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March 5, 2012

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:

Thank you for your response of February 14, 2012, to FIRE's letter of January 24. We are pleased that Purdue University Calumet (PUC) has found Professor Maurice Eisenstein not guilty of violating the university's Equal Opportunity, Equal Access and Affirmative Action Policy, or Anti-Harassment Policy. As we explained in our first letter, punishing Eisenstein for his expression of personal political and religious views would have violated the First Amendment, by which public institutions like PUC are both legally and morally bound. Accordingly, PUC's decision here was not only correct, but constitutionally required.

While we are pleased that PUC has reached the right result with regard to the harassment and discrimination charges, we understand that Eisenstein was nevertheless found guilty of two charges of violating PUC's policy regarding retaliation. We write today to express our deep concern about the threat to freedom of expression presented by these findings, which cannot be supported on the grounds cited by the university.

As articulated in your decision letters to Eisenstein, PUC's retaliation policy reads as follows:

> Purdue University prohibits any overt or covert act of reprisal, interference, restraint, penalty, discrimination, coercion, intimidation, or harassment against an individual for complaining of harassment or enforcing its Anti-Harassment Policy.

Eisenstein was found guilty of two separate charges of retaliation.

First, a professor accused Eisenstein of retaliation for the following interaction, as described in the relevant decision letter of February 22 to Eisenstein:

> [The professor] reported that she said, “Hi” to Dr. Eisenstein, and that he responded, “Now I know why your son committed suicide.”

Eisenstein denies making such a comment. However, in your letter, you explained that you “find it more likely than not that this incident did occur, and that it was retaliation for [the professor] having filed a complaint against Dr. Eisenstein,” and that as a result, PUC will issue “a formal written reprimand to Dr. Eisenstein.”

Second, another professor accused Eisenstein of retaliation for the following interaction, as described in the relevant decision letter of February 22 to Eisenstein:

> [Eisenstein] sent an electronic communication to two colleagues associated with the Jewish Federation that read:
>
> > “There will not be anything from [the professor] sent to anyone in this house. My mother cursed him before her death (a true Orthodox curse.) He knows why. Therefore, there will be no association with him period. I consider anything from him to be in and of itself cursed and therefore untouchable. In respect for my mother z’l, I and my family will also consider him in a like manner.”

Eisenstein notes that this response was sent from his personal email account and followed an unsolicited email sent to Eisenstein’s personal account from the professor. In your letter, you explained that you “find that Dr. Eisenstein sent this email in retaliation for [the professor’s] initial complaint.” You elaborated:

> The first time that Dr. Eisenstein informed [the professor] of the curse was 17 years after the death of Dr. Eisenstein’s mother and shortly after [the professor] filed his initial complaint against [the professor] on November 21. The seventeen year delay followed by the action after Dr. Eisenstein knew that [the professor] had filed a complaint is suspicious timing that provides enough evidence for me to conclude the act was in retaliation for [the professor] having filed a complaint against Dr. Eisenstein.

As a result of this finding, you decided that a second written reprimand would be issued to Eisenstein. These findings are inconsistent with applicable legal precedent, and the resulting reprimands violate Eisenstein’s First Amendment rights.

PUC’s Anti-Harassment Policy is a broad provision addressing the university’s compliance with various state and federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964, barring workplace discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Section 704(a) of Title VII addresses retaliation for employees alleging violations of Title VII, stating that an employer may not “discriminate against any of his employees or applicants for employment … because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.” The

United States Court of Appeals for the Seventh Circuit has held that in the context of Title VII retaliation claims, "employers can be liable for co-worker actions when they know about and fail to correct the offensive conduct." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996).

Critically, the Supreme Court of the United States has clarified Section 704(a)'s parameters. In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 67 (2006), the Court found that Title VII's "antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Specifically, the Court determined that alleged retaliation must be "materially adverse," meaning that the retaliation would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id*. at 68 (internal quotation and citations omitted).

While this standard is seemingly broad, the Court made clear in *Burlington Northern* that Section 704(a) requires "*material* adversity because we believe it is important to separate significant from trivial harms." *Id*. (emphasis in original). The Court wrote:

> Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see *Faragher*, 524 U.S., at 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"). **An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.** See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that **"courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)).** The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson*, 519 U.S., at 346, 117 S. Ct. 843, 136 L. Ed. 2d 808. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. *Ibid.* And normally **petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.** See 2 EEOC 1998 Manual § 8, p 8–13.

Id. (emphases added).

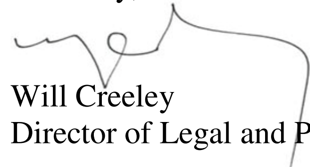
Given the Court's unambiguous pronouncement here that "petty slights," "minor annoyances," "snubbing," "personality conflicts," "antipathy," and a "simple lack of good manners" do not constitute the type of materially adverse employment action prohibited by Title VII's antiretaliation provision, it is untenable for PUC to punish Eisenstein for "retaliation" for engaging in precisely such behavior. Though arguably rude and impolite, the two isolated comments to fellow employees at issue here simply do not rise to the level of retaliation specified by the Supreme Court as a violation of Title VII.

As a practical matter, it is unreasonable to prohibit Eisenstein from expressing his frustration with fellow employees who have leveled unfounded charges of discriminatory harassment against him, as PUC does here. To the contrary, the Court in *Burlington Northern* expressly anticipates the "snubbing" and "lack of good manners" cited in the two complaints. While Eisenstein's comments (again, one of which he denies making) may be registered as unpleasant social consequences for his colleagues, surely PUC does not believe that these "trivial harms" would dissuade a reasonable professor from filing or supporting charges of discriminatory harassment.

Eisenstein's comments do not constitute retaliation for purposes of Title VII. As a result, each of these findings imposes disciplinary sanctions on Eisenstein for speech protected by the First Amendment. Neither can stand without violating Eisenstein's First Amendment rights—rights that PUC, as a public university supported by taxpayer dollars, is bound by law to respect and honor.

FIRE again asks that you recognize the First Amendment rights threatened by PUC's action in this matter. We ask that the findings of retaliation against Eisenstein be rescinded and the formal written reprimands removed from his file. We request a response by March 26, 2012.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

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