

August 25, 2003

President Salvatore J. La Lima
Suffolk County Community College
Norman F. Lechtrecker Building
533 College Road
Selden, New York 11784-2899

Dear President La Lima:

Thank you very much for your response to my letter of July 21 regarding Ursula Monaco (attached). We at FIRE are quite appreciative of your having taken the time to write a reply. As your letter described, this is a multifaceted case, with many important points to address.

With that in mind, I would like to take this opportunity to provide you with some additional information on just a few of those points. In particular, I wish to further discuss the topic of speech that is, as you described it in your letter, “harassing, intimidating or threatening.”

On July 28, shortly after I first wrote to you, Assistant Secretary Gerald A. Reynolds of the U.S. Department of Education’s Office for Civil Rights (OCR) issued an open letter clarifying the relationship between harassment law, federal regulations, and the First Amendment (attached). Secretary Reynolds states:

[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.

Secretary Reynolds confirms what FIRE argued in its previous letter to you: speech is not transformed into unprotected harassment simply because someone finds it offensive. As Secretary Reynolds writes, “harassment must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny [one’s] ability to participate in or benefit from an educational program.”

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While the law, in fact, requires that conduct be severe *and* pervasive in order to be punishable harassment, Ms. Monaco's behavior did not reach this level even if assessed element by element. The use of a single profanity in an e-mail accidentally sent to a professor would, without doubt, not be considered so "severe" as to transform it from fully protected speech to punishable harassment. Furthermore, it is clear from the case law that one profanity in one e-mail is nowhere near sufficient to make Ms. Monaco's conduct "pervasive" or "persistent." If Ms. Monaco had sent numerous e-mails to this professor over the course of a short amount of time personally berating her, then we might enter an arena where a claim of harassment could be justified. As it stands, Ms. Monaco's speech was not harassment and therefore remains fully protected.

In your response, you stated that this case can be distinguished from the cases that I cited in my previous letter because it was "directed" at an individual. As a factual matter, the speech was obviously not directed at the recipient and was sent to her by accident. Even if it had been purposefully sent to Professor Altizer, however, there is no First Amendment exception for rude speech directed at an individual. Please consult the 1972 Supreme Court case of *Gooding v. Wilson* in which an individual who said "White son of a bitch, I'll kill you," to police officers in a face-to-face confrontation was found to have uttered protected speech. I could easily cite numerous other cases where speech far more outrageous than Ms. Monaco's single profanity was found to be fully protected speech even when it was directed at an individual.

I would now like to address your letter's contention that Ms. Monaco's speech may have constituted "intimidating" speech. A recent United States Supreme Court decision, in the case of *Virginia v. Black*, addressed this topic in some detail.

In *Virginia v. Black*, the Court investigated the constitutionality of a Virginia statute that labeled all cross burnings "intimidating." As might be expected, the Court had to probe the legal definition of "intimidating." It found that:

Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

The bearing of this decision on the case of Ms. Monaco is relatively straightforward: in order to be "intimidating," Ms. Monaco's speech must be such that it would cause a reasonable person in Professor Altizer's situation to have legitimate cause to fear for his or her life or safety. I do not believe that Professor Altizer was placed in fear of bodily harm from a fifty-five-year-old grandmother who clearly accidentally sent her an e-mail. I am most certain that a court would not believe this was the case. Ms. Monaco's speech absolutely does not rise to the level of "intimidating" or "threatening" in any way that SUNY Suffolk may lawfully punish.

Finally, I would like to speak to your statement that, "Participation on a student newspaper is a privilege, not a right." For the most part this distinction between "privileges" and "rights" has been abandoned and certainly does not apply in the case of a public university's First Amendment duties. Free speech and freedom of association are rights, not privileges. As Mark

Goodman from the Student Press Law Center stated in a letter to Ms. Monaco, the law is clear in indicating that school officials have no authority to choose who can or cannot write for a student newspaper.

I do appreciate your honest response to our letter. I hope you understand that in taking this action against Ursula Monaco, SUNY Suffolk has, without question, exceeded its lawful powers. Legally speaking this is not a close call. We urge you to undo your punishment of Ms. Monaco as soon as possible. While FIRE does not litigate against universities, we do warn them when they are treading on legally untenable ground. We hope that this can be resolved through reasoned discussion before Ms. Monaco decides to litigate.

Sincerely,

Greg Lukianoff
Director of Legal and Public Advocacy

cc:

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Ursula Monaco

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