



Foundation for Individual Rights in Education

210 West Washington Square, Suite 303 · Philadelphia, PA 19106

Tel: 215.717.3473 · Fax: 215.717.3440 · fire@thefire.org · www.thefire.org

David French
PRESIDENT

July 5, 2005

Greg Lukianoff
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

President Arnold Speert
Office of the President
Hobart Manor Room 114
William Paterson University
300 Pompton Road
Wayne, New Jersey 07470-2103

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URGENT

Re: Jihad Daniel

Sent by U.S. Mail and Facsimile (973-720-2399)

Dear President Speert:

As you can see from the list of our Directors and Board of Advisors, FIRE unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, and freedom of speech on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is gravely concerned about the threat to free speech, academic freedom, and due process posed by William Paterson University's reprimand of university employee and graduate student Jihad Daniel. FIRE understands that the university has found Mr. Daniel guilty of violating university nondiscrimination policy and state nondiscrimination and harassment law based on an e-mail he sent a professor expressing an opinion about homosexuality. FIRE further understands that Mr. Daniel was denied his right to a fair hearing prior to being sanctioned.

As a public institution, William Paterson has a duty to ensure that the constitutional rights of all its faculty, staff, and students are protected, and that no federal, state, local, or university rule, policy, or regulation trumps the exercise of rights guaranteed by the United States Constitution.

This is our understanding of the facts, based on e-mails and documents provided by Mr. Daniel. Jihad Daniel is a professional services specialist who has worked for William Paterson for about fifteen years and is currently also a student

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pursuing a master's degree in communications and media studies at the university. On March 7, 2005, Mr. Daniel received an e-mail announcement from Professor Arlene Holpp Scala about a viewing and discussion of the film *Ruth and Connie: Every Room in the House*, which the announcement described as "a lesbian relationship story." The email included a line that stated, "Please do not hit reply, click here: MAIL TO: ScalaA@wpunj.edu."

On March 8, Mr. Daniel responded to Professor Scala privately with the subject "Homosexuality" and requested that he not be sent "any mail about 'Connie and Sally' and 'Adam and Steve.'" Mr. Daniel further opined, "These are perversions. The absence of God in higher education brings on confusion. That is why in these classes the Creator of the heavens and the earth is never mentioned." (The e-mail is attached.)

On March 10, Professor Scala submitted a complaint to the university's Office of Employment Equity and Diversity, forwarding Mr. Daniel's e-mail and accusing him of violating university nondiscrimination policy because his message "sound[ed] threatening" to her. Professor Scala also wrote, "I don't want to feel threatened at my place of work when I send out announcements about events that address lesbian issues... I am not sure about what else should be done to censure him and make me feel that I am working in a safe environment."

Director of Employment Equity and Diversity John I. Sims subsequently proceeded to "investigate" the complaint by interviewing Mr. Daniel and Professor Scala, and by reviewing written statements and "other relevant evidence." The "other relevant evidence" was never presented to Mr. Daniel. In Mr. Daniel's March 24 e-mail response to the charges against him, he wrote, "I responded to the unsolicited email as a student and in conjunction with the tenets embodied in the three Abrahamic faiths, Judaism, Christianity and Islam. You cannot invite me to reply to something and then become offended because I do not respond the way you want me too." (*sic*) Mr. Daniel was not given a formal hearing to refute the charges as stipulated under the guidelines to the university's disciplinary process for employees (Part One, Section X), which appear to apply to student employees such as Mr. Daniel. Instead of being handled by a hearing officer, the matter appears to have been sent directly to the university president in what appears to constitute an unwritten disciplinary action in violation of Mr. Daniel's right to due process.

Your June 15 letter of reprimand, which summarized Sims' investigation, stated:

The investigator concluded that since the Merriam-Webster dictionary definition of 'perversion'...is clearly a 'derogatory or demeaning' term as it was used in your e-mail to refer to gay or lesbian individuals, that you violated the *Interim State of New Jersey Policy Prohibiting Discrimination, Harassment or Hostile Environment in the Workplace*.

In the same letter, you stated your agreement with the investigator's conclusion that Mr. Daniel's response violated university policies and "was not part of [his] university work responsibilities," and that the letter of reprimand would be placed in Mr. Daniel's permanent employee file.

Even in a workplace, it is ridiculous to conclude that a one-time e-mail constitutes unlawful discrimination and harassment. It is especially ridiculous to apply such a policy to a working student at an institution of higher education that has a special responsibility to ensure academic freedom. To base such a conclusion on a dictionary definition, no less, blatantly contradicts decades of Supreme Court decisions clarifying unlawful harassment and protecting freedom of expression. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993), *Hustler Magazine, Inc. et al. v. Jerry Falwell*, 485 U.S. 46 (1988), *Meritor v. Vinson*, 477 U.S. 57, 68 (1986), *Cohen v. California*, 403 U.S. 15 (1971).

A policy prohibiting "derogatory or demeaning" speech is both unconstitutional and unwise. For example, employees jokingly insulting one another over e-mail or professors casually saying other professor's ideas are crazy or stupid would constitute actionable harassment under such restrictions. Indeed, Professor Scala would be guilty of "harassment" under the same policy for sending an e-mail that may have been "demeaning" or "offensive" to other faculty, employees, and students such as Mr. Daniel. If Mr. Daniel had been the one filing a complaint that Professor Scala's e-mail "threatened" his religious beliefs, would William Paterson have taken action against her for violating state law against religious discrimination?

The university may not and should not punish Professor Scala, Mr. Daniel, or any other university student, faculty, or staff who engages in constitutionally protected speech. In fact, over the past few years the misinterpretation of federal harassment law by colleges and universities bent on chilling protected speech had become so rampant that on July 28, 2003, Assistant Secretary Gerald A. Reynolds of the U.S. Department of Education's Office for Civil Rights (OCR) issued an open letter (attached) to all college and university presidents in the United States that clarified the relationship between harassment law, federal regulations, and the First Amendment. Secretary Reynolds wrote:

[I]n addressing harassment allegations, OCR has recognized that **the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment** under the statutes enforced by OCR... Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. **Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.** [Emphasis added.]

The OCR letter also explains that in order to qualify as harassment under the law, the pattern of harassment "must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny

a student's ability to participate in or benefit from an educational program." William Paterson's actions against Mr. Daniel in this case make a mockery of federal law and dangerously trivialize real harassment.

To be clear, Mr. Daniel has indicated in his appeal letters that (1) he was speaking as a student in response to a public announcement from a professor about an issue of public concern; (2) his response was intended to express that he no longer wished to receive announcements about events supporting views that violate his religious beliefs; and (3) he believed he was invited to respond by the prominent "mail to" line included in the professor's announcement. In light of these factors, any argument that Mr. Daniel's e-mail in any way constituted harassment or violated university nondiscrimination policy is both morally and legally untenable.

Furthermore, Mr. Daniel appealed your decision in a June 23 e-mail asserting that his response to Professor Scala was protected by the First Amendment right to freedom of expression afforded all individuals on campus. In your June 24 response, you wrote, "Not every utterance is protected under the [F]irst [A]mendment. Whether the State's policy that prohibits 'derogatory and / or demeaning' comments is at odds with constitutional protections of free speech is beyond the scope of this finding." For any public university president to make this assertion is deeply alarming. William Paterson and its administrators cannot simply choose to ignore the First Amendment when it becomes inconvenient.

To announce university-sponsored events discussing a positive view of homosexuality and punish people who respond with dissenting social, religious, or political views constitutes unlawful viewpoint discrimination. Such double standards will not hold at a public institution such as William Paterson. As Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." The university's current actions against Mr. Daniel are inconsistent with the First Amendment and bring with it the specter of legal liability for each day during which it allows such a violation of its students' rights. You may object to Mr. Daniel's beliefs about homosexuality, but while you have every right to say so, you have no right to punish him for expressing his religious beliefs.

While FIRE would be happy to provide a more detailed elaboration of why Mr. Daniel's speech is not harassment and, rather, constitutes protected expression, we hope that this is not necessary. This is not a close call, and the denial of due process rights is simply outrageous. FIRE requests that William Paterson University immediately rescind all unfair and unlawful treatment of Mr. Daniel. We request that the university: (1) affirm that Mr. Daniel's opinions are fully protected under the First Amendment to the United States Constitution and that no device or contrivance will be used to circumvent his rights; (2) rescind the current sanction and remove any record of this incident from Mr. Daniel's file; and (3) guarantee that Mr. Daniel will endure no further

punishment or retaliation for the expression of his constitutionally protected opinions on this or any other issue.

FIRE hopes that we can resolve this situation thoroughly and swiftly; however, we are categorically committed to using all of our resources in support of Jihad Daniel's expressive rights and to seeing this process through to a just and moral conclusion. Please spare William Paterson University the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound.

Because of the ongoing violation of Mr. Daniel's basic rights, FIRE requests a response by 5 p.m. on Tuesday, July 12, 2005.

Sincerely,



Greg Lukianoff
Director of Legal and Public Advocacy

cc:

Chernoh M. Sesay, Provost and Executive Vice President, William Paterson University
John Martone, Associate Vice President and Dean of Student Development, William Paterson University

Marc Schaeffer, Executive Assistant to the President and Board of Trustees, William Paterson University

Ofelia Garcia, Dean, College of Arts and Communication, William Paterson University

Bruce Gulbranson, Associate Dean, College of Arts and Communication, William Paterson University

John I. Sims, Director, Office of Employment Equity and Diversity, William Paterson University

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Jihad Daniel

Encl.