



Foundation for Individual Rights in Education

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November 4, 2011

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Chancellor Robert Coombe
Office of the Chancellor
University of Denver
2199 South University Boulevard
Denver, Colorado 80208

Sent via U.S. Mail and Facsimile (303-871-4101)

Dear Chancellor Coombe:

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 about the threat to free speech and academic freedom presented by the University of Denver's (DU's) punishment and finding of sexual harassment against Professor Arthur N. Gilbert after roughly 50 years of teaching. Although his academic peers cleared him of sexual harassment allegations and criticized the merit and impact of the allegations, DU's provost has nevertheless refused to abandon the university's ill-considered, illiberal prosecution, taking Gilbert's classroom comments out of their academic context in order to sustain an unfounded charge of sexual harassment.

The following is our understanding of the facts. Please correct us if you believe we are in error.

On April 1, 2011, two students anonymously raised subjective concerns about Professor Arthur N. Gilbert's teaching in his graduate course titled "The Domestic and International Consequences of the Drug War." According to the syllabus, one of the themes in the course is "Drugs and Sin in American Life: From Masturbation and [P]rostitution to [A]lcohol and [D]rugs," one of the points therein involving the negative effects of "purity crusades." In a letter dated April 6, Dean Christopher Hill of DU's Korbel School of International Studies notified Gilbert that Gilbert had been placed on paid administrative leave pending an investigation.

DU's Office of Diversity and Equal Opportunity (ODEO) and Department of Human Resources investigated the allegations and found all of the conduct-based allegations without basis for a sexual harassment finding. In its letter of determination on June 8, however, ODEO stated that five of the speech-related allegations, *taken together and "absent an academic justification,"* would constitute hostile environment sexual harassment in Gilbert's class (emphasis added). Significantly, ODEO deferred academic judgment regarding "the academic integrity of [Gilbert's] teaching of the subject matter," leaving the matter to be "determined by the appropriate academic decision makers."

In a letter dated July 14, Hill wrote Gilbert, declaring that Gilbert had committed hostile environment sexual harassment. He required that Gilbert cease "this behavior" immediately and that Gilbert attend sensitivity training. Appropriately following DU's grievance process, Gilbert timely appealed the findings and punishment in a grievance on August 9.

A Faculty Review Committee (FRC) of Gilbert's academic peers investigated his grievance. In a report dated October 4, the committee announced its finding that DU had violated Gilbert's academic freedom:

There is no evidence in the record that members of the faculty were consulted by Dean Hill, HR [Human Resources], or ODEO in determining Professor Gilbert's teaching methods constituted sexual harassment. Nor was there any reference to external standards that might have led to such a conclusion. ... To summarily remove a member of the faculty from the classroom and ban that person from campus and from contacting colleagues and students because of something that was said in the classroom and reported anonymously, without full consideration, ... violates academic freedom and overall concepts of fairness.

Despite this clear finding, DU Provost Gregg Kvistad denied Gilbert's appeal on October 20. Although the FRC had explicitly concluded that DU had violated Gilbert's academic freedom by failing to engage in an academic review of Gilbert's classroom expression, Kvistad stated that the FRC itself had declined to do so. In other words, by Kvistad's own admission, **the relevance and appropriateness of Gilbert's academic expression in the classroom has never been evaluated.**

Kvistad also wrote that of the five allegations regarding classroom speech, only three of them had been judged by ODEO as requiring further academic evaluation. Kvistad also suggested that the other two allegations (namely that Gilbert "frequently used the word 'fuck'" and often stated "that males should masturbate and ejaculate" so as to reduce the risk of prostate cancer, based on medical evidence Gilbert had presented in class) could stand alone as sufficient evidence of a hostile environment, failing to accept that the ODEO's hostile environment finding relied on an evaluation of the *entire* classroom environment, taking all of the allegations together as a whole. Kvistad also stated that he had examined the classroom as a "workplace" environment, ignoring the critical differences between the classroom and the "workplace," as understood by harassment law. In sum, Kvistad upheld Hill's finding of sexual harassment but modified the punishment to include a single conversation with ODEO Director Kathryne Grove rather than sensitivity training.

DU's "Faculty Personnel Guidelines Relating to Appointment, Promotion, and Tenure," approved by DU's Board of Trustees, identify the importance of academic freedom at DU. This document states that "The purposes of tenure are to assure academic freedom in both teaching and research and to afford a basic security that will attract faculty of ability to the University" and frequently refers to academic freedom as a DU faculty member's right. In promulgating this document, DU has essentially bound itself to the legal and moral requirements of academic freedom. In the free speech context, the Supreme Court of the United States has held that academic freedom is a "special concern of the First Amendment" and that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). As the Court observed 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.

In contrast to the University of Denver's promises, DU has permitted the sensitivities of two anonymous graduate students to trump free speech and academic freedom in the classroom. Gilbert's expression has not been evaluated in light of the special characteristics of the graduate classroom. It is inappropriate to take individual allegations out of their proper context in class. For example, simply using the word "fuck" frequently does not establish a hostile environment, particularly if the word was not used to describe sex. It further is inappropriate to sever the two allegations mentioned above from the rest of the ODEO's evaluation of the *overall* classroom environment.

Even if a "workplace" standard were to be used to analyze the expression in question—albeit erroneously, given the crucial differences between the workplace and the classroom—Gilbert's classroom speech was certainly not "sufficiently severe or pervasive 'to alter the conditions of [the victim's education] and create an abusive [educational] environment.'" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Further, as the Supreme Court made clear in *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (emphasis added):

[W]hether an environment is "hostile" or "abusive" can be determined only by looking at *all the circumstances*. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Considering both the unique characteristics of the professor's role in an academic environment and the totality of the circumstances, as ODEO urged and Kvistad declined to do, it is simply impossible to conclude that Professor Gilbert's germane, in-class speech constitutes sexual harassment.

The University of Denver has violated its moral and contractual promises in finding Professor Arthur N. Gilbert guilty of sexual harassment. FIRE asks that you vacate this finding or, at worst, direct the appropriate reconsideration of the allegations in light of their academic context and the entire classroom environment.

Professor Gilbert has waived his right to confidentiality with regard to communications with FIRE about this dispute. We request a response to this letter by November 18, 2011.

Sincerely,



Adam Kissel
Vice President of Programs

Encl.

cc:

Gregg Kvistad, Provost, University of Denver

Christopher R. Hill, Dean, Josef Korbel School of International Studies, University of Denver

Kathryne C. Grove, Director, Office of Diversity and Equal Opportunity, University of Denver

Dean Saitta, Professor and Chair, Department of Anthropology, University of Denver

Amy King, Director of Human Resources, University of Denver

Kathy Ohman, Chair, Faculty Review Committee, University of Denver

Cary Nelson, President, American Association of University Professors