FIRE
Foundation for Individual Rights in Education

March 28, 2022

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URGENT

Sent via Electronic Mail (pbarran@barran.com, ttolbert@barran.com)

Dear Ms. Barran:

Thank you for your quick response to FIRE's March 24, 2022, letter to Linfield University's President, Miles K. Davis, regarding what you have now confirmed is an external investigation initiated by Linfield of Professor Reshmi Dutt-Ballerstadt, which based on our initial impressions involved her protected social media posts. We assume we can communicate with you regarding this matter going forward, and will pass that along to Dutt-Ballerstadt and her counsel as well.[1] Thank you for also confirming that, per the plain language of Linfield's free speech policies, it intends the promises therein to afford speech protections commensurate with the First Amendment.[2] These commitments are, of course, binding on Linfield contractually (and morally),[3] even if the First Amendment does not apply directly, as your letter argues.

We found curious, however, your reference to the recent Supreme Court opinion in *Houston Community College System v. Wilson*,[4] with which we are no doubt familiar having filed as

[1] If this is not correct, please clarify for us the appropriate person(s) with whom we should communicate.

[2] LINFIELD UNIV., FACULTY HANDBOOK App. IV.3 (Fall 2020) ("HANDBOOK"), *available at* https://inside.linfield.edu/_files/academic-affairs/2020-21-FACULTY-HANDBOOK-01-06-21.pdf (stating that faculty are "entitled to use speech to convey disagreement, agreement, inquiry, or commentary in keeping with the principles underlying constitutionally protected free expression."); *see also id.* App. C, § 5(a) ("Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.").

[3] *See Conway v. Pac. Univ.*, 924 P.2d 818, 823 (Or. 1996) (treating university handbook as part of contract between professor and university); *cf. Swartout v. Precision Castparts Corp.*, 730 P.2d 1270, 1271 (Ct. App. Or. 1986) (employee handbook is part of contractual relationship between employee and employer).

[4] ___ S. Ct. ___, 2022 WL 867307 (Mar. 24, 2022).

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amicus in the case.[5] We agree *Wilson* is "worthy of []our consideration," as you say, but were confused by your suggestion that it has "much to say about issues such as the one before the University" here, as it is unclear in what regard that would be so. To be sure, *Wilson* did arise in the context of post-secondary education, which, naturally, encompasses Linfield, and some headlines and press may emphasize that aspect of the case. But in the decision itself, the Court expressly states its opinion is not meant to "pass on the First Amendment implications of censures or reprimands issued by government bodies against government officials who do not serve as members of those bodies," and it elsewhere indicates that the opinion narrowly focuses on Mr. Wilson and his co-trustees—all of which, of course, presents circumstances quite different from those involving the relationship between Dutt-Ballerstadt and Linfield.[6] It is thus inaccurate to suggest, as does your letter, that *Wilson* stands for the proposition that, when it comes to *professors* who are *employees* of a college or university, "an institution has the right to respond to misconduct ... by censuring that conduct -- even if it involved speech." *Wilson* does not speak directly to that point at all, in fact.

Whatever relevance *Wilson* has in more general contexts, such as that here, only reinforces points made in our letter to Linfield. The Court's unanimous opinion explains that "deprivations less harsh than dismissal" of employees can and do constitute adverse employment actions that can give rise to constitutional injury.[7] It also confirms that whether adverse actions are sufficiently material to create a potential First Amendment violation rests on the extent to which they "would chill a person of ordinary firmness ... from engaging in future First Amendment activity,'" or have "adversely affected the[ir] protected speech, taking into account things like the relationship between speaker and retaliator and the nature of the government action."[8] Under *Rutan*, "even an act of retaliation as trivial as failing to hold a birthday party for a public employee [suffices] when intended to punish her for exercising her free speech rights."[9] In fact, the Ninth Circuit, whose decisions bind Linfield, has repeatedly and consistently held that employers' disciplinary investigations of employees—precisely what Linfield announced against Dutt-Ballerstadt—are enough to constitute an adverse employment action.[10]

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[5] *See* https://www.thefire.org/houston-community-college-system-v-wilson. Your suggestion that our March 24 letter to Linfield was drafted before the Court issued its decision that morning is thus both curious, and in any event, misplaced.

[6] *Wilson*, 2022 WL 867307, at *6; *see also, e.g.*, *id*. at *6 (describing how the Court's reasoning apply "in these circumstances" involving co-equal members of an elective body, and tying it to "the[] features of Mr. Wilson's case"); *cf. id*. at *6 ("The censure at issue before us was a form of speech *by elected representatives* concerning the public conduct *of another elected representative*. *Everyone involved was an equal member of the same deliberative body.* The censure did not prevent Mr. Wilson from doing his job [and] did not deny him any privilege of office ....") (emphases added).

[7] *Id* at *5 (quoting *Rutan v. Repub. Party*, 497 U.S. 62, 75 (1990)).

[8] *Id*. at *5 (quoting *Nieves v. Bartlett*, 587 U.S. ____, 139 S. Ct. 1715, 1722 (2019)) (internal quotation marks omitted), and *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (internal quotation marks and ellipses omitted)).

[9] 497 U.S. at 75 n.8.

[10] *See Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir.2003) ("To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden."); *id.* at 976—77 ("[S]ome, perhaps all, of the following acts, considered individually, were adverse employment actions for purposes of plaintiffs' First Amendment retaliation suit: the transfer to new duties; an

A university's investigation of one of its professors for her speech, such as that Linfield has had initiated against Dutt-Ballerstadt, surely would chill and adversely affect a person of ordinary firmness in future expressive activities. (At minimum, we can surely agree, placing an employee under investigation—especially where the employer commits resources to having outside parties conduct it—is at least as severe, if not more so, as failing to commemorate the employee's birthday.) While you claim in this connection that FIRE does not have all the facts, Linfield's notice to Dutt-Ballerstadt—announcing the launch of a formal investigation based on "a series of events" and posts on "social media"—provides enough information to form two important conclusions: first, her personal social media posts form at least *part* of the basis for the investigation; second, by virtue of being formally investigated, she subsequently faces punishment up to and including dismissal.

Thus, regardless of additional information Linfield claims to possess but has yet to reveal—even to Dutt-Ballerstadt—these facts implicate her expressive and due process rights and trigger the university's attendant duty to follow specified processes. Linfield's faculty handbook states in no uncertain terms that "[d]ismissal of a faculty member" with tenure, such as Dutt-Ballerstadt, "will be preceded by" informal settlement discussions, an informal inquiry by a faculty committee, and a "statement of charges, *framed with reasonable particularity*" by the university's administration.[11] Adequate cause for such a dismissal lies only where conduct is "related, directly and substantially, to the fitness of the faculty member in their professional capacities as teachers or researchers."[12] In such a case, it is followed by a statement of charges, the right to appear before an unbiased faculty hearing committee, and notice of charges at least 20 days before the hearing.[13]

Linfield might conceivably argue dismissal is not among the possible outcomes of this particular investigation, but Dutt-Ballerstadt would have no way to know that because

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unwarranted disciplinary investigation; an unwarranted assignment of blame; a reprimand containing a false accusation; a criminal investigation; repeated and ongoing verbal harassment and humiliation; the circulation of a petition at the encouragement of management; a ten-day suspension from work; a threat of disciplinary action; an unpleasant work assignment; a withholding of customary public recognition; an unwarranted disciplinary action; and two consecutive ninety-day 'special' reviews of work quality.") (court's enumeration of adverse actions omitted); *see also D'Andrea v. Univ. of Hawaii*, 686 F. Supp. 2d 1079, 1088 (D. Haw. 2010), *aff'd sub nom. D'Andrea v. Hawaii*, 453 F. App'x 749 (9th Cir. 2011). ("Threats sufficient to deter an employee from engaging in protected activity may include threats to terminate employment, reduce compensation, or impose administrative leave.").

[11] HANDBOOK at App. C § 5(b) (emphasis added). Your letter claims the complaint resulting in Linfield seeking an investigation of Dutt-Ballerstadt "was not trivial on its face and presented content meriting an investigation." It is, of course, difficult to assess the accuracy of that assertion without the additional information you claim Linfield has but is withholding. But we take your characterization of the complaint as "non-trivial" to mean Linfield has a policy under which it summarily dismisses complaints that, on their face, call for sanctions in circumstances and/or ways that Linfield's policies embodying the First Amendment would bar. If so, it would be appropriate in those circumstances for "Linfield to tell one employee that another employee is immune from scrutiny because of what was said," despite your letter's suggestion that doing so would be improper. If, on its face, Dutt-Ballerstadt's speech giving rise to the complaint cannot be punished consistent with free speech principles, Linfield should, in fact, summarily dismiss the complaint. That it has not done so suggests it believes the complaint contains allegations sufficiently serious that Linfield must afford Dutt-Ballerstadt the process protections outlined above—including a complete accounting of allegations against her and the basis for the investigation.

[12] *Id.* § 5(a).

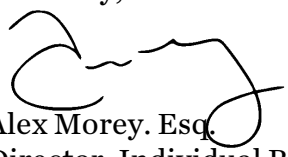
[13] *Id.* § 5(c).

Linfield has withheld crucial information about its investigation. Regardless of the particulars, under any conception of due process and minimal fairness, Linfield must provide faculty accused of wrongdoing basic facts about the nature of proceedings against them, including a summary of the allegations, and what policy they are alleged to have violated. Linfield cannot justify failure to take these most preliminary steps by claiming concern for the privacy of Dutt-Ballerstadt's accuser. Merely telling a faculty member which policy they allegedly violated cannot be said to compromise the rights of any other faculty member.

To the extent Linfield cites privacy issues with sharing information about Dutt-Ballerstadt's case with FIRE—despite an express privacy waiver from her allowing the university to do so—FIRE's primary concern is that the university has yet to provide such information *to Dutt-Ballerstadt herself*. While FIRE would appreciate seeing the information Linfield has regarding this investigation, the university is bound—morally and legally—to provide it to the professor under investigation. Linfield should have done so last Tuesday, and there is no excuse for not doing so immediately now.

In sum, we respectfully submit that you should reconsider viewing *Wilson* as in any way supporting Linfield's position in this matter, and that you strongly urge your client to share with Dutt-Ballerstadt all information that it claims supports investigating her speech protected by the First Amendment and Linfield's free speech promises. We request a substantive response to this letter no later than Friday, April 1, 2022.

Sincerely,



Alex Morey. Esq.
Director, Individual Rights Defense Program

Cc: Dr. Miles K. Davis, President
Lynn Johnson, Director of Human Resources