

CAMPUS “FIRE” SAFETY

By: Brett A. Sokolow, JD

The Foundation for Individual Rights in Education (FIRE) continues to trumpet victories over colleges and universities on freedom of speech issues. The question I pose in this issue is why are we making this so easy for them? Since its inception, FIRE has painted universities as thought-police who are heavy-handedly imposing the politically correct views of administrators on timid students. While this has only been true for a small minority of campuses, it makes for good grist for the media, and FIRE has created the perception that speech codes are the norm. They are not. So, this year, my New Year’s Resolution is to help you to help keep FIRE away from your campuses.

SOKOLOW’S SIMPLE FREE SPEECH RULE #1

- If any of your employees acts to discipline someone for something they have said (or stop them prior to saying it), you may be on FIRE.
- If any of your employees bars someone from an event or prevents an event from being held, you may be on FIRE.
- If any of your employees acts to limit, censor or control the contents of campus publications, you may be on FIRE unless you are in Illinois.

These are the three main categories of events which trigger wildFIRES for most campuses.

THE HARASSMENT CONFLICT

FIRE makes much of what they term “speech codes.” Speech codes are policies (including posting policies, harassment policies, etc.) that facially prohibit or curtail protected speech or activities. Policies, for example, that prohibit derogatory comments, are the prime example. We want students to be civil, inclusive and tolerant, but the first amendment does not readily permit us to punish them when they are not. Most college policies cannot accurately be termed speech codes on their faces, but can nevertheless be applied in a way that encroaches via overbreadth or vagueness on the constitutional rights of students.

Some training for staff can help to enhance sensitivity to where the boundaries lay. Generally, administrators believe they are correctly applying policy in many of the situations in which FIRE involves itself. They believe that calling a woman fat or a homosexual a fag or an African American a nigger is a violation of their campus harassment policies. On a private college campus, that could be true. But, not on a public college campus. Harassment rules are ALWAYS subject to first amendment preeminence. I think in some ways that activist courts and agencies have given a false impression that any sexist, ageist, racist, etc. remark is tantamount to harassment.

Perhaps the problem is in terminology, to some extent. Our policies prohibit harassment when they ought more accurately to be prohibiting discriminatory harassment. In harassment cases, the stringent legal requirement is that merely offensive conduct is not enough to establish a policy violation on a public college campus. Harassment is only established when someone is subject to a course of conduct that is so severe, pervasive and objectively offensive that it deprives someone of educational or employment access and opportunities. It creates a discriminatory impact. More precisely, if I call you a fag, I am harassing you. But, my right to call you a fag is protected by the first amendment, and outweighs your right to be free from being called a fag. I have a first amendment right to harass anyone I want, in the lay sense of the word harassment as irritating or tormenting someone. But, even the dictionary is clear that harassment is defined as having the quality of persistence. If I call you a fag so often and so publicly that it impacts your peaceful enjoyment of the campus, then your right to peaceful enjoyment is the highest priority, and I do not have a first amendment right to engage in discriminatory harassment. I advise my clients that to assess whether there is a violation of a harassment policy, there are three critical elements that must all be present:

1. Targeting of a protected class (gender, race, religion, etc.); and
2. Unwelcomeness of harassing behavior or verbal conduct; and
3. Deprivation of access, opportunities, rights or peaceful enjoyment.

We must focus more effectively on the third element. We ignore it too often. One instance of a comment, no matter how egregious or offensive, is protected speech. I do not believe that there exists a viable “fighting words” exception to the First Amendment today, mainly because of the reclamation of epithets and slang by various groups, and because of the general coarsening of discourse within our society since the fighting words doctrine was first acknowledged by the courts. If nothing else, I think the fighting words doctrine has merged with the threat doctrine today, and threats of immediate violence are not protected speech. To summarize, merely offensive harassing speech is protected speech. Speech that rises to the level of discriminatory harassment is not protected speech. Examples of such speech are rare and unusual. Most campus speech is going to be merely offensive.

While this article may make me sound like a first amendment hawk, I am not. I think there is moral value in free discourse, but my personal views are not as expansive as first amendment doctrine extends in the United States currently. I still cannot fathom how or why the Supreme Court declared that hate speech is protected, but they did. And my role in this article is not to promote my First Amendment politics, but to give you sound risk management advice on what I believe the law of our land to be, regardless of whether I personally agree with that law.

Below, I have included a pair of case studies that FIRE has posted to its website as recent victories. Reviewing and discussing them can help us to apply the principles announced above. The following case studies have been adapted from the FIRE website (www.thefire.org) by Ken Kozlowski, JD, Legislation and Litigation Editor of the *Report*

on Campus Safety and Student Development. This material is reprinted from Volume 7, issue 4 of the *Report on Campus Safety and Student Development.*

- The University of Wisconsin-Eau Claire instituted a ban in July that prohibited its Resident Assistants from leading unofficial Bible studies in their own dormitories. The stated reason for the policy was that some students might feel “judged,” and that the RAs might not be sufficiently “approachable.” An RA filed a complaint in Wisconsin federal court, alleging that the UWEC administrators and trustees had violated his freedoms of speech and association.

The University of Wisconsin System, which featured a similar ban on its Madison campus, responded to the complaint by claiming that RAs had always been banned from leading all organizations and activities, not just religious ones, within UWEC dorms. FIRE found that the latter statement conflicted with the job description of the RAs and the fact that the university had praised and supported RAs who led and organized controversial and political activities such as an official dorm production of *The Vagina Monologue*, *A Tunnel of Oppression*, and various other programs. The UW System President and 25 Wisconsin state legislators asked the state’s Attorney General for her opinion on the constitutionality of the RA Bible study ban. The AG’s office refused to give an opinion on the grounds that it might have to represent UWEC in litigation. UWEC Interim Chancellor Vicki Lord Larson then suspended the policy on November 30, 2005. The RAs attorney stated that the suit will continue until the policy is truly repealed.

Brett Sokolow Comments: I am sure that administrators at two UW System schools had compelling reasons for this rule. Perhaps non-religious students on the RA’s halls felt that favoritism was given to the residents in the Bible study groups. Perhaps some RAs were using the groups to try to proselytize, or to use their positions of authority to influence residents to participate. A rule that such groups could not be conducted on your own floor, or in your own residence hall, but allowing them to meet elsewhere on campus, might have been more narrowly tailored to avoiding these problems. Yet, we must step back and look at the conduct here that was prohibited. Were the RAs harassing people? Were they discriminating on the basis of race? They weren’t cannibals. They weren’t meeting to study diagrams of bomb-making instructions. Nothing so pernicious is apparent from the case. What is apparent is that these students were studying the Bible. Preventing that practice does not meet the constitutional test for content neutrality. It is content-specific. Perhaps UW could argue that it has greater latitude to regulate the speech of employees, which RAs are, but employee speech is most protected when it regards a matter of public concern. The free exercise of religion is very much a matter of public concern in the United States of America. This case has allowed FIRE to posture as the protector of the Bible, and has painted UW as the politically correct imposer of secular practices onto people of faith. If the students involved in the Bible study were fundamentalists, their claims of persecution will be all the more credible.

- Student employee Jihad Daniel at William Paterson University in New Jersey replied to an unsolicited mass e-mail from a Professor that promoted a viewing and discussion of a film described as a “lesbian relationship story.” His e-mail requested that he not be sent any mail about “Connie and Sally” or “Adam and Steve,” calling them perversions and stating the absence of God in higher education had brought on confusion. About two months later, Daniel had received a letter of reprimand in his personnel file saying that since the word “perversion” was “derogatory or demeaning,” he was guilty of violating state discrimination and harassment regulations. Daniel appealed to the WPU President, arguing that the First Amendment protected his speech, but was told that such an argument was beyond the scope of the finding.

FIRE advised the WPU President that state college administrators cannot choose to ignore the First Amendment. New Jersey’s Attorney General responded to FIRE, asserting that speech that violates a non-discrimination policy was not protected. Daniel then appealed WPU’s finding through a union grievance process, with a hearing taking place on November 16, 2005. Daniel received a response on December 6 that the hearing officer had determined that the sexual harassment charge was not supported and that the letter would be removed from his file. The hearing officer stated that a one-time expression of a personal religious belief was not harassment.

Brett Sokolow Comments: Sounds familiar, right? One instance of a sexual orientation-based derogatory comment is not discriminatory harassment. It is harassing only in the lay sense, not the legal sense. So, why did Daniel have to appeal this all the way to the college President and a union grievance process to prove that? The Attorney General is right that speech that violates a non-discrimination policy is not protected, but this is not speech that should rise to level of violating the New Jersey state law, and if it does, that law is likely going to be found to be constitutionally overbroad. The Professor who received this email was not threatened or in any way deprived of the rights, privileges and access of employment at William Patterson University. Now, if this student worked in the campus coffee bar, and refused to serve coffee to the Professor on the basis of being gay or lesbian, that would be discriminatory harassment. But, expressing an unpopular opinion (whether religiously-founded or not) in an email should not be met with discipline. It should be met with the delete key. The synopsis does not indicate whether Daniel received the initial letter of reprimand without notice and a hearing, but I am curious about that as well.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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