

FIRE

Foundation for Individual
Rights and Expression

October 31, 2022

Ken Hush
President's Office
Emporia State University
1 Kellogg Circle
Campus Box 4001
Emporia, Kansas 66801

Sent via U.S. Mail and Electronic Mail (khush@emporia.edu)

Dear President Hush:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Emporia State University's (ESU's) adoption of new procedures for firing university employees that implicate free expression, and the university's subsequent firing of more than 30 faculty members, including Professor Max McCoy. ESU's implementation of this policy poses a serious threat to academic freedom. We write to caution ESU against using this policy to fire faculty for protected speech, including speech that may be unpopular, offensive, or critical, and to express concern that McCoy's rights were violated when ESU invoked the new policy to fire him.

I. Emporia State University Implements New Policy and Fires More Than 30 Faculty Members

In January 2021, the Kansas Board of Regents endorsed a policy offering state universities new standards for suspending, dismissing, and terminating university employees in response to financial troubles from the COVID-19 pandemic.² The new policy gave state universities the option to implement the new standards for two years following the Board's endorsement. ESU's new policy gives administrators broad discretion to fire university employees, including tenured faculty members, for almost any reason.³ The policy states, "[a] decision to suspend,

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² Tim Carpenter, *Kansas Board of Regents extends deadline for university action on employee dismissal policy*, KAN. REFLECTOR (June 23, 2022), <https://kansasreflector.com/2022/06/23/kansas-board-of-regents-extends-deadline-for-university-action-on-employee-dismissal-policy>.

³ *Id.*

dismiss, or terminate any university employee shall be based on factors such as, but not limited to”:⁴

- Low enrollment.
- Cost of operations.
- Reduction in revenues for specific departments or schools.
- Current or future market considerations as to the need for a program or department.
- Restructuring of a program, department, or school as determined to be necessary by the university.
- Realignment of resources.
- Performance evaluations.
- Teaching and research productivity.
- Low service productivity.

In contrast, ESU’s previous policy allowed for tenured faculty to be fired only for adequate cause, such as chronic low performance and abandonment of duties, or “program or unit discontinuance or under extraordinary circumstances because of financial exigency.”⁵ The previous policy also provided participation from other faculty members during the dismissal process, which the new policy lacks, giving ESU administrators nearly unlimited discretion to make these decisions.⁶ Last month, ESU submitted a plan to adopt the new policy, titled the Framework for Workforce Management, to the Board of Regents, which was approved by the Board on September 14.⁷ ESU began firing faculty the next day, and as of the date of this letter, has fired 33 faculty members under the policy.⁸

ESU’s September 15 firings included journalism professor Max McCoy. Days before the new policy went into effect, McCoy wrote a column for the *Kansas Reflector* criticizing it.⁹ McCoy began his piece with the sentence “I may be fired for writing this,” expressing his fear of being fired for speaking out against the policy.¹⁰

⁴ *Framework for Workforce Management*, EMPORIA STATE UNIV., <https://bloximages.newyork1.vip.townnews.com/emporiagazette.com/content/tncms/assets/v3/editorial/a/b7/ab752106-3444-11ed-98b2-5f4e265b988a/6321f7c9b39fd.pdf.pdf> [https://perma.cc/4DLM-NCYS].

⁵ *University Policy Manual*, EMPORIA STATE UNIV., https://www.emporia.edu/documents/33/University_Policy_Manual.pdf [https://perma.cc/8GU6-LLST].

⁶ *Id.*

⁷ Allison Funk, *The breath ‘punched out of them:’ KBOR approves ESU’s plan to dismiss employees*, BULLETIN (Sept. 14, 2022), http://www.esubulletin.com/news/the-breath-punched-out-of-them-kbor-approves-esu-s-plan-to-dismiss-employees/article_749b9860-349c-11ed-bb9f-dfdd903a7f7b.html.

⁸ Sam Bailey and Cameron Burnett, *Emporia State dismisses 33 faculty*, BULLETIN (Sept. 15, 2022), http://www.esubulletin.com/campus_commons/emporia-state-dismisses-33-faculty/article_4fbfb12e-3533-11ed-8e89-2f8aa7fec93a.html.

⁹ Max McCoy, *Emporia State University is about to suspend tenure. Here’s why you should care.*, KAN. REFLECTOR (Sept. 13, 2022), <https://kansasreflector.com/2022/09/13/emporia-state-university-is-about-to-suspend-tenure-heres-why-you-should-care>.

¹⁰ *Id.*

Following his dismissal, McCoy asked for a specific reason for his termination, but administrators declined to provide one. His dismissal letter stated only that his appointment was terminated due to “extreme financial pressures accelerated by COVID-19 pandemic, decreased program and university enrollment, continuing and ongoing increases in the cost of operations across campus, and substantive changes in the education marketplace,” and cited every reason available for dismissal listed in the new policy.¹¹

II. The First Amendment Bars ESU from Firing Faculty for Speech Critical of University Policies

It has long been settled law that the First Amendment binds public universities like ESU,¹² and as such their decisions and actions—including the pursuit of disciplinary sanctions,¹³ and maintenance of policies implicating student and faculty expression¹⁴—must remain within constitutional limits. Public university faculty in particular do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment,” but instead retain a right to speak as private citizens on matters of public concern.¹⁵ A government employer may penalize an employee for speaking as a private citizen only if it demonstrates that its interests “as an employer, in promoting the efficiency of the public services it performs through its employees” outweighs the interest of the employee “as a citizen, in commenting upon matters of public concern.”¹⁶

McCoy’s column constitutes speech as a private citizen, not on behalf of or as an employee of ESU. The “critical question” is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, *not whether it merely concerns those duties*.”¹⁷ While McCoy may be a journalism faculty member, his duties do not include writing pieces for local media outlets. McCoy noted as much, stating in his piece that he has “never written much before about the university, at least not in column form.”¹⁸ The fact that McCoy voiced his concerns to a public audience, as opposed to his employer’s internal “chain of command,”¹⁹ is indicative of him speaking as a private citizen.

¹¹ Letter from Emporia State University Office of the President to Max McCoy (Sept. 15, 2022) (on file with author). Naturally, the recitation in the text comprises our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

¹² *Healy v. James*, 408 U.S. 169, 180 (1972) (“[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.’”) (internal citation omitted).

¹³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁴ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹⁵ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁷ *Lane v. Franks*, 573 U.S. 228, 240 (2014) (emphasis added).

¹⁸ McCoy, *supra* note 9.

¹⁹ *Buddenberg v. Weisdack*, 939 F.3d 732, 740 (6th Cir. 2019).

McCoy's column also addresses matters of public concern because it can "be fairly considered as relating to any matter of political, social, or other concern to the community."²⁰ ESU is a public university, and McCoy's piece commented on the university's leadership, policies, and financial affairs, each of which is of concern to the community both on campus and at large in Emporia. McCoy's commentary on tenure and academic freedom in his column relates to matters relevant to the academic community and discussed throughout the country. Additionally, his discussion about the Kansas legislature's influence on ESU's decision to adopt the tenure policy certainly relates to a "matter of political . . . or other concern to the community."²¹

McCoy's termination arose in the context of this public criticism, with his firing coming just days after publicly criticizing the very policy used to terminate him. And ESU's justifications for his dismissal—which include every reason outlined in the policy, ranging from "cost of operations" to "realignment of resources"—are so vague as to leave McCoy rightly concerned his dismissal was in retaliation for his protected speech. ESU bears the "burden of proof . . . to demonstrate that it would have reached the same decision even if the [professor] had not engaged in the protected" expression.²²

III. ESU's New Policy Presents Serious Concerns for Faculty Academic Freedom and Freedom of Expression

ESU's Framework for Workforce Management poses serious threats to academic freedom and faculty's expressive rights. The policy cites a non-exclusive list of factors sufficient to fire any university employee, including tenured faculty:²³

- Low enrollment.
- Cost of operations.
- Reduction in revenues for specific departments or schools.
- Current or future market considerations as to the need for a program or department.
- Restructuring of a program, department, or school as determined to be necessary by the university.
- Realignment of resources.
- Performance evaluations.
- Teaching and research productivity.
- Low service productivity.

²⁰ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

²¹ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

²² *Lindsey v. Bd. of Regents*, 607 F.2d 672, 676 (5th Cir. 1979).

²³ Framework for Workforce Management, *supra* note 4.

Under this new policy, terminating even a tenured faculty member is no longer a last resort in response to limited cases like serious misconduct and criminal activity, or something wielded only in the face of “extraordinary circumstances because of financial exigency.”²⁴ Instead, ESU may now terminate a tenured faculty member for any number of reasons, such as being too outspoken, rigorous, or simply inconvenient to administrators and students, with such a dismissal justified by one of the policy’s vague reasons such as “realignment of resources” or “restructuring.” As was the case in McCoy’s firing, ESU may terminate a tenured faculty member for any of the factors listed, as well as others not specified, without being required to elaborate or justify the action. Administrators can too easily abuse the policy, targeting for dismissal faculty who cause controversy, or whom administrators simply dislike.

The updated procedures for dismissing tenured faculty are also concerning, requiring employees to receive only 30 days’ notice of employment status changes. Such a brief window violates basic conceptions of fairness, providing faculty too little time to gather evidence or hire counsel to meaningfully appeal the decision. The policy also requires employees to send their appeals to the Board of Regents Office of Administrative Hearings and bear the burden of proof to show they should not have been fired. By shifting the burden from the university to the faculty member, and eliminating participation by other faculty in this process, ESU has given itself nearly unbridled, unilateral authority to make all decisions regarding faculty members’ continued employment.

We recognize the financial hardship faced by many institutions—including ESU—in light of COVID-19. However, the financial incentive behind dismissing tenured faculty under this policy is clearly outweighed by the damage this practice does to intellectual diversity and rigor on ESU’s campus. While a public university might have lawful reasons to terminate a faculty member’s contract, it cannot do so for a retaliatory purpose, including for speech protected by the First Amendment.²⁵ This principle is of fundamental importance to faculty at any public institution and is of particular concern to faculty members at ESU who, under this new policy, no longer have the traditional protections tenure affords. In implementing its new dismissal provisions, ESU must therefore avoid even the appearance of viewpoint discrimination when it makes faculty contract decisions. The constitution forbids public institutions like ESU from using adverse employment action as a means of responding to a faculty member’s criticisms.

IV. Conclusion

Professor McCoy’s column is clearly protected speech and may not form the basis for termination or other punishment. ESU’s problematic policy all but guarantees he will not be the last faculty member dismissed under the specter of viewpoint discrimination.

We call on ESU to immediately review McCoy’s firing, as well as the recent dismissal of the 32 other faculty, and provide evidence it was not prompted by their protected speech. ESU must hastily revise its ill-conceived Framework for Workforce Management to ensure it comports

²⁴ University Policy Manual, *supra* note 5.

²⁵ *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]he nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights”) (internal citations omitted); *see also Lindsey*, 607 F.2d at 674.

with the university's clear and binding First Amendment's obligations. We request receipt of a response to this letter no later than the close of business on Monday, November 14, 2022.

Sincerely,

A handwritten signature in cursive script, reading "Anne Marie Tamburro".

Anne Marie Tamburro
Program Officer, Campus Rights Advocacy

Cc: Blake Flanders, President and CEO, Kansas Board of Regents

Encl.

Authorization and Waiver for Release of Personal Information

I, Max McCoy, do hereby authorize
Emporia State University (the "Institution") to release
to the Foundation for Individual Rights and Expression ("FIRE") any and all
information concerning my employment, status, or relationship with the Institution.
This authorization and waiver extends to the release of any personnel files,
investigative records, disciplinary history, or other records that would otherwise be
protected by privacy rights of any source, including those arising from contract, statute,
or regulation. I also authorize the Institution to engage FIRE and its staff members in a
full discussion of all information pertaining to my employment and performance, and,
in so doing, to disclose to FIRE all relevant information and documentation.


This authorization and waiver does not extend to or authorize the release of any
information or records to any entity or person other than the Foundation for Individual
Rights and Expression, and I understand that I may withdraw this authorization in
writing at any time. I further understand that my execution of this waiver and release
does not, on its own or in connection with any other communications or activity, serve
to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of
all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal.
Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept
in my name in any and all Institution or District offices; (2) any emails, notes,
memoranda, video, audio, or other material maintained by any school employee in
which I am personally identifiable; and (3) any and all phone, medical or other records
in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any
information or records to any entity or person other than the Foundation for Individual
Rights and Expression, and I understand that I may withdraw this authorization in
writing at any time. I further understand that my execution of this waiver and release
does not, on its own or in connection with any other communications or activity, serve
to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this
authorization and waiver, but only the information that I authorize.

Signature

A black rectangular box redacting the signature.

10/28/2022

Date