



Foundation for Individual Rights in Education

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July 16, 2010

Interim Chancellor Robert A. Easter
University of Illinois at Urbana-Champaign
Swanlund Administration Building
601 East John Street
Champaign, Illinois 61820

Sent via U.S. Mail and Facsimile (217-244-4121)

Dear Chancellor Easter:

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

FIRE is deeply concerned about the threat to academic freedom, freedom of speech, and due process posed by the adverse employment action against Professor Kenneth Howell as a result of his e-mailing plainly relevant material to his religion class. That the University of Illinois at Urbana-Champaign (UIUC) has chosen to punish a professor for sincerely fulfilling his classroom responsibilities is a serious threat to the rights of every faculty member at UIUC. This action will have a chilling effect across the campus, and every day that this situation remains unresolved deepens the violation of the faculty's academic freedom and constitutional rights. I urge you to protect UIUC from further embarrassment and restore freedom of expression to your campus by immediately reinstating Professor Howell.

Statement of Facts

This is our understanding of the facts; please inform us if you believe we are in error.

UIUC Professor Kenneth Howell has taught in the Department of Religion since 2001 as an adjunct associate professor and, until this spring, had received no official warnings about his teaching or any sort of discipline for breaking any UIUC policy regarding the content or style of his teaching. He regularly taught a 100-level (undergraduate) course called Introduction to Catholicism, which requires students to understand but not to believe in Catholicism. On May 3,

2010, the topic of discussion in Introduction to Catholicism was “The Question of Homosexuality in Catholic Thought.” The next day, Howell e-mailed his students to elaborate on the May 3 class.

The subject of the e-mail was “Utilitarianism and Sexuality” because, he explained, the May 3 class discussion had included the theme of utilitarianism, which was to be a topic on Introduction to Catholicism’s final exam. According to Howell, “In class, our discussion of the morality of homosexual acts was very incomplete because any moral issue about which people disagree ALWAYS raises a more fundamental issue about criteria. In other words, by what criteria should we judge whether a given act is right or wrong?” This premise led Howell to compare utilitarian criteria and Catholic criteria for determining the morality of various sexual behaviors, including homosexual sexual conduct. He associated Catholic criteria with those apparent in what he deemed “Natural Moral Theory,” arguing that from this perspective, a utilitarian “consent” criterion is not sufficient because Natural Moral Theory also uses a criterion based on “nature.” Thus, Howell’s e-mail concluded by further explaining the Natural Moral Theory position and by emphasizing critical thinking about such questions:

Natural Moral Theory says that if we are to have healthy sexual lives, we must return to a connection between procreation and sex. Why? Because that is what is REAL. It is based on human sexual anatomy and physiology. Human sexuality is inherently unitive and procreative. If we encourage sexual relations that violate this basic meaning, we will end up denying something essential about our humanity, about our feminine and masculine nature.

I know this doesn’t answer all the questions in many of your minds. All I ask as your teacher is that you approach these questions as a thinking adult. That implies questioning what you have heard around you. Unless you have done extensive research into homosexuality and are cognizant of the history of moral thought, you are not ready to make judgments about moral truth in this matter. All I encourage is to make informed decisions. As a final note, a perceptive reader will have noticed that none of what I have said here or in class depends upon religion. Catholics don’t arrive at their moral conclusions based on their religion. They do so based on a thorough understanding of natural reality.

This e-mail was circulated beyond Howell’s class by unknown persons. Sometime before May 28, one student not in Howell’s class e-mailed an informal complaint to Robert McKim, Head of the Department of Religion, stating that a friend of his in Introduction to Catholicism had told him that Howell “would preach (not teach) his ideology to the class.” No specific statements of Howell’s were given to back up this allegation other than the May 4 e-mail.

On May 28, about two weeks into UIUC’s summer session, McKim and Howell met at McKim’s office. According to Howell, as stated in a letter sent to you by the Alliance Defense Fund (ADF) on July 12, McKim said that a “higher official” had declared that Howell would no longer be rehired to teach at UIUC. This was not a disciplinary hearing; Howell was simply told that the adverse employment action was being meted upon him.

Every rationale for this action that was given by any university official depended on the content of Howell's e-mail. According to the ADF letter, McKim said that the e-mail "had prompted a series of complaints" and that it "would hurt the Department and the University." Furthermore, according to *The News-Gazette* of July 9,

In a series of e-mail exchanges between McKim and UI administrators about how to proceed regarding Howell's teaching and his appointment as an adjunct professor, McKim states he will send a note to Howell's students and others who were forwarded his e-mail to students, "disassociating our department, College, and university from the view expressed therein."

In addition, according to the article and a July 9 Associated Press article, Associate Dean Ann Mester told other UIUC staff that "the e-mails sent by Dr. Howell violate university standards of inclusivity, which would then entitle us to have him discontinue his teaching arrangement with us."

According to a July 16 article in *The News-Gazette*, you asked UIUC's Faculty Senate's Committee on Academic Freedom and Tenure to review Howell's case. According to University of Illinois President Michael Hogan, as quoted in the article, the review is intended "to be able to reassure ourselves there was no infringement on academic freedom here."

The Refusal to Rehire Professor Howell Plainly Violates His Academic Freedom and Freedom of Speech

As a public university, UIUC is both legally and morally bound by the First Amendment's guarantees of freedom of expression and academic freedom. The Supreme Court has held that academic freedom is a "special concern of the First Amendment" and that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). As the Supreme Court wrote in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. ... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

This principle holds whether the subject is communism, Catholicism, or climate change. Howell's e-mail was precisely on the topic of classroom instruction and highly relevant to his class, and it promoted critical thinking and understanding rather than any sort of indoctrination. It thus is fully protected by academic freedom as both a legal matter under the First Amendment and as a moral matter under the traditional canons of academic freedom.

We trust that you understand that the First Amendment's protections fully extend to public universities like UIUC. See, e.g., *Keyishian*, 605–06 ("[W]e have recognized that the university

is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted) ("[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'").

Even if Howell expressed full agreement with the Catholic positions he was teaching about, it is vital to understand that the principle of freedom of speech does not exist to protect only non-controversial speech. Indeed, it exists precisely to protect speech that some members of a community may find "controversial" or "offensive." The Supreme Court stated in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Similarly, the Court wrote in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that "the 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.'" No public university may retaliate against a professor because others on campus, including the professor's own students, felt offended by fully protected speech.

Rights of Adjunct Faculty

Adjunct faculty do not have diminished First Amendment rights because of their employment status. Adverse employment action against an adjunct faculty member, when that action is due to the professor's protected expression, violates the professor's First Amendment rights. This includes decisions not to rehire adjunct faculty members who have a reasonable expectation of being rehired. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 ("[A teacher's] claims under the First and Fourteenth Amendments are not defeated by the fact that he [does] not have tenure."); *Berndt v. Jacobi*, 781 F. Supp. 553, 557 (N.D. Ill. 1991) ("The fact that the public employee lacks tenure, *i.e.*, lacks a property interest in his employment, makes no difference if his public employer has made an adverse employment decision based on the employee's exercise of a [F]irst [A]mendment right.").

While a public school is often allowed to choose not to rehire an adjunct faculty member for a very wide variety of reasons or for no reason at all (unless contractual agreements state otherwise), a public school is not permitted to make such a decision for a constitutionally impermissible reason, such as religious discrimination or as punishment for protected speech. Yet this is just what has happened in Howell's case. He had been teaching successfully for nine years and had every expectation of being rehired. By all indications, but for the content of the e-mail, the decision not to rehire him would not have occurred. This is impermissible.

Immediate Resolution of Such Cases Is Required

When a case such as this one involves the clear violation of a faculty member's rights, when the faculty member, as in this case, has signaled that he has engaged a lawyer to help him defend his rights, and when the university is in imminent danger of facing a losing lawsuit, you have not only the authority but also the moral and legal responsibility to work to resolve the situation as quickly as possible. Every day that the case continues is a deeper violation of academic freedom and freedom of speech and a more thorough chilling of faculty speech at UIUC.

The investigation of protected speech is a violation of the rights of the person investigated. *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 248 (1957). Thus, merely waiting for the process of the faculty's investigation to run its course does not absolve you or UIUC of its moral and legal responsibility to immediately reverse the decision not to rehire Howell.

Significant Due Process Concerns

This case also introduces significant due process concerns. By all indications, Howell has been denied rehire as a punishment for seeming misconduct. But no formal charges were brought against him, and no school policy was invoked against him. Howell was offered no hearing and was given no chance to appeal. Moreover, a central principle of due process is the right of the accused to face and question his accusers. Howell has been given no such opportunity.

In addition, Dean Mester's invocation of "university standards of inclusivity" has no meaning in the present case. Every student in Howell's class was included on his e-mail. "Inclusivity" is not the same as non-discrimination, if that was Dean Mester's intended implication, and it is deeply troubling that Howell has been punished for violating vague "standards of inclusivity" merely by discussing his interpretation of the Catholic tenets about which he was teaching.

Conclusion

Professor Kenneth Howell cannot legally be investigated or punished by UIUC and deprived of his rights. FIRE urges you to immediately reverse the decision not to rehire him, ensure that any record of this matter be expunged from the administrative record, and announce to the UIUC campus that the university will never investigate or punish a professor's protected expression. As University of Alaska President Mark Hamilton wrote in a similar case:

[R]esponses to complaints or demands for action regarding constitutionally guaranteed freedoms of speech CANNOT BE QUALIFIED. Attempts to assuage anger or to demonstrate concern by qualifying our support for free speech serve to cloud what must be a clear message. Noting that, for example, "The University supports the right to free speech, but we intend to check into this matter," or "The University supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances," is unacceptable. There is nothing to "check into," nothing "to investigate."

Indeed, although you have sent this matter to a faculty committee, no professional academic experience is required to judge Howell's e-mail as entirely within the bounds of professional conduct of a university professor.

We urge UIUC to show the courage necessary to admit its error. Please spare the university the deep embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound. While we hope this situation can be resolved amicably and swiftly, we are committed to using all of our resources to see this situation through to a just and moral conclusion.

We recognize that the letter from ADF asks for a response by today. Because of the chilling effect on faculty speech that increases every day without a resolution of this issue, we agree that an immediate response is required. Please respond to this letter in writing by 5:00 p.m. ET on July 30, 2010.

Sincerely,



Adam Kissel

Director, Individual Rights Defense Program

cc:

Michael J. Hogan, President, University of Illinois

Richard Wheeler, Interim Vice Chancellor for Academic Affairs, University of Illinois at
Urbana-Champaign

Ruth V. Watkins, Dean, College of Liberal Arts and Sciences, University of Illinois at Urbana-
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Ann Mester, Associate Dean, College of Liberal Arts and Sciences, University of Illinois at
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Robert McKim, Head, Department of Religion, University of Illinois at Urbana-Champaign

Jeffrey Dawson, Chair, Academic Senate Committee on Academic Freedom and Tenure,
University of Illinois at Urbana-Champaign

Matthew W. Finkin, incoming Chair, Academic Senate Committee on Academic Freedom and
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