FIRE

Foundation for Individual Rights in Education

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October 10, 2013

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

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

Dear Chancellor Keon:

The Foundation for Individual Rights in Education (FIRE) last wrote you on March 5, 2012, regarding retaliation charges filed against Purdue University Calumet (PUC) professor Maurice Eisenstein. We understand that both those claims and subsequent related complaints were resolved in a manner respectful of Eisenstein's First Amendment rights. FIRE appreciates this result and your recognition of the importance of free expression and academic freedom at a public institution like PUC.

Unfortunately, FIRE must again write you today concerning Eisenstein's right to freedom of expression. This is our understanding of the facts. Please inform us if you believe we are in error.

On August 28, 2013, PUC Professor Yahya R. Kamalipour filed a complaint against Eisenstein, alleging that content posted by Eisenstein on his personal blog constituted harassment under PUC's policies. After investigation, Kamalipour's complaint was dismissed by a university investigator, who determined that the First Amendment protected the blog content at issue. However, on September 30, you informed Eisenstein in a letter that his inclusion of a link to his personal blog in the signature block of emails sent from his PUC email account constitutes a violation of university policy. Specifically, you wrote:

> The Electronic Mail policy (VII.A.1C) contains the rules for acceptable use of University email. That policy provides that "any use of University E-mail Facilities that interferes with University activities and functions or does not respect the image and reputation of Purdue University Calumet is improper." The policy also prohibits the use of email that [sic] "to harass or threaten" or "degrade or demean" other individuals. Your use of University electronic mail to draw attention to your personal blog is an

> improper use of your University email account. Given the degrading and demeaning manner in which you have referred to students and your colleagues in your blog, I am telling you to remove that link from any University e-mail. Kindly remove the link by October 3, 2013. Your failure to do so will subject you to revocation or limitation of your University email privileges.

This order violates Eisenstein's First Amendment rights in contravention of PUC's legal and moral duties as a public institution.

PUC has already recognized that the First Amendment protects the content of Eisenstein's personal blog. As a result, PUC may not discipline Eisenstein on the basis of this expression. Nor may PUC discipline Eisenstein for simply providing a link to such expression via his university email account, just as it could not lawfully discipline a professor for providing a link to any other instance of protected expression in his or her email correspondence with others.

The fact that PUC believes the content of Eisenstein's personal blog to be "degrading and demeaning" is irrelevant, and any punishment based on that consideration violates the First Amendment. Again, PUC has already determined that Eisenstein's personal blog does not meet the threshold for harassment—and, as we have explained in previous correspondence, public institutions like PUC may not discipline faculty for speech simply because some, many, or even all find the idea expressed to be "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). We remind you that the Supreme Court has made clear 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.'" *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (internal citations omitted).

PUC's characterization of Eisenstein's email access as a "privilege" indicates that PUC may believe that revoking or limiting such access does not constitute disciplinary action. This is incorrect. Revoking or limiting Eisenstein's email access—on the basis of his protected speech—would negatively affect the conditions of Eisenstein's workplace by significantly decreasing Eisenstein's ability to interact with students, peers, and the larger academic community.

PUC may further contend that its university network, and the student and faculty email accounts it serves, constitutes a nonpublic forum—i.e., "public property not intended to be a forum for the public expression of ideas and opinions." *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113 (7th Cir. 1986). Assuming for the purposes of argument that this classification is correct, and that PUC's network is not instead a limited, designated, or traditional public forum, PUC is still forbidden from punishing Eisenstein on account of his point of view. In nonpublic forums, "the government's authority to prevent such expression is almost complete and fails only when the government tries to suppress a particular point of view." *Id*. So while "the government can regulate content in a nonpublic forum," and "a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum," a government actor still "cannot encourage or discourage a particular viewpoint, slant, or opinion on some matter of public concern." *Id.* As a result, the Supreme Court has held that a government actor like PUC "violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985). Because

we imagine that PUC does not prohibit professors and students from discussing Islam, the Middle East, and the other topics covered on Eisenstein's personal blog via their university email accounts, PUC cannot selectively ban Eisenstein's points of view simply because it finds his opinions to be "degrading and demeaning."

A recent opinion from the United States Court of Appeals for the Ninth Circuit is instructive on this point. In *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9th Cir. 2010), the Ninth Circuit found that the First Amendment protected emails sent to a university listserv by a Glendale Community College professor that espoused contentious views on immigration, the "superiority of Western Civilization," and other topics. As a result, the Ninth Circuit found that while Maricopa County Community College District officials could criticize the views expressed in the emails, they properly declined to take disciplinary action against the professor, even following an Equal Employment Opportunity Commission workplace discrimination complaint.

In a unanimous opinion written by Chief Judge Alex Kozinski and joined by Circuit Judge Sandra Ikuta and Associate Justice Sandra Day O'Connor (retired from the Supreme Court and sitting on the panel by designation), the Ninth Circuit determined that the professor's emails—however offensive—constituted protected speech and not workplace harassment. Chief Judge Kozinski wrote:

> Plaintiffs suggest the district should have applied its existing anti-harassment policy to silence [Professor Walter] Kehowski as soon as the nature of his speech became apparent, either by revoking his access to the district's technology resources or by warning him that further speech would lead to discipline. It's true that a public employer's refusal to enforce existing policies to stop unlawful harassment may violate the Equal Protection Clause. But Kehowski's speech was not unlawful harassment.

Id. at 708. Not only was Kehowski's speech not unlawful harassment, Chief Judge Kozinski observed, it was an example of the very kind of speech—a charged, controversial, minority viewpoint, like Eisenstein's in the instant matter—that most demands the First Amendment's protection. The opinion states:

> Plaintiffs no doubt feel demeaned by Kehowski's speech, as his very thesis can be understood to be that they are less than equal. But that highlights the problem with plaintiffs' suit. Their objection to Kehowski's speech is based entirely on his point of view, and it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive. "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204; see also *United States v. Stevens*, 130 S. Ct. 1577 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").
>
> Indeed, precisely because Kehowski's ideas fall outside the mainstream, his words sparked intense debate: Colleagues emailed responses, and Kehowski

> replied; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning, students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. The right to provoke, offend and shock lies at the core of the First Amendment. [Some citations omitted.]

Id. Chief Judge Kozinski made explicit that the First Amendment is of crucial importance on college campuses—particularly in defense of viewpoints some, many, or even all find offensive, like those of Kehowski and Eisenstein. He wrote:

> This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. **But that role in our society will not survive if certain points of view may be declared beyond the pale.** "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." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). We have therefore said that "[t]he desire to maintain a sedate academic environment … [does not] justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975). [Emphasis added.]

Id. at 708–09. Finally, with regard to the plaintiffs' contention that the college could simply have silenced the professor by means of its control over the institution's email network and servers, the Ninth Circuit made clear that the First Amendment forbade such a result:

> Plaintiffs assert that the district could have applied its harassment policy to suppress Kehowski's speech because he spoke in a limited or nonpublic forum. For the purpose of this appeal, we assume plaintiffs are correct that the email list and servers were limited or nonpublic forums. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). But even in a nonpublic forum, state actors may not suppress speech because of its point of view, *id*. at 46, and that is exactly what application of the harassment policy to Kehowski's emails and website would have done. Others could speak about race and culture without violating the policy; Kehowski's speech would be singled out for suppression because of his disfavored opinions on those issues.

> Nor are we impressed by plaintiffs' suggestion that the district could have suppressed Kehowski's speech by limiting discussion on its mailing list and web servers to official school business. We assume the First Amendment would not prevent the district from restricting use in that manner. See *id*. at 49; *Desyllas v. Bernstine*, 351 F.3d 934, 943–44 (9th Cir. 2003). We also assume plaintiffs are correct that the district already had such a written policy, although it was not enforced. Plaintiffs don't allege that defendants selectively applied this policy in favor of Kehowski's speech; their claim is that once Kehowski began to speak, defendants were obliged to apply the policy to silence Kehowski, even if that meant they had to also silence everybody else.
>
> The power to limit or close a forum does not entail any such obligation. If speech is harassment, the proper response is to silence the harasser, not shut down the forum. And if speech is not harassment, listeners who are offended by the ideas being discussed certainly are not entitled to shut down an entire forum simply because they object to what some people are saying. Such a rule would contravene the First Amendment's hostility towards laws that "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of" certain points of view. *Reno v. ACLU*, 521 U.S. 844, 880 (1997). Because some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all.

Id. at 710–11. In the instant case, PUC has already determined that the content of Eisenstein's personal blog is not harassment and is protected by the First Amendment. Accordingly, PUC may not lawfully punish Eisenstein for simply linking to that protected speech in the signature block of emails.

FIRE asks that you recognize the First Amendment rights threatened by PUC's action in this matter. We appreciate your consideration and would be pleased to further discuss this matter with you at your convenience. We request a response by October 31, 2013.

Sincerely,

Will Creeley
Director of Legal and Public Advocacy

cc:
Peggy Gerard, Interim Vice Chancellor for Academic Affairs and Provost
Ronald Corthell, Dean of Liberal Arts and Social Sciences