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August 13, 2007

Ms. Tara Sweeney
Senior Program Officer
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510
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Re: Professor Richard Crandall

Dear Ms. Sweeney:

Lake Superior State University (LSSU) has asked us to respond to your letter to LSSU President Betty Youngblood, dated July 23, 2007, regarding LSSU Professor Richard Crandall. This firm represents LSSU in this matter. Please direct all future correspondence to us.

Richard Crandall is a professor in the Social Sciences Department of LSSU. As noted in your letter, in a February 14, 2005 memorandum, Bruce Harger, Vice President for Academic Affairs and Provost for LSSU, notified Professor Crandall that he had received complaints about material displayed on Professor Crandall's office door and surrounding wall, and about comments made by Professor Crandall during his lectures. The complaints involved, in essence, what the complainants felt were hateful and bigoted comments by Professor Crandall and materials placed on display by Professor Crandall in the area surrounding his office. In the memorandum, Vice President and Provost Harger reminded Professor Crandall of the following provision within the applicable Agreement governing Professor Crandall's employment with LSSU:

> 6.2. The faculty member is entitled to academic freedom in the classroom in discussing his or her subject, **but he or she should be careful not to introduce**

into his or her teaching controversial matter which has no relation to his or her subject.

6.3.1. The concept of freedom should be accompanied by an equally demanding concept of responsibility. The University teacher is a citizen, a member of a learned profession, and a representative of an educational institution, When he or she speaks or writes as a citizen, he or she shall be free from institutional censorship or discipline; **but his or her special position in the community imposes special obligations. As a person of learning and a representative of an educational institution, he or she should remember that the public may judge his or her profession and the institution by his or her utterances. Hence, he or she should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others,** and should take every effort to indicate that he or she is not acting as an institutional spokesperson.
[Emphasis added]

Vice President and Provost Harger concluded the memorandum by cautioning Professor Crandall to exercise restraint in his utterances and in his office displays and by reminding him to exercise his First Amendment rights in a responsible manner.

Thereafter, Vice President and Provost Harger received further complaints from students and others regarding additional comments and postings by Professor Crandall which were perceived by them to be demeaning and degrading toward minority groups such as people of Arabic descent and Muslims. In addition, Vice President and Provost Harger saw such postings in the area outside of Professor Crandall's office.

In March 2007, Vice President and Provost Harger was walking through the area of Professor Crandall's office when he saw some of the objectionable displays on the door and walls around Professor Crandall's office. He accordingly asked Professor Crandall to remove the objectionable material. Professor Crandall responded in an entirely unprofessional and insubordinate manner. After claiming to have removed the offensive material from his office door and wall area, Professor Crandall then threatened the University that he intended to return the material to the same area despite the instructions he had received from Vice President and Provost Harger to remove the material.

The cases cited by you in your letter of July 23, 2007, fail to support the position that Professor Crandall possesses an essentially unfettered right to post whatever material he chooses on the door and surrounding walls of his office at LSSU. A special standard applies to the ability of governmental employers to impose sanctions upon public employees based upon their speech, and that standard clearly dictates that LSSU has every right to require that Professor Crandall remove certain objectionable content from the door and walls around his office. That standard is expressly addressed in Connick v. Myers, 461 U.S. 138 (1982), under which this situation is properly analyzed.

In that case, District Attorney Connick decided to transfer Assistant District Attorney Myers to prosecute cases in a different section of the criminal court. Myers strongly opposed the transfer. Accordingly, Myers prepared and distributed a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Connick learned of this and promptly terminated Myers for refusing to accept the transfer and for committing an act of insubordination by distributing the questionnaire. Myers sued Connick, claiming inter alia that her discharge violated her First Amendment rights.

The Supreme Court held that such claims present two questions: (1) whether the employee's speech amounted to "speech on a matter of public concern," and (2) if it did, whether the State was nevertheless justified in terminating the employee.[1] As to the first question, the Court stated as follows:

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Id. at 146. Applying this standard, the Court concluded that "with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of 'public concern.'" Id. at 148. The "one exception" recognized by the Court was the question pertaining to whether assistant district attorneys felt pressured to work in political campaigns; this was "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." Id. at 148-49.

Since part of Myers' survey touched upon a matter of public concern, the Court turned to the second question of whether Connick was justified in discharging her. The Court deferred to the judgment of the employer:

> Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to

[1] Furthermore, the court must determine "the *point* of the speech in question . . . [because c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection." Dambrot v. Central Michigan University, 55 F.3d, 1177-1187 (6th Cir.1995) (emphasis in original) (internal quotation and citation omitted). See also, Hardy v. Jefferson Community College, 260 F.3d 671, 678 (6th Cir. 2001).

> the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. at 151-52. The Court concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment." Id. at 154. Connick disposes of Professor Crandall's First Amendment argument. Professor Crandall's inappropriate material as displayed in the area surrounding his office simply does not implicate a matter of public concern.

But even assuming -- for the sake of argument only -- that Professor Crandall's comments amounted to "speech on a matter of public concern," it is clear that the University acted legitimately in requiring that he remove the offensive material from the area of his door and surrounding walls of his office at the University. The fact is that Professor Crandall's posting of that material did cause a disruption on campus and resulted in complaints to the University. Further, in the judgment of the University, it interfered with the University's relationship with its faculty, minority students and members of the public, and threatened the recruiting of those potential students who would understandably conclude that they do not wish to attend a University that turns a blind eye when one of its professors starts posting such inappropriate and offensive material on University property. Finally, Professor Crandall's conduct threatened to create an environment that would endorse and promote the use of epithets that are degrading to people of Arabic descent and others of protected characteristics. Thus, even if Professor Crandall's speech related to a matter of public concern, there is no doubt but that under the circumstances of this case, the University's interests would outweigh Professor Crandall's First Amendment rights.[2]

It should be added that it is particularly important to defer to the judgment of a University employer in this case, because the First Amendment guarantees "the freedom of the academy to pursue its ends without interference from the government," Piarowski v. Illinois Community College, 759 F.2d 625, 629 (7th Cir. 1985), and "the freedom of the academy to manage its affairs as it chooses." Id. at 630.[3] Thus, to the extent that this case involves First Amendment rights at all, it involves the First Amendment rights of the University and not of Professor Crandall.

Furthermore, when Professor Crandall posted the objectionable material, he created a potentially "hostile environment" that the University was free -- if not obligated -- to remedy. His behavior is thus more properly analyzed as discriminatory conduct than as speech.

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[2] This case is similar to the facts in Dambrot v. Central Mich. Univ., 55 F.3d, 1177 (6th Cir.1995), where the Sixth Circuit Court of Appeals held that the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker-room peptalk. See Dambrot, 55 F.3d at 1187. The Dambrot court found it significant that "Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed." *Id.* Dambrot's argument that his speech was protected by the First Amendment was rejected because it failed to "advance[ ] an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189.

[3] See also EEOC v. University of Notre Dame, 715 F.2d 331 (7th Cir. 1983); Ewing v. Board of Regents of University of Michigan, 559 F. Supp. 791 (E.D. Mich. 1983), rev'sd on other grounds, 742 F.2d 913 (6th Cir. 1984).

It is well-established that discrimination prohibited by Title VII includes the creation or tolerance of a racially, sexually or religiously hostile work environment. See Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57 (1986); Rogers v. E.E.O.C., 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986). In Meritor, supra, the United States Supreme Court acknowledged "EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. 57, 65 (1986). Moreover, Title VII "is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." Rogers, supra, at 238.

In the case of R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the United State Supreme Court struck down a so-called "hate speech" ordinance as overbroad. In the process, however, the Court reaffirmed the validity of State action directed against the evils of discrimination:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content ... of the speech." (Citations omitted).
>
> Moreover, since words can in some circumstances violate laws directed not against speech but against conduct ... a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.
>
> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Id. at 4670-71.

Thus, under R.A.V., the University has the right to prevent discriminatory conduct (which will sometimes be verbal in nature) that violates Title VII. Further, Title VII itself makes this more than a right; it makes it a duty. Under Title VII, an employer cannot "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color . . . or national origin." 42 U.S.C. § 2000e.[4] Thus, the University has the right to "police" its own employees to insure that they do not offend Title VII. In this case, Title VII at the very least required

[4] The Michigan Elliott-Larsen Civil Rights Act, MCLA 37.2101, et seq. also proscribes such conduct as to employees and students and students have similar rights under Title VI and Title IX.

the University to protect its employees from Professor Crandall's potentially harassing verbal conduct. Further, in addition, the University has the right to ensure that its employees (as State actors) do not offend the Constitution by violating equal protection guarantees. The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." In short, Professor Crandall's behavior could have subjected the University to charges of discriminatory harassment under Title VII. The University had the right, if not the obligation, to end that conduct. R.A.V. makes clear that such a decision does not run afoul of the First Amendment.[5]

In conclusion, as set forth above, Professor Crandall's complaint regarding the University's action with respect to the objectionable material posted by Professor Crandall is without any factual or legal basis. If we can be of any further assistance in this matter, please do not hesitate to contact me at (248) 540-8019.

Very truly yours

VERCRUYSSE MURRAY & CALZONE

Robert M. Vercruysse

RMV/jac

[5] Professor Crandall's offensive postings may also be prohibited as "fighting words." See, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (acknowledging that fighting words -- "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" -- are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in law and morality.") Under this principle, the University has the authority to bar degrading material such as that posted by Professor Crandall.