



April 6, 2018

Dennis Assanis
Office of the President
University of Delaware
104 Hulliher Hall
Newark, Delaware 19716

URGENT

Sent via U.S. Mail and Electronic Mail (president@udel.edu)

Dear President Assanis:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the threat to freedom of speech posed by the University of Delaware's (UD's) punishment of professor of law and political science Sheldon Pollack for inadvertently sending an email with a link to a satirical article to the wrong colleague, and then mentioning the mix-up when he ultimately emailed the piece to the intended recipient, another faculty member. The disciplinary action against Pollack violates the First Amendment rights that UD is both legally and morally bound to uphold, and must be reversed. FIRE further urges you to cure the defects in current UD policies under which Pollack was improperly investigated and punished.

The following is our understanding of the facts; please inform us if you believe we are in error.

I. FACTS

On October 6, 2017, UD Professor Jennifer Joe submitted a harassment complaint against Professor Joel Pollack to UD Vice Provost for Faculty Affairs Matthew Kinservik, containing six allegations. The first four claims alleged that Pollack sought to undermine her hiring and opposed her appointment to a university committee. The final two claims concerned an allegedly harassing email Pollack sent Joe five months prior, in May 2017 (hereafter claim #5), and an email Pollack sent to all full professors in the Department of Accounting and Management Information Systems in October 2017 that allegedly contained "false and defamatory claims" about Joe (claim #6).

As detailed in a November 30 memo (encl.) submitted to Interim Chief Human Resources Officer Darcell Griffith, Kinservik wrote that he investigated each of the six allegations under the “Professional Ethics Statement” from the Faculty Handbook, which bars discrimination and harassment of colleagues, and Personnel Policy 4-29 (V.B.5), which states:

Certain behavior alleged to be discriminatory may not rise to the level of discriminatory harassment but may nonetheless be unprofessional in the workplace, disruptive in the classroom, or violate other University policies and could warrant remedial actions and/or discipline.¹

Kinservik found the first four claims to be either entirely unsubstantiated or involving instances of protected speech by Pollack. Claims #5 and #6, however, he found to be violations of UD policy.

On the merits of claim #5, with which FIRE takes issue, Kinservik wrote:

On 5/22/2017 Pollack sent Joe an email, stating that he feels “emasculated” on campus and including a link to an Inside Higher Ed article titled, “Faux scholarly article sets off criticism of gender studies and open-access publishing.” The article concerns a scholarly hoax involving the publication of an essay entitled, “The Conceptual Penis as a Social Construct.”

Finding:

Professor Pollack admits to sending the email, but explains that Professor Joe received it by mistake. He intended to send it to Professor Jeff Jordan, but inadvertently sent it to Professor Joe. Professor Jordan confirmed receipt of the email and noted that Professor Pollack sent it to him, also forwarding Professor Joe’s reply to Professor Jordan. Sending this email with this message and a link to the IHE article represents a misuse of University email and shows poor taste and poor judgment. Given the history between Professors Joe and Pollack, it is understandable that she would view this as another instance of targeting by him. To his credit, he apologized for sending the email. But to then forward Professor Joe’s response to Professor Jordan is highly unprofessional. The only reason for doing so can be to make light of Professor Joe’s response. The entire episode is unprofessional.

On December 12, 2017, Griffith authored a memo (encl.) agreeing with Kinservik’s findings on claims #5 and #6, and recommending Pollack be formally punished by the placement of a letter in his personnel file indicating “the nature of the improper behavior” and mandating professional counseling from a health professional or social worker.

¹ Univ. of Delaware, *Unlawful Harassment Policy For Faculty*, available at <https://sites.udel.edu/generalcounsel/policies/unlawful-harassment-policy-for-faculty/>.

Griffith's memo notes that her punishment recommendations are based upon several UD policies. The first, outlined in the Faculty Handbook, requires employees to "respect the rights of the University," and "be courteous, respectful, honest, and to protect the University environment."² The second is Section V of "Employee's Use of E-Communications," which states, in relevant part, that "[e]mployees are expected to be courteous and respectful in their e-communications in accordance with established codes of ethics and the common rules that have evolved regarding e-mail, sometimes referred to as Netiquette" and that "[e]mployees must not send sexually explicit, offensive, demeaning, insulting or intimidating e-communications . . . or anything that harasses or disparages others."³ Finally, Griffith cites the university's Statement of Respect & Responsibility:

The University of Delaware community values both personal and academic freedom. Each member of the campus community has the responsibility to promote an atmosphere in which the free exchange of ideas and opinions can flourish. All members have the right to benefit from this atmosphere.⁴

Pollack has an appeal pending before the Faculty Welfare & Privileges Committee, which may issue a non-binding recommendation to the provost.

II. ANALYSIS

The University's Statement of Respect & Responsibility promises an atmosphere where all community members can benefit from the free exchange and ideas and academic freedom.⁵ Yet several UD policies used to justify Pollack's punishment for accidentally sending a satirical article to one colleague, and then forwarding the exchange to another, expressly conflict with the university's own stated commitment to freedom of expression and its legal obligation to that principle under the First Amendment.

As a public institution, UD is bound by the First Amendment, which applies in full on campus. *See, e.g., 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) ("[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.") (internal citations and quotation marks omitted).

² Univ. of Delaware, *Faculty Handbook*. § 4.2.2 Professional Ethics Statement, available at <http://facultyhandbook.udel.edu/handbook/422-professional-ethics-statement>.

³ Univ. of Delaware, *Employees' Use of E-Communications*, available at <http://sites.udel.edu/generalcounsel/policies/employees-use-of-e-communications/>.

⁴ Univ. of Delaware, *Statement of Respect & Responsibility*, available at <https://sites.udel.edu/oei/respect-and-responsibility/>.

⁵ *See id.*

UD has admitted that, after a thorough investigation, it found no pattern of harassing behavior by Pollack against Jennifer Joe. Absent repeated and targeted behavior that would elevate this lone, awkward email foible to something demonstrably demeritorious, there are no grounds for punishment. Sending an email—even to an unintended recipient—about feeling “emasculated” with a link to a satirical article that happens to include the word “penis,” is entirely protected by the First Amendment.

Notably, this is the second time in as many years that FIRE has written to your university over censorship of the word “penis.” In 2016, a university police officer warned students that they could face punishment under the university’s sexual misconduct policy for failing to scrub the word “penis”—and an accompanying depiction—from a “Free Speech Ball” at a campus tabling event. In response to our letter, then-acting president Nancy Targett conceded that the officer’s characterization of university policy was “clearly . . . not accurate” and that, when unconnected to a pattern of behavior that would constitute sexual harassment, use of the word “penis” alone is protected speech. As we wrote to UD at the time, both the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit (whose decisions are binding on UD) have so ruled:

The mere depiction of and the written word “penis” are certainly protected expression. *Cf. Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the slogan “Fuck the Draft” into a courthouse because message was protected under First Amendment). While some may find the depiction and word juvenile or distasteful, a harassment policy cannot be employed to punish protected expression because it is offensive. *See DeJohn*, 537 F.3d at 317–18 (holding university harassment policy that could be applied to cover any “gender-motivated” speech that offended someone to be facially unconstitutional).

The findings against Pollack demonstrate the constitutional infirmities in UD’s policies. Four of the policies cited in punishing professor Pollack are unconstitutionally vague and overbroad, violating the expressive rights of not only Pollack, but all UD faculty members.

A policy is unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

UD’s policies do not define key terms, and therefore fail to give UD employees adequate notice as to what conduct may subject them to discipline. Specifically, subsection 5 of UD’s Personnel Policy 4-29 fails to define “unprofessional” behavior as it relates to behavior not rising to the level of discriminatory harassment. The Faculty Handbook and Section V of the e-communications policy, likewise, fail to properly define behavior that is “courteous” and “respectful.” And UD’s ban on “offensive, demeaning, insulting or intimidating e-communications . . . or anything that harasses or disparages others” also fails to properly define these terms, such that faculty members like Pollack cannot reasonably determine what speech would be prohibited.

These terms are inherently subjective, requiring those subject to the policies to guess at how their words may be interpreted by the listener, or administrators. Courts have held that policies containing similar prohibitions violate the constitutional prohibition on vagueness. *See Dambrot v. Central Michigan Univ.*, 839 F. Supp. 477, 484 (E.D. Mich. 1993), *aff'd* 55 F.3d 1177 (1995) (“The terms ‘offensive’ and ‘negative’ require subjective reference in order to define them; the meanings of these terms are as vastly divergent as are individual tastes and personalities. . . . For a person, even one as perceptive and intelligent as the average college student or professor, to accurately guess what a listener’s reaction will be to something *potentially* offensive is nigh on impossible.”) (emphasis in original). *See also UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (finding that a policy prohibiting expression that “create an intimidating, hostile or demeaning environment” was impermissibly vague). The nebulous prohibitions in UD’s policies similarly force faculty members to anticipate the reaction to their expression, leading to uncertainty about what expression may subject them to discipline. Moreover, these policies grant administrators unfettered discretion to define, redefine, and apply these policies at will, depending on the context and individuals involved. Such a result is expressly forbidden by the First Amendment.

The matter should have concluded when UD acknowledged that Pollack had not engaged in targeted harassment. Instead, UD sought out policies under which it *could* punish Pollack. It is unsurprising that the policies under which UD decided to sanction Pollack were those containing vague terms susceptible to varying and subjective interpretations. Whatever interest UD may have in ensuring a professional and collegial work environment does not and cannot outweigh its legal obligations under the First Amendment.

III. CONCLUSION

Punishing a faculty member for engaging in speech protected by the First Amendment is unacceptable at a public university. Accordingly, UD must immediately reverse any punishment levied against Sheldon Pollack for accidentally sending a satirical email to one colleague and then discussing that exchange with another.

FIRE also urges UD to revise the above-referenced policies to prevent administrators from applying them unconstitutionally in the future. FIRE is always happy to work with institutions like UD—free of charge—to improve their policies.

We request a response to this letter by April 13, 2018.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alexandria L. Morey'. The signature is fluid and cursive, with a large initial 'A' and a long, sweeping tail that loops back.

Alexandria L. Morey

Program Officer for Legal and Public Advocacy
Foundation for Individual Rights in Education

cc:

David Kinservik, Vice Provost for Faculty Affairs
Darcell Griffith, Interim Chief Human Resources Officer
University of Delaware Faculty Welfare and Privileges Committee
Gerry Turkel, AAUP-UD

Confidential

To: Darcell Griffith, Interim Chief Human Resources Officer

From: Matthew J. Kinservik, Vice Provost for Faculty Affairs

Re: Harassment Complaint

Date: 30 November 2017

I am providing this report of findings based upon Personnel Policy 4-29 "Unlawful Harassment" (VI. D. 5). On October 6, 2017, I received a complaint from Jennifer Joe, Whitney Family Professor of Accounting, charging her colleague, Professor Sheldon Pollack, with harassment. The particular points of her complaint are as follows:

1. Despite a positive vote by the faculty, Pollack sought to undermine Joe's appointment by meeting directly with Interim Provost Nancy Brickhouse and Vice Provost Maggie Anderson to argue against Joe's appointment.
2. After Joe's appointment, Pollack continued to oppose her hire by bringing a complaint against Dean Weber and sending an email to all full professors in Accounting & MIS on 10/13/2014.
3. Pollack used that complaint to seek confidential information about Joe's hire that he then used to undermine her reputation by making the report of the Faculty Welfare & Privileges Committee available to all faculty members in the Lerner College on 5/19/2015.
4. In the spring and summer of 2017, Pollack sought to influence the Lerner College Organizing Committee with the purpose of preventing Joe from serving on the Lerner College P&T Committee.
5. On 5/22/2017 Pollack sent Joe an email, stating that he feels "emasculated" on campus and including a link to an *Inside Higher Ed* article titled, "Faux scholarly article sets off criticism of gender studies and open-access publishing." The article concerns a scholarly hoax involving the publication of an essay entitled, "The Conceptual Penis as a Social Construct."
6. On 10/3/2017 Pollack sent an email to all full professors in Accounting & MIS in which he makes false and defamatory claims about Joe's conduct as Chair of the department's P&T Committee.

Pursuant to Policy 4-29, I met with Professor Pollack on October 23rd to interview him. He was accompanied by Professor Gerry Turkel, Contract Maintenance Officer for the UD-AAUP. The Interim Department Chair, Bob Paretta, was also present. At that meeting I shared the above list of particular concerns. Additionally, I explained the nature of the complaint and the process for resolving it, including the following excerpts from the Faculty Handbook and Policy 4-29:

Faculty Handbook

4.2.2 "Professional Ethics Statement"

As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.

Personnel Policy 4-29 (V.B.5):

Certain behavior alleged to be discriminatory may not rise to the level of discriminatory harassment but may nonetheless be unprofessional in the workplace, disruptive in the classroom, or violate other University policies and could warrant remedial actions and/or discipline.

Based upon these policy statements, the questions to be decided are these: Are Professor Joe's claims true? If so, do they constitute unprofessional conduct on the part of Professor Pollack that warrants remedial action and/or discipline?

After our interview on October 23rd, I provided Professor Pollack with the evidential material Professor Joe submitted with her complaint (Attachment 1). On November 1st, he provided me with a written response and additional materials (Attachment 2). I then interviewed Professor Joe on November 16th. I also interviewed Professor Jeff Jordan by phone on November 20th and Emerita Professor Maggie Anderson by email on November 17th. Based upon these interviews and the information provided by Professor Pollack, I offer these findings, point-by-point:

Claim #1:

Despite a positive vote by the faculty, Pollack sought to undermine Joe's appointment by meeting directly with Interim Provost Nancy Brickhouse and Vice Provost Maggie Anderson to argue against Joe's appointment.

Finding:

Professor Pollack denied meeting with Anderson and she confirmed that they never met and never discussed Professor Joe's hire. Professor Pollack discussed many issues with Interim Provost Brickhouse in his role as President of the Faculty Senate. He also discussed his concerns with her regarding what he perceived to be procedural problems with the way his department and college handled Professor Joe's hire, but did so without denigrating Professor Joe or arguing that she should not be hired. He was within his rights to raise procedural concerns about the conduct of department and college administrators. I see no evidence to support the claim.

Claim #2

After Joe's appointment, Pollack continued to oppose her hire by bringing a complaint against Dean Weber and sending an email to all full professors in Accounting & MIS on 10/13/2014.

Finding:

Professor Pollack responded to this by pointing out that he never refers to Professor Joe in his email; rather, he refers generally to a procedural concern on the part of Dean Weber. This is true and he was within his rights to raise these concerns. Because the email went to several members of the department, there can be no question that Professor Joe's hire is the case he alludes to, so her sensitivity to his references to her case is understandable. Professor Pollack further claims that it is "neither reasonable nor credible" for Professor Joe to accuse him of harassment based upon an action that took place three years ago. I see no basis for concurring with this: harassment can take the form of one egregious incident or a series of lesser indignities and provocations over time, even three years. Even so, I am not persuaded that Professor Pollack's intention in this instance was to harass Professor Joe.

Claim #3

Pollack used that complaint to seek confidential information about Joe's hire that he then used to undermine her reputation by making the report of the Faculty Welfare & Privileges Committee available to all faculty members in the Lerner College on 5/19/2015.

Finding:

Professor Joe's claim is that her reputation suffered because Professor Pollack circulated the report of the Committee on Welfare & Privileges, which included reference to the process of her hire. Specifically, her claim is that he intentionally sought to damage her reputation. Professor Pollack denies any intention to harm her reputation and points out that the procedures of that committee specifically allow the complainant and respondent to share the report at their discretion. "Discretion" is the key word. Professor Pollack chose to circulate the report and to refer to the process of Professor Joe's hire in the catalogue of his charges against Dean Weber in the email that went to all members of the Lerner College. He was, as he points out, acting within his rights to do so. But by electing to include commentary on Professor Joe's hire in an email that went to all members of the Lerner faculty, I can only conclude that the exercise of his discretion did not extend to considering the impact on Professor Joe of such a public airing of a personnel matter.

Claim #4

In the spring and summer of 2017, Pollack sought to influence the Lerner College Organizing Committee with the purpose of preventing Joe from serving on the Lerner College P&T Committee.

Finding:

The basis for this claim is not clear. Professor Pollack has provided a detailed explanation of the events around the nomination and election of members to the Lerner College P&T Committee, pointing out that his actions had to do with advocacy for his own eligibility to be nominated and elected. I see no evidence to support the claim.

Claim #5

On 5/22/2017 Pollack sent Joe an email, stating that he feels “emasculated” on campus and including a link to an *Inside Higher Ed* article titled, “Faux scholarly article sets off criticism of gender studies and open-access publishing.” The article concerns a scholarly hoax involving the publication of an essay entitled, “The Conceptual Penis as a Social Construct.”

Finding:

Professor Pollack admits to sending the email, but explains that Professor Joe received it by mistake. He intended to send it to Professor Jeff Jordan, but inadvertently sent it to Professor Joe. Professor Jordan confirmed receipt of the email and noted that Professor Pollack sent it to him, also forwarding Professor Joe’s reply to Professor Jordan. Sending this email with this message and a link to the *IHE* article represents a misuse of University email and shows poor taste and poor judgment. Given the history between Professors Joe and Pollack, it is understandable that she would view this as another instance of targeting by him. To his credit, he apologized for sending the email. But to then forward Professor Joe’s response to Professor Jordan is highly unprofessional. The only reason for doing so can be to make light of Professor Joe’s response. The entire episode is unprofessional.

Claim #6

On 10/3/2017 Pollack sent an email to all full professors in Accounting & MIS in which he makes false and defamatory claims about Joe’s conduct as Chair of the department’s P&T Committee.

Finding:

Professor Pollack responds to this claim by characterizing his letter as “protected speech.” Members of the faculty certainly have the right—the responsibility—to speak up when they suspect that violations of University policy have occurred. However, the manner of speaking up depends upon the discretion of the faculty member. In this instance, Professor Pollack’s concerns led him to personally call a potential external reviewer in a P&T case in what he characterized as an effort to verify Professor Joe’s actions as the Chair of the Department P&T Committee. This is a highly unusual move, so unusual that it prompted the potential external reviewer to report the phone call to the University. I verbally reprimanded Professor Pollack at the time for the step he took and admonished him not to interfere with the external review process any further. He refers to this instance in item #12 of his

charges against Professor Joe. In that section, he falsely claims that Professor Joe called me to report his phone call to the external reviewer. She did not. Then, on the basis of the false assumption that Professor Joe is the person the potential external reviewer spoke with, he speculates that she had called this reviewer in an effort to persuade him to write a negative review letter for the P&T case under consideration. This is a very serious charge. To make it on the basis of speculation is uncollegial at best and defamatory at worst.

Conclusion:

Professor Joe's charge of harassment was based on six specific instances. Some of these (#1 and #4) are not substantiated. Others (#2 and #3) involve instances of protected speech by Professor Pollack, but that does not mean that the impact of that speech on Professor Joe was not harmful. It is understandable that his public and repeated complaints about the process of her hire would strike her as detrimental to her professional reputation. Even so, in these instances Professor Pollack never mentions Professor Joe by name and his declared goal in each case is to challenge what he perceives as improper actions by the department and college administration. The last two instances (#5 and #6) are more troubling. Forwarding the *IHE* story to Professor Joe, even if by mistake, and including a comment that can only be regarded as gender-based bias, even as a joke, is unprofessional. To then forward her response to a third party in order to make light of her reaction compounds the misjudgment with unkindness. That email was followed up a few months later by Professor Pollack's letter to the full professors in the department, accusing Professor Joe of deliberately attempting to use her position as Chair of the Department P&T Committee to produce a negative result in a case under consideration. Raising procedural concerns is protected speech, but the false assumptions, innuendo, and derisive tone of that letter also betray a growing unprofessionalism and personal animosity. On balance, I do not conclude that Professor Pollack has harassed Professor Joe since her hire in 2014. But I do regard his recent actions (items #5 and #6) as violations of the Professional Ethics statement due to their disrespectful and harassing nature.

Confidential

To: Matthew J. Kinservik, Vice Provost for Faculty Affairs

From: Darcell Griffith, Interim Chief Human Resources Officer

Re: Harassment Complaint – Sheldon Pollack

Date: December 12, 2017

I have reviewed the Conclusion of the Investigation Report prepared by Matthew J. Kinservik, Vice Provost for Faculty Affairs, regarding the Harassment Complaint and allegations raised against Professor Sheldon Pollack. In reading the outcome of the investigation and findings outlined in the November 30, 2017 document that is attached, there were a total of six alleged claims brought against Professor Sheldon Pollack. While Claim items (#1 and #4) are not substantiated and Claim items (#2 and #3) involve instances of protected speech by Professor Pollack, the impact of the protected speech on Professor Joe was not harmful.

The overall conclusion, specifically detailed findings outlined regarding Claim items (#5 and #6) lead me to recommend the following prescriptions as corrective action in accordance with *UD Faculty Handbook 4.2.5 Sexual and Other Unlawful Harassment* and *UD Policy 4-29 Unlawful Harassment*.

- Placement of a letter in Sheldon Pollack's personnel file indicating the nature of the improper behavior.
- Recommend that Sheldon Pollack seek counseling services through HMS/Health Advocate or through the onsite services provider, Cecily Sawyer-Harmon, located at The STAR Campus.

These recommendations are based upon relevant information outlined in the Faculty Handbook, University of Delaware Policy regarding an employee's use of email communications and the UD Statement of Respect & Responsibility.

- The Faculty Handbook, states, in part:
It is University policy that "employees are expected at all times, to respect the rights of the University, its students, visitors and other members of the University community. Inherent in this responsibility is the obligation to be courteous, respectful, honest, and to protect the University environment."

- Section V. of Employee's Use of E-Communications states, in part:
 1. *Employees are expected to be courteous and respectful in their e-communications in accordance with established codes of ethics and the common rules that have evolved regarding e-mail, sometimes referred to as [Netiquette](#).*
 2. *Employees must not use University e-communications resources for personal commerce, for fund-raising, or for partisan political purposes. The State-created University Charter prohibits the Management of the University to benefit any party, sect, or denomination. Employees may choose to participate in any of the above activities but cannot use University resources to support their personal activities.*
 3. *Employees must not send chain letters, pyramid scheme messages, spam or other messages not related to University business. These are an irresponsible waste of computing resources and an inconsiderate nuisance. Chain letters and pyramid scheme messages are also a violation of federal law.*
 4. *Employees must not send sexually explicit, offensive, demeaning, insulting or intimidating e-communications, ethnic or racial slurs or anything that harasses or disparages others. Sending such messages is grounds for disciplinary action, including termination of employment. ([Employee's Use of E-Communications](#))*

- The University's [Statement of Respect & Responsibility](#) states, in part:

The University of Delaware community values both personal and academic freedom. Each member of the campus community has the responsibility to promote an atmosphere in which the free exchange of ideas and opinions can flourish. All members have the right to benefit from this atmosphere.