



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

Greg Lukianoff
PRESIDENT

January 24, 2012

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Thomas L. Keon, Chancellor
Purdue University Calumet
Lawshe Hall, Room 330
2200 169th Street
Hammond, Indiana 46323

William Creeley
DIRECTOR OF LEGAL AND
PUBLIC ADVOCACY

Adam Kissel
VICE PRESIDENT OF
PROGRAMS

Sent via U.S. Mail and Facsimile (219-989-2581)

Dear Chancellor Keon:

Alan Charles Kors
CO-FOUNDER AND
CHAIRMAN EMERITUS

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.

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FIRE is concerned about the threat to free speech presented by Purdue University Calumet's (PUC's) disciplinary investigation of Professor Maurice Eisenstein for harassment due to his expression of political and religious opinions online. The following is our understanding of the facts. Please correct us if you believe we are in error.

Barbara Bishop
William J. Hume
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Daniel Shuchman

Eisenstein regularly posts his personal opinions on his personal Facebook page. For example, on November 6, 2011, he posted a photo of some of the "Christians killed by a radical Muslim group" in Nigeria on November 4, adding: "Where are the 'moderate' Muslims['] reaction[s] to this? Oh, I forgot they are still looking at the earth as flat according to the idiot Mohammad, may his name be cursed." His comments sparked debate, and at least one PUC student voluntarily engaged him in extensive discussion on the Facebook page. In the course of the discussion, Eisenstein wrote that "this is not a classroom nor is it my profession."

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Several complaints were then filed against Eisenstein. For example, on November 17, the PUC Muslim Student Association (MSA) filed a complaint "on behalf of all Muslim students against the continuous insults, religious discrimination, and racial comments" allegedly made by Eisenstein on Facebook and in previous semesters in class. (The alleged classroom comments were unspecified.) On November 21, you notified Eisenstein that he was subject to PUC's "formal

resolution process” for the MSA charges of “decimation [sic] of character, religious and racial discrimination, and harassment.” Similarly, on November 21 you notified Eisenstein that PUC was pursuing a formal complaint of “racial and discriminatory harassment” from a student (“N.E.”) who apparently has had no contact or relationship of any kind with Eisenstein.

Two months later, Eisenstein remains under investigation for these serious charges.

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 right to free speech includes the right to say things that are deeply offensive to many people, and the United States Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends people. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973), the Court held 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.’” In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the Court held that “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” In *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the Court explained the rationale behind these decisions well, saying 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.”

The Court handed down such a robust defense of potentially offensive speech precisely because deeming certain speech to be offensive is an entirely subjective exercise. In a milieu as diverse as the modern academy, offense is virtually unavoidable. Free speech needs breathing room in order to thrive. The principles of academic freedom and free expression in the university setting mandate far more tolerance than has been afforded Eisenstein.

Additionally, the Supreme Court has defined harassment in the educational context as conduct that is (1) unwelcome; (2) discriminatory; (3) on the basis of gender or another protected status, like race; (4) directed at an individual; and (5) “so severe, pervasive, and objectively offensive, and ... [that] so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999). 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. Indeed, to be legally punishable as harassment, speech must be far more than simply offensive. Rather, someone must be actively engaged in a specific type of discrimination to such a degree that the victim is effectively prohibited from the educational opportunity or benefit.

Please be advised that a court in PUC’s federal circuit struck down a university harassment policy on First Amendment grounds. In *UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991), a federal district court ruled unconstitutional a policy prohibiting speech that “[d]emean[s] the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; [and] ... [c]reate[s]

an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.” In striking down the code on First Amendment grounds, the court observed that “the suppression of speech, even where the speech’s content appears to have little value and great costs, amounts to governmental thought control.” *Id.* at 1174, n.9. In light of the precedent in PUC’s own federal circuit, the university 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.

Further, as Eisenstein’s attorney suggested in letters to you on December 2, 2011, there are serious due process issues involved in pursuing complaints against Eisenstein stemming from his classroom expression given that many of the complainants were not his students, that the complaints refer vaguely to expression from long-past courses for which complaints appear to be time-barred by PUC’s own policies, that the alleged classroom expression has not been identified, and that it is unclear whether any of the classroom expression can be matched with a student actually in his class at the time. Rather, it appears that the vast majority of the complaints at issue are based on Facebook comments that were voluntarily read and discussed by students outside of class.

Purdue University Calumet may not drag out a disciplinary investigation of Eisenstein due to his protected expression. FIRE requests that you cease all investigation and disciplinary action against him. Please do not let your students abuse the university’s disciplinary process in order to interfere with the free personal expression and academic freedom of one of your professors. 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 waiver from Maurice Eisenstein, permitting you to fully discuss his case with FIRE.

We request a response to this letter by February 14, 2012.

Sincerely,



Adam Kissel
Vice President of Programs

Encl.

cc:

Ralph Rogers, Vice Chancellor of Academic Affairs
Ronald Corthell, Dean of Liberal Arts and Social Sciences
Richard Rupp, Chair, Department of History and Political Science
Linda Knox, Associate Director, Affirmative Action