authorize University of Baltimore (the "Institution") to release to the Foundation for Individual Rights and Expression ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights and Expression, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
8E9B483D512944F...

Student's Signature

6/29/2023

Date