FIRE
Foundation for Individual Rights in Education

July 16, 2015

Catherine R. Locallo
Robbins Schwartz
55 West Monroe Street
Suite 800
Chicago, Illinois 60603-5144

Sent via U.S. Mail and Electronic Mail (clocallo@robbins-schwartz.com)

Dear Ms. Locallo:

FIRE is in receipt of Oakton Community College's (OCC's) June 1, 2015, reply to our letter dated May 22. While we appreciate OCC's prompt response, your letter on behalf of the college fails to adequately address our concerns about OCC's response to Chester Kulis' May 1, 2015, email referencing the Haymarket Riot. We write to reiterate our request that OCC rescind its cease-and-desist letter to Kulis and assure its faculty that the college will honor First Amendment rights.

Preliminarily, as OCC clarified in its June 1 letter, Kulis' grievance arbitration—which, to our understanding, was ongoing at the time his email was sent—has concluded, and he is no longer employed by the college as an adjunct faculty member. Nevertheless, the college has no grounds to demand that he refrain from communications containing speech protected by the First Amendment. Moreover, OCC's threats of legal action endanger open discourse among current faculty members, who may fear similar reprisals for voicing criticism of the administration.

OCC's June 1 letter argues that Kulis' email does not enjoy First Amendment protection because it is a "true threat." At the outset, OCC's legal analysis begins by factually distinguishing from the present case several Supreme Court cases cited in FIRE's May 22 letter. As should be obvious, however, these cases—*Texas v. Johnson*, 491 U.S. 397 (1989), *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Virginia v. Black*, 538 U.S. 343 (2003)—were cited for the general principles of law articulated therein, not for a comparison of their fact patterns to the facts here under consideration. OCC's factual distinction of those particular cases is irrelevant to the question of whether Kulis' email constitutes a true threat under existing case law.

170 S Independence Mall W, Suite 510 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

More importantly, OCC's analysis evinces a fundamental misunderstanding of the narrow definition of a true threat articulated both by the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit, the decisions of which are binding on OCC.[1]

As explained in our May 22 letter, the Supreme Court has defined true threats, which are not protected by the First Amendment, as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court further elaborated that speech may lose protection as "intimidation," a form of true threat, when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

The Seventh Circuit employs an objective standard to determine whether speech constitutes a true threat. *See U.S. v. Parr*, 545 F.3d 491, 499 (7th Cir. 2008).[2] This inquiry asks "whether a reasonable speaker would understand that his statement would be interpreted as a threat," or, alternatively, "whether a reasonable listener would interpret the statement as a threat." *Id.* Context is important in reaching this determination:

> [T]he true threat determination is informed by but not limited to what the recipient or target of the alleged threat knew about the defendant. Contextual information—especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible regardless of whether the recipient or targeted victim had full access to that information.

Id. at 502.

---

[1] Indeed, OCC inappropriately cites *Schenck v. United States*, 249 U.S. 47 (1919), in the course of its true threat analysis. *Schenck*, which addressed suppression of speech during wartime, is an obsolete precursor to the modern standard for incitement as an exception to First Amendment protection, announced in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Not only are incitement and true threats separate and distinct exceptions to the First Amendment, with their own jurisprudence, but the frequent misuse and misunderstanding of *Schenck* by would-be censors—particularly Justice Holmes' infamous "fire in a crowded theater" quote, which OCC employs—has long been decried by commentators. *See, e.g.,* Trevor Timm, *It's Time to Stop Using the 'Fire in a Crowded Theater' Quote*, THE ATLANTIC, Nov. 2, 2012, http://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449; Ken White, *Three Generations of a Hackneyed Apologia for Censorship Are Enough,* POPEHAT, Sept. 19, 2012, http://popehat.com/2012/09/19/three-generations-of-a-hackneyed-apologia-for-censorship-are-enough.

[2] The *Parr* court noted in *dicta* that the *Black* decision might require both objective *and subjective* standards when determining whether a true threat exists, but did not ultimately reach the issue. *Id.* at 500. District courts in the Seventh Circuit have continued to apply the traditional objective standard in the absence of a final resolution from the Court of Appeals. *See, e.g., U.S. v. Buddhi*, No. 2:06-CR-63, 2014 U.S. Dist. LEXIS 68145, *11-14 (N.D. Ind. May 19, 2014); *U.S. v. Bradbury*, No. 2:14-CR-71, 2015 U.S. Dist. LEXIS 66858, *7 (N.D. Ind. May 22, 2015).

No reasonable speaker could expect Kulis' email to be taken as a threat of violence towards then-OCC President, Dr. Margaret Lee, or the college community, and no reasonable recipient could take it as such. First, Kulis' reference to the 1886 Haymarket Riot—which OCC takes as a violent threat—appears in the context of celebrating May Day, the origins of which are tied to the riot. May Day commemorates the struggles and gains of the international labor movement and the Haymarket Riot was a significant event in its history in the United States, as it was followed by a widely criticized trial of several labor activists and a crackdown on the movement nationwide. As should be readily apparent, the statement is a reference to a tumultuous historical event in the equally tumultuous history of the "struggle for union rights," as the email put it. Second, the subject line of the email, "May Day – The Antidote to the Peg Lee Gala," is at most an unspecific expression of displeasure with Dr. Lee and/or her administration. It unfavorably compares an event sponsored by Dr. Lee's administration and honoring her leadership to a day meant to honor the struggles of workers to gain labor rights. It was, at worst, a criticism sent to several faculty colleagues in addition to Dr. Lee (which, under *Parr*, is relevant context even if she was not aware of the multiple recipients). Viewed in the context of Kulis' history as a labor activist for adjunct faculty actively involved in a labor dispute with OCC's administration, the email cannot reasonably be read as any more than criticism of the administration.

True threats must be distinguished from political hyperbole, which is core speech protected by the First Amendment. The Supreme Court underlined this distinction in *Watts v. United States*, 394 U.S. 705, 706 (1969), in which a young man at a public rally expressed his opposition to the draft by saying, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." He was convicted under a statute criminalizing threats against the President. *Id.* at 707. The Court reversed the conviction, holding that his statement was not a threat, but rather political hyperbole fully protected by the First Amendment. *Id.* at 708. The Court reasoned:

> For we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The language of the political arena, ***like the language used in labor disputes*** ... is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President."

Id. (Internal citations and quotations omitted.) (Emphasis added.)

OCC's assertion that Dr. Lee could have reasonably interpreted Kulis' email as a "serious expression of an intent to commit an act of unlawful violence" against her or the campus community is neither justified nor credible in light of established precedent. Kulis' email is

political hyperbole of the kind protected by the Court in *Watts*. Indeed, the email contains a far more attenuated reference to violence than the statement at issue in *Watts*, as it contains no reference at all to harming Dr. Lee or anyone else.

Where courts find that statements can reasonably be interpreted as crossing the line from political hyperbole to unprotected threat, they require specificity and a direct connection to possible violence against an identified target, caused by the speaker. Such facts are nowhere present in this case. For example, the U.S. Court of Appeals for the Second Circuit upheld the conviction of "shock jock" Harold Turner for threatening three Seventh Circuit judges, in response to their ruling in a case before them, after Turner: (1) posted on his blog multiple times that the judges should be killed; (2) posted about the recent murders of a Seventh Circuit district judge's husband and mother because of her role in a case involving a white supremacist group; (3) posted comments suggesting that his own posts calling for the bereaved judge's death motivated the murders; and (4) posted photos and work addresses for the three targeted judges as well as a map and photo of their courthouse. *U.S. v. Turner,* 720 F.3d 411, 422–23 (2d Cir. 2013).

By contrast, the U.S. Court of Appeals for the Fourth Circuit found postings to neo-Nazi websites by white supremacist William White to be political hyperbole where the statements—though they expressed the view that someone should kill a Canadian civil rights activist—could not reasonably be understood to communicate White's *own* intent to cause the activist's death. *U.S. v. White*, 670 F.3d 498, 513 (4th Cir. 2012). On the other hand, the same court found that an email sent by White to a Citibank employee could reasonably be interpreted as a true threat where White: (1) stated that he had paid money to locate a large amount of personal information about the employee; (2) expressed anger over his relations with Citibank; (3) demanded she send him certain information and threatened to act if she did not; and (4) ended the email by comparing the employee to the Seventh Circuit judge, referenced above, whose relatives were murdered. *Id.* at 512.

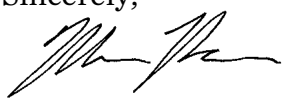
Kulis' email has more in common with the protected expression of the plaintiff in *Holley v. County of Orange*, 625 F. Supp. 2d 131 (S.D.N.Y. 2009), and is indeed even more innocuous. In *Holley*, the court granted summary judgment in favor of the plaintiff on her claim of false arrest after she was arrested for allegedly threatening her son's probation officer. To express her anger over the probation department's role in her son's conviction, she placed a large bouquet of dead flowers consisting of thorns, sticks and weeds, tied with a black bow, on an unmanned security desk in the department with a signed note addressed to the officer and department stating, "Thinking of you -- Your 'HELP' will long be remembered." *Id.* at 135. The district court held that this expression was protected by the First Amendment and was "easily distinguishable" from cases where courts found statements to be true threats. *Id.* at 140.

Like the vague expression in *Holley,* Kulis' email is easily distinguishable from cases in which courts have found statements to be true threats. Most importantly, the email does

not contain *any* expression of an intention to commit violence against a particular person or group, as required under *Black*. Even if the Haymarket Riot reference could reasonably be interpreted as a threat of violence, the email contains no reference to Dr. Lee (as opposed to her gala) or anyone in the campus community. Moreover, as *Turner* and *White* demonstrate, even if a specific target is identified, it is not enough to express a general violent wish; courts require more in order to find that speech can reasonably be interpreted as a threat. They require facts showing that the speaker communicated to the target an actual intention to cause real harm. There is nothing in Kulis' email that comes close to the threshold for true threats established by case law.

Oakton Community College's continued assertion that Kulis' speech constitutes a true threat is unsupportable and alarming. OCC has no basis on which to demand that he cease future communications such as his May 1 email, which contained only political speech enjoying full First Amendment protection. Moreover, such a response could have a deeply chilling effect on the speech of current OCC faculty. To see a former colleague and adjunct activist threatened with legal action and silenced for expressing political views critical of the administration sets a dangerous precedent for open dialogue on campus. FIRE asks once more that OCC rescind its cease and desist letter against Chester Kulis and take immediate steps to assure the OCC faculty that they will not face reprisal for exercising their right to openly express their views of OCC's administration.

Sincerely,



Marieke Tuthill Beck-Coon
Senior Program Officer, Individual Rights Defense Program

cc:
Joianne Smith, President, Oakton Community College
Tom Hamel, Vice President for Academic Affairs, Oakton Community College