



Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • F 215-717-3440 • fire@thefire.org • www.thefire.org

December 16, 2011

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President Gary D. Russi
Oakland University
Office of the President, 204 WH
Rochester, Michigan 48309

Sent via U.S. Mail and Facsimile (248-370-3504)

Dear President Russi:

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

FIRE is concerned about the threat to free speech presented by Oakland University's prosecution of student Joseph Corlett for alleged sexual harassment in his Advanced Critical Writing class. The following is our understanding of the facts. Please correct us if you believe we are in error.

Around November 1, 2011, Corlett submitted his writing journal to Pamela Mitzelfeld, his Advanced Critical Writing professor. A course document describes the journal as a "Daybook," stating that "a Daybook should be an ongoing volume that essentially functions as a place for a writer to try out ideas and record impressions and observations." The Daybook should contain "[f]reewriting/brainstorming for essay assignments," "[o]bservation logs: People, places, etc.," and "[c]reative entries of your own."

One entry in Corlett's journal, titled "Hot for Teacher," describes his experience of being worried about being distracted in class due to his physical attraction to several of his professors, despite his having been married for 30 years. The essay discusses his (perhaps fictionalized) impressions of his first class with Mitzelfeld: "Kee-rist, I'll never learn a thing. Tall, blond, stacked, skirt, heels, fingernails, smart, articulate, smile. I'm toast but I stay. I'll fuck [up my] Tuesday-Thursday class thing if I drop. I'll search for something unattractive about her. No luck yet." It continues, "I'm not a maniac for every female although I try to find something attractive about everyone." In a second entry dated September 23 and titled "Hot for Teacher Continued," the Daybook states that the "eternal male question" is

whether to prefer a woman like Ginger from the television series *Gilligan's Island* (comparing her to Mitzelfeld) or one like Mary Ann from the same series (comparing her to a different professor).

In an email to Mitzelfeld on November 2, Dean of Students and Assistant Vice President of Student Affairs Glenn McIntosh encouraged Mitzelfeld to file a sexual harassment complaint against Corlett. McIntosh's recommendation followed an earlier phone conversation between McIntosh and Mitzelfeld, which Mitzelfeld later described to McIntosh as having included "tears and emotion." (It is not clear whether McIntosh had read Corlett's writing.) In a meeting with Corlett that also took place on November 2, McIntosh instructed Corlett not to attend Mitzelfeld's class the next day. Corlett complied.

On November 4, English Department Chair Susan E. Hawkins emailed McIntosh, stating that after speaking with Mitzelfeld, Hawkins believed that Corlett "needs to undergo 'sensitivity training' in terms of sexual harassment issues as well as hate speech" and that Corlett "should receive immediate counseling attention." Replying to Hawkins on November 6, McIntosh wrote that he interpreted Hawkins' email as expressing Mitzelfeld's wish that Corlett no longer attend Mitzelfeld's class, and McIntosh stated that his office would inform Corlett of the restriction.

According to Corlett, he did not receive notice of the restriction. Furthermore, in response to Corlett's Freedom of Information Act request, Oakland University has produced no record showing that Corlett had been notified of such a restriction. Corlett attended class on November 8, whereupon Mitzelfeld had the university police escort Corlett from class.

In an email to Hawkins and McIntosh on November 15, Mitzelfeld continued to pursue action against Corlett, including an "administrative withdrawal" of Corlett from her course. McIntosh then emailed Hawkins and Mitzelfeld, noting that "[s]ince Corlett has not made any threats to anyone, our only recourse is an administrative withdrawal, or the options we discussed." According to Corlett, on November 18, McIntosh offered to refund Corlett's tuition if he would withdraw from the class. Corlett declined the offer and remained enrolled, though he was required to have no contact with Mitzelfeld except by turning in assignments via an intermediary.

On November 23, Mitzelfeld announced to various parties via email that she was "officially filing a claim of sexual harassment" against Corlett because of the "ongoing situation that you have been aware of since November 1, 2011." Mitzelfeld provided no further information about her charge or any evidence. McIntosh accepted this email as an actionable complaint and began to "advance this matter to a conduct hearing."

In an email to various parties on November 29, Mitzelfeld noted that Corlett had "written letters to our school newspaper defending the right to carry concealed weapons on campus" and that she had been "afraid to go to the ladies restroom ... because someone informed me that [Corlett] was in the library." Mitzelfeld added, "Either Mr[.] Corlett leaves campus or I do." She also notified her students that she had canceled their December 1 class.

On December 1, Corlett met with Assistant Dean of Students Karen Lloyd regarding the initiation of disciplinary action against him. He was informed in writing that he would be notified of a planned disciplinary hearing with 72 hours notice, at which time he also would be presented “with sufficient particulars to enable [him] to prepare [his] defense.” No hearing has yet been scheduled.

On December 7, Corlett met with McIntosh and Vice President for Student Affairs & Enrollment Management Mary Beth Snyder. Corlett was given a letter from Snyder raising concerns about Corlett’s expression including “[n]umerous written musings of a sexual nature about your female English 380 instructor recorded in your class journal.” The other speech listed by Snyder consisted of isolated expression unrelated to Corlett’s interactions with Mitzelfeld: an argument with student journalists, a phone call to a classmate regarding an assignment, and sending some of his creative writing to another of his writing professors. (In a letter to Snyder later that day, Corlett provided the context for these instances of protected expression.)

Snyder’s letter requested that Corlett withdraw from all of his scheduled winter 2012 classes, have no contact with anyone “in the departments of English and Writing and the Writing Center,” and “[s]tay out of Kresge Library and the area surrounding that building.” According to Corlett, he orally agreed to the latter two restrictions through the end of the fall 2011 semester, since the semester was essentially concluded and he had no need to be in the library or contact anyone in English or Writing until the next semester. Later that day, Corlett wrote Snyder, explaining his expression as being fully within the bounds of the course and its requirements of “freewriting” and “brainstorming,” adding that Mitzelfeld had explicitly declined to impose “topical restrictions” on the content of student Daybooks.

Snyder replied to Corlett on December 8. She noted that her requests were voluntary but added, “we need your agreement to withdraw from winter semester classes given the nature of the complaints and circumstances.” Corlett and McIntosh discussed this request on December 9. On December 14, McIntosh wrote Corlett that he would allow Corlett “to enroll for up to two online courses [in winter 2012] as long as they are not related in any way to either the Writing or English departments/programs.”

The prosecution and restrictions against Corlett violate his right to free expression under the First Amendment, by which Oakland University, a public university, is legally and morally bound.

Given the power dynamic that exists between teachers and students, the standard for alleged student-on-teacher harassment should be *at least* as stringent and protective of free expression as the standard announced in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). In *Davis*, the Supreme Court of the United States defined student-on-student hostile environment harassment in the educational context as conduct that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” By definition, this includes only extreme and usually repetitive behavior—behavior so serious that it would prevent a reasonable person from receiving his or her education. For example, in *Davis*, the behavior found by the Court to be actionable harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals and repeated sexually explicit comments directed at and about the victim. Under any reasonable

reading of this exacting legal definition, Corlett’s Daybook—which consists solely of protected speech that fits the writing requirements for his course—does not constitute sexual harassment and is protected speech. The other expression listed in Snyder’s December 7 letter is irrelevant to a charge of sexually harassing Mitzelfeld and does not qualify as sexual harassment of anyone else.

It is crucial to note that under *Davis*’ requirement of “objective[] offens[e],” a subjective feeling of discomfort is not enough, lest student expression be left at the mercy of the most sensitive member of the campus community, no matter how unreasonable their reaction. Indeed, to be legally punishable as harassment, a student’s speech must be *far* more than simply offensive. Rather, he or she must be actively engaged in a specific type of discrimination to such a degree that the student effectively prohibits the professor from performing their duties. Nothing in Corlett’s Daybook approaches the level of severity, pervasiveness, or objective offense that would justify a sexual harassment finding or such extreme reactions as fearing to use the restroom and canceling class.

Even if a “workplace” standard were to be used to analyze the expression in question—albeit erroneously, given the crucial differences between the workplace and the classroom—Corlett’s Daybook expression was certainly not “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Further, as the Supreme Court made clear in *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (emphasis added):

[W]hether an environment is “hostile” or “abusive” can be determined only by looking at *all the circumstances*. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Considering both the unique characteristics of the student’s role in the academic environment of a creative writing class and the totality of the circumstances in this case, it is simply impossible to conclude that Corlett’s germane, class-related expression and other expression listed by Snyder constitutes sexual harassment of Mitzelfeld or anyone else.

Please be advised that courts in Oakland University’s federal circuit have twice struck down university harassment policies on First Amendment grounds. In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit invalidated a “discriminatory harassment policy” maintained by Central Michigan University that prohibited speech that “subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by ... demeaning or slurring individuals ... because of their racial or ethnic affiliation; or ... using symbols, [epithets] or slogans that infer negative connotations about the individual’s racial or ethnic affiliation.” In holding the policy to be unconstitutionally overbroad, the Sixth Circuit pronounced that it was “clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy’s language presents a ‘realistic danger’ the University could compromise the protection afforded by the First

Amendment.” *Dambrot*, 55 F.3d at 1183. The policy was also void for vagueness, as it failed to “provide fair notice of what speech will violate the policy,” meaning that “[d]efining what is offensive [was] wholly delegated to university officials.”

In a similar policy challenge, a federal district court in Michigan struck down a policy on “discrimination and discriminatory harassment” maintained by the University of Michigan. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The policy restricted “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed ... and that ... creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University[-]sponsored extra-curricular activities.” In invalidating the speech code, the court observed that “[t]he Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad.” *Doe*, 721 F. Supp. at 864.

In light of the *Doe* and *Dambrot* precedents in Oakland University’s own federal circuit, Oakland should be wholly aware that a public university cannot, consistent with its legal obligations under the First Amendment, prosecute or punish merely offensive protected expression under the rationale of harassment.

Oakland University has violated Corlett’s right to free expression by restricting his activity and pursuing sexual harassment charges against him due to his protected expression. FIRE requests that Oakland University remove all of its restrictions on Corlett and cease all disciplinary action against him. Please spare the university the embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound.

With this letter we enclose a signed FERPA waiver from Joseph Corlett, permitting you to fully discuss his case with FIRE.

We request a response to this letter by December 30, 2011.

Sincerely,



Adam Kissel

Vice President of Programs

Encl.

cc:

Glenn McIntosh, Dean of Students and Assistant Vice President for Student Affairs

Karen Lloyd, Assistant Dean of Students

Mary Beth Snyder, Vice President for Student Affairs and Enrollment Management

Susan E. Hawkins, Chair, English Department