



Foundation for Individual Rights in Education

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August 26, 2010

Chancellor Gene D. Block
Chancellor's Office
University of California, Los Angeles
Box 951405, 2147 Murphy Hall
Los Angeles, California 90095-1405

URGENT

Sent by U.S. Mail and Facsimile (310-206-6030)

Dear Chancellor Block:

As you know from our August 14, 2009, letter concerning a separate matter, the Foundation for Individual Rights in Education (FIRE; www.thefire.org) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, freedom of association, religious liberty and, as in this case, freedom of speech on America's college campuses. I appreciate Senior Campus Counsel Patricia M. Jasper's prompt and satisfactory resolution of the previous matter involving First Amendment rights.

FIRE is disappointed to be writing to you again about the violation of First Amendment rights on your campus. FIRE is very concerned about the threats to freedom of speech, academic freedom, and due process posed by University of California, Los Angeles' (UCLA's) decision not to rehire Dr. James E. Enstrom, a faculty member in the UCLA School of Public Health (SPH). Non-rehire decisions made because of a faculty member's protected expression, of which Enstrom's case appears to be an example, violate the First Amendment.

This is our understanding of the facts; please inform us if you believe we are in error. Dr. Enstrom has continuously held a non-tenured faculty position in SPH since 1976. He has consistently been rehired by UCLA. Since 2004, he has been rehired into UCLA's Department of Environmental Health Sciences (EHS). His research on environmental health issues falls squarely within EHS' research mission. Over the years, he and a few of his SPH colleagues have sometimes disagreed strongly about research on environmental health issues—for example, on the extent of the threat to public health posed by certain air pollutants, a topic of Enstrom's research which has been the subject of intense debate in California.

Enstrom also was a successful whistleblower regarding members of the Scientific Review Panel on Toxic Air Contaminants for the California Air Resources Board who, according to a lawsuit filed by the Pacific Legal Foundation (PLF) in June 2009, had been serving beyond the three-year legal limit on their terms of office without being properly re-nominated. One such member was EHS faculty member John Froines. As a direct result of Enstrom's advocacy on this issue, Froines was replaced on the panel effective July 22, 2010. According to Enstrom, at least six of the nine panel members were replaced in 2010 as a direct result of Enstrom's advocacy and the PLF lawsuit.

Enstrom has faced retaliation as a result of his whistleblowing and as a result of his research. According to a February 9, 2010, e-mail from Enstrom to EHS Chair Richard J. Jackson, he first learned about the retaliation on December 14, 2009, when he learned that, without his knowledge or permission, his salary had been charged to various funds in place of Fund 59605, which had been "an active source of ongoing support that paid my entire UCLA salary." Enstrom also learned in January 2010 that this fund had been cut off without Enstrom's knowledge, causing the other funds to be depleted.

Then, according to a June 15, 2010, letter from Enstrom to SPH Dean Linda Rosenstock, Enstrom faced further retaliation in February 2010, when Jackson informed Enstrom that Enstrom was being "indefinitely ... laid off" as of April 21, 2010, due to lack of funding for his position. Ever since his February 9 e-mail, Enstrom has been asking for a full accounting of his research funds dating back to 2007, but he has not received a response of any substance. In his June 15 letter, Enstrom calculated that there was sufficient funding (including unused vacation and sick leave) to employ him at least through December 2011. UCLA officials appear to have subsequently abandoned this particular justification for severing Enstrom's employment.

On June 9, 2010, however, Enstrom learned of still another instance of retaliation from his department. He received an e-mail from Jackson stating that the EHS faculty (including Froines) had voted not to rehire Enstrom. Jackson also wrote Enstrom a letter on June 9 stating that Enstrom would be "indefinitely laid off" effective June 30, 2010. Jackson wrote that the decision was made for "programmatic and financial reasons," adding:

Programmatically, your research is not aligned with the academic mission of the Department, and your research output and ability to secure continued funding does not meet the minimum requirements for the Department. In reviewing financial resources, the Department is unable to continue your current appointment.

Such a layoff timeline violates UCLA's "Procedures for Non-Reappointment of an Appointee Who Has Served Eight or More Consecutive Years," of which section 137-32 requires that "The University shall provide a written Notice of Intent not to reappoint at least sixty (60) days prior to the appointment's specified ending date." (Incidentally, the American Association of University Professors recommends 12 months in such cases.)

On June 30, 2010, SPH Associate Dean for Academic Programs Hilary Godwin wrote Enstrom extending his appointment for an additional 60 days, ending August 30. Godwin wrote:

The basis for non-reappointment is that the faculty of Environmental Health Sciences have determined that your research is not aligned with the academic mission of the Department, and that your research output and other contributions do not meet the department minimums.

Enstrom appealed this decision, following UCLA's "Procedures for Non-Reappointment of an Appointee Who Has Served Eight or More Consecutive Years," via a July 14 letter to Vice Chancellor for Academic Personnel Thomas Rice. Rice deferred to Godwin, who rejected the appeal. Godwin sent Enstrom a letter on July 29, stating:

As previously notified, the reason for non-reappointment is [that] the faculty of the Department of Environmental Health Sciences has determined that your research is not aligned with the academic mission of the Department, and your research output and other contributions do not meet the department requirements.

In both Enstrom's June 15 and July 14 letters, Enstrom challenged the decisions against him. In particular, he demonstrated that his research on environmental health is fully aligned with the "mission" of EHS and that his research output has been robust. He also argued that this and the other grounds given by Jackson and Godwin for non-rehire are merely pretextual, hiding the faculty's dislike for his research findings and his advocacy against such a prominent EHS faculty member as Froines.

In the absence of any evidence that Enstrom has failed to meet "department minimums" or "department requirements" or even that such standards exist, we agree with Enstrom's characterization of the non-rehire decision as pretextual. According to Enstrom, his research output has changed little over time. Furthermore, he has never been told what the "department requirements" or "department minimums" are, and he has never seen any statement of what these requirements are, if they exist at all. He also is unaware that the so-called requirements have been used to assess anyone else in the department, let alone to justify a decision not to rehire.

On August 12, Enstrom filed a timely grievance challenging his non-reappointment. According to Enstrom, a Grievance Liaison has found merit in the grievance and has referred it to Rice so that he can select a Step II Reviewer of the grievance, following UCLA procedure.

Again, all signs are that UCLA would not have made its non-rehire decision but for the apparent animus felt by many of his peers as a result of Enstrom's research and his whistleblowing—all instances of protected speech. As a public university, UCLA is both legally and morally bound by the First Amendment's guarantees of freedom of expression and academic freedom. The Supreme Court 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 teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). 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.

This principle holds whether the subject is communism, Catholicism, climate change, or the effects of air pollution. We trust that you understand that the First Amendment's protections (as well as the free speech protections of the California Constitution) fully extend to public universities like UCLA. See, e.g., *Keyishian*, 605-06 (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment”); *Healy v. James*, 408 U.S. 169, 180 (1972) (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’”).

Non-tenured faculty members do not have diminished First Amendment rights because of their employment status. Adverse employment action against a non-tenured faculty member, when that action is due to the faculty member's protected expression, violates the faculty member's First Amendment rights. This includes decisions not to rehire adjunct faculty members who have a reasonable expectation of being rehired. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 (“[A teacher's] claims under the First and Fourteenth Amendments are not defeated by the fact that he [does] not have tenure.”); *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) (“Withal, it is our duty to protect First Amendment values. Initially, our concern is to guard the rights of the terminated instructor. But, more importantly, we examine alleged First Amendment violations because of their potential chill on others, especially those situated like the complainant. **Although a person's tenure status is irrelevant to the First Amendment inquiry** (*Perry v. Sindermann* (1972) 408 U.S. 593, 597–98, 33 L. Ed. 2d 570, 92 S. Ct. 2694), our close examination is particularly appropriate where, as here, a complex of reasons may as well mask an unlawful motive as legitimately motivate a refusal to rehire ...”) (emphasis added).

While a public university is often allowed to choose not to rehire a non-tenured faculty member for a very wide variety of reasons, or for no reason at all (unless contractual agreements state otherwise), it is not permitted to make such a decision for a constitutionally impermissible reason, such as whistleblowing retaliation or as punishment for protected speech. Yet all signs are that this is just what has happened here. UCLA appears to have used hitherto unknown, ambiguous, or unenforced funding and research output “minimums” as mere pretexts for accomplishing what it could not otherwise accomplish lawfully. But for retaliation for Enstrom's protected expression, he would still be employed by UCLA. This is impermissible.

Enstrom's Case Requires Immediate Resolution

Because Enstrom's case involves the violation of a faculty member's rights, you have not only the authority but also the moral and legal responsibility to work to resolve the situation as quickly as possible. Every day that the case continues is a deeper violation of academic freedom

and freedom of speech and a more thorough chilling of faculty speech at UCLA. Merely waiting for the process of the grievance to run its course does not absolve you or UCLA of the moral and legal responsibility to immediately reverse the decision not to rehire Enstrom.

FIRE urges you to immediately reverse the decision not to rehire Enstrom. We also request that you ensure that he receives the full financial accounting he has requested. Furthermore, if any written evidence of "department minimums" does exist, Enstrom must receive a copy of it in order to properly defend himself.

In the alternative, if you choose not to recognize Enstrom's rights in this matter, FIRE requests that you preserve the status quo while Enstrom has a pending grievance at UCLA, and keep Enstrom employed as a faculty member at UCLA until his grievance is resolved. This status will permit Enstrom to seek additional research funding in order to demonstrate the possibility of funding for employment beyond December 2011.

We urge UCLA to show the courage necessary to admit its error. Please spare the university the deep embarrassment of fighting against the Bill of Rights, by which it is legally and morally bound. While we hope this situation can be resolved amicably and swiftly, we are committed to using all of our resources to see this situation through to a just and moral conclusion.

We have enclosed a waiver that permits UCLA to fully discuss Enstrom's case with us. Because Enstrom's last day at UCLA is scheduled for August 30, we ask for a response in writing by 5:00 p.m. PT on August 30, 2010.

Sincerely,



Adam Kissel

Director, Individual Rights Defense Program

Encl.

cc:

Patricia M. Jasper, Senior Campus Counsel

Kevin S. Reed, Vice Chancellor-Legal Affairs and Associate General Counsel

Charles F. Robinson, General Counsel and Vice President for Legal Affairs

William Cormier, Director, Administrative Policies & Compliance

Richard Jackson, Chair, Department of Environmental Health Sciences

Linda Rosenstock, Dean, School of Public Health

Hilary Godwin, Associate Dean for Academic Programs, School of Public Health

Susan Fisher, Manager, Human Resources, School of Public Health

Esther Hamil, Assistant Director, Academic Personnel Office

Thomas Rice, Vice Chancellor, Academic Personnel