



Foundation for Individual Rights in Education

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April 23, 2013

President Mary Jane Saunders
Florida Atlantic University
Administration Building, Room 339
777 Glades Road
Boca Raton, Florida 33431

Sent via U.S. Mail and Facsimile (561-297-2777)

Dear President Saunders:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals 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 with the threat to freedom of expression presented by Florida Atlantic University's (FAU's) sanctions against Professor James Tracy due to the content of his personal blog. FAU's actions violate Tracy's right to freedom of expression and threaten the academic freedom of all FAU faculty. FAU must recognize its moral and legal obligations under the First Amendment and immediately reverse its disciplinary actions.

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

In addition to being a tenured associate professor in FAU's School of Communication & Media Studies, James Tracy maintains a personal blog, *Memory Hole*. Following the December 2012 shooting deaths at Sandy Hook Elementary School in Newtown, Connecticut, Tracy posted entries at *Memory Hole* in which he questioned and criticized the media's portrayal of the shootings. Tracy's articles garnered substantial media attention and criticism. As reported on January 7 by the *Sun Sentinel*, FAU Director of Media Relations Lisa Metcalf released a statement from FAU confirming that "James Tracy does not speak for the university. The website on which his post appeared is not affiliated with FAU in any way."

On January 18, Tracy met with Heather Coltman, Interim Dean of FAU's College of Arts and Letters, and Associate Provost of Academic and Personnel

Programs Diane Alperin. Professor Douglas Broadfield, Grievance/Contract Enforcement Chair of the FAU chapter of the United Faculty of Florida (UFF), was also present. Coltman, who summarized the details of this meeting in a January 28 memorandum, asked Tracy about the disclaimer on the *Memory Hole* blog (clarifying that the opinions on the blog only represented Tracy's personal opinions) and when it was posted. She also asked him to provide her with evidence of the disclaimer. Tracy complied with this request, sending Coltman a link to an archived version of his blog, originally called *Memory Gap*, in a January 18 email. The "About" page on the archived site, dating back at least to July 23, 2012, contains a disclaimer stating that "[t]he views and analyses are solely the author's and are in no way endorsed or condoned by Florida Atlantic University or the State University System of Florida."

Memory Hole's current "About" page states, in bolded type:

All items published herein represent the views of James Tracy and are not representative of or condoned by Florida Atlantic University or the State University System of Florida. James Tracy is not responsible for and does not necessarily agree with ideas or observations presented in comments posted on memoryholeblog.com.

In his January 18 email to Coltman, Tracy informed her that he had added the second sentence of the disclaimer several weeks earlier.

Despite his compliance with FAU's requests, and FAU's previous statements to the press that Tracy's blog was not affiliated in any way with FAU, Coltman sent Tracy a "Notice of Discipline," dated March 28, related to the content of the blog. Regarding the disclaimer's placement on the blog, Coltman wrote that "[c]learly, this disclaimer was ineffective as shown by the widespread misperception that your job and FAU are connected to the blog site." Coltman cited three other entries on *Memory Hole*, one referencing her and another FAU administrator, and two containing references to FAU that Tracy did not remove. "No disclaimers are present on any of these pages," the letter stated.

Coltman further charged that Tracy had "ignored" his obligations under section 5.3(d) of the FAU's Board of Trustees/United Faculty of Florida Collective Bargaining Agreement (CBA), which states in part:

When speaking on any matter of public interest, a faculty member shall make clear when comments represent personal opinions and when they represent official University positions.

Coltman concluded:

You must stop dragging FAU into your personal endeavors. Your actions continue to adversely affect the legitimate interests of the University and constitute misconduct. ... If you continue to fail to meet your professional obligations and respond to directives from your supervisor, you will face additional disciplinary action.

FAU's misguided and intrusive demands regarding the content of Tracy's blog threaten the free speech and academic freedom rights of Tracy and the entire FAU faculty.

As an initial matter, it is settled law that the First Amendment is fully binding on public universities like FAU. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”); *Healy v. James*, 408 U.S. 169, 180 (1972) (internal 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’”). The Supreme Court has also repeatedly held that speech may not be punished merely because many may find it to be offensive or disrespectful. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If 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.”); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”)

The First Amendment protects Tracy's personal blog entries. Recognizing that “a citizen who works for the government is nonetheless still a citizen,” the Supreme Court has held that the First Amendment imposes limitations on the government's ability, as employer, “to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). While “the First Amendment does not prohibit managerial discipline based on an employee's expressions *made pursuant to official responsibilities*,” the government may not exert its authority as employer to punish employees for speech uttered as private citizens, particularly when that speech concerns matters of public concern. *Id.* at 424 (emphasis added); *see also Pickering v. Board of Education*, 391 U.S. 563, 571–72 (1968) (holding that because “free and open debate is vital to informed decisionmaking by the electorate,” the dismissal of a public school teacher for criticizing the Board of Education violated the First Amendment, as the speech concerned “a matter of legitimate public concern”). The Court has identified the importance of protecting “the individual and societal interests that are served when employees speak as citizens on matters of public concern.” *Garcetti* at 420.

Tracy's personal blog is not authored pursuant to, or as a requirement or function of, his employment by FAU. Nor does it “owe[] its existence to [Tracy's] professional responsibilities.” *Id.* at 421. As Coltman's letter acknowledges, Tracy's blog is a “personal endeavor.” Because Tracy's blog plainly concerns matters of public concern and is explicitly unrelated to his official responsibilities as an FAU professor, FAU may not discipline him for its content. This is true even when Tracy's blog entries concern or criticize FAU. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected”); *Pickering*, 391 U.S. at 574 (“statements by public officials on matters of public concern must be accorded First

Amendment protection despite the fact that the statements are directed at their nominal superiors").

The CBA further ensures Tracy's right to engage in personal speech, even speech critical of FAU, as a matter of his academic freedom. As Article 5.2 notes, Tracy's academic freedom rights include the right to "[s]peak freely on, and seek changes in, academic and institutional policies," and to "[e]xercise constitutional rights without institutional censorship or discipline." Prohibiting Tracy or any other FAU faculty member from mentioning the university or their university affiliations, and by extension from criticizing perceived injustices at FAU, amounts to a gag order on faculty speech.

By publishing a disclaimer on his personal blog, Tracy has complied with FAU policy by the plain language of the CBA. Article 5.3(d) states that on matters of public interest—as the circumstances of the murders in Newtown surely are—faculty "shall make clear when comments represent personal opinions and when they represent official University positions." Tracy has done exactly this; the statement on his personal blog explains that "[a]ll items published herein represent the views of James Tracy and are not representative of or condoned by Florida Atlantic University or the State University System of Florida." This clear, all-encompassing disclaimer is entirely sufficient. Requiring that he post such disclaimers repeatedly throughout his blog—especially on any article referencing FAU, as the university seems to desire—is unnecessary. Tracy cannot be held responsible for others' incorrect and unreasonable attribution of his speech to FAU.

By restricting what Professor Tracy can say on his personal blog and disciplining him for failing to abide by its unconstitutional requirements, FAU has chilled academic freedom. If FAU faculty cannot trust that the university will fully protect their First Amendment rights outside of the classroom, it only follows that they will fear for their academic freedom inside the classroom, as well, and self-censor accordingly. At a university ostensibly committed to free inquiry and scholarly debate, this is a disappointing, dangerous, and impermissible outcome. 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.

FIRE asks that Florida Atlantic University retract its disciplinary letter against James Tracy, disavow any future punishment of Tracy on the basis of his blog's protected content, and make clear to Tracy and all FAU faculty that they enjoy full First Amendment rights in their extramural expression—including on their personal blogs. We hope FAU will welcome this opportunity to take a strong stand for faculty rights, and we are committed to ensuring a just outcome in this case.

We request a response to this letter by May 14, 2013.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

cc:

Heather Coltman, Interim Dean, Dorothy F. Schmidt College of Arts and Letters

Diane Alperin, Associate Provost of Academic Personnel and Programs

Chris Robé, President, United Faculty of Florida, FAU Chapter

Douglas Broadfield, Grievance/Contract Enforcement Chair, United Faculty of Florida, FAU
Chapter

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