

# HIGHER EDUCATION

## LegalAlert

Your monthly supplement to the book *Higher Education Law in America* – the leading authority in education case law.

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## Court Upholds Suspension of Abrasive Professor

Reversing a lower court's ruling, the Supreme Court of Washington decided that a university did not violate a professor's legal rights when it suspended him without pay based on his history of abrasive and offensive behavior on campus.

For more than 20 years, Perry Mills has been a professor at Western Washington University. He was granted tenure as an associate professor in the university's theater arts department in 1994.

In 1998, Mills's bid for promotion to full professor was denied. At that time, the chair of the theater arts department noted that Mills often

demeaned and berated colleagues and students. The department chair also noted that Mills had "an extremely high student complaint rate."

#### **Bad Behavior Continues**

Two years after Mills was denied the promotion, a new department chair sent him a letter that admonished him for making off-color comments about women, gay students, minorities and colleagues. The new chair warned Mills that he needed to change his behavior.

The letter did not produce the desired effect. Beginning in the fall

See **SUSPENSION** on page 12

## Student Claims Detention Violated His Fourth Amendment Rights

A community college in New Mexico did not violate the constitutional rights of a former student when it briefly detained him after he got into an argument in the school's financial aid office, the U.S. Court of Appeals for the Tenth Circuit decided.

Paul Keith Reyes is a former student at Central New Mexico Community College. For reasons not disclosed by the court's ruling, the college at some point made a decision to disenroll him.

Reyes was not happy about the fact that he was disenrolled, and he visited the school's financial aid

office to discuss the situation. While he was there, he got into a heated argument with an employee of the financial aid office.

#### **Physical Fight Avoided**

The argument in the financial aid office got so heated that it nearly escalated into a physical altercation. But cooler heads prevailed, and a physical fight was avoided.

Before Reyes left the campus, several school officials temporarily detained him and questioned him about what exactly happened in the financial aid office. After the school officials completed their questioning,

See **DETENTION** on page 11

## FOCUS ON ...

We'll report on sessions from the annual Association for Student Conduct Administration conference (see [theasca.org](http://theasca.org)) in upcoming issues but start with the article below, as the ASCA conference gave us a chance for a closer look at an institution that strikes fear in many of your hearts – or maybe it just gives you heartburn.

**M**ention FIRE to many higher ed professionals and watch them go tense.

FIRE is the Foundation for Individual Rights in Education, a civil rights watchdog notorious for taking on the schools it believes violate rights on campus.

How? Well, it knows a lot of trial attorneys and is not afraid to call them.

It also sends universities alarming letters and gives them grades – “green light,” “yellow light” or the dreaded “red light” – based on the extent FIRE thinks policies violate students’ speech rights.

### Where’s FERPA When You Need It?

FIRE not only grades the graders; it *publicizes* the grades.

One way is via its website. See this for yourself (and check for your school) by going to [thefire.org](http://thefire.org), selecting “speech codes,” and then clicking on “spotlight database” from the drop-down menu.

But possibly the most hair-raising thing FIRE does is its annual full-page print ad that announces its “worst of the worst” schools – FIRE’s “Red Alert List.”

This ad runs in *U.S. News & World Report’s* (brace yourself) Best Colleges issue.

The most recent ad cautions: “Think twice before applying to one of FIRE’s Red Alert schools.”

So when we saw in the ASCA conference agenda that FIRE was giving a presentation to a roomful of some of the people who really bear the brunt of these tactics, we went to the session mainly (we admit this) because we wanted to *watch*.

And we weren’t disappointed.

### FIRE Meets Ice

It was a smallish group. That can mean cozy – but it didn’t mean that here. There was palpable tension in the room and a polite but chilly reception to FIRE’s director and associate director of legal education and public advocacy, Will Creeley and Azhar Majeed.

Actual hostility followed soon. When Creeley mentioned FIRE’s green-light schools, a woman in the audience shot back, “And if we’re not a green-light school, we’re on your hit list.”

This was met with ferocious laughter – laughter with a mean edge. The student conduct professionals were *laughing with intent*.

But that was also the turning point. Because things could have gotten really ugly there. But they didn’t. Creeley calmly said there are times when if it doesn’t get

aggressive, things that need to change *don’t* change.

Also, he and Majeed were polite and had useful info to share – including copies of FIRE’s booklet, “Correcting Common Mistakes in Campus Speech Policies.” (You can access it at [myfire.thefire.org/Page.aspx?pid=256](http://myfire.thefire.org/Page.aspx?pid=256).)

### ‘People Are Very Threatened by FIRE’

But what really impressed us was when an audience-member – University of Mississippi Assistant Dean of Students Scott Wallace – spontaneously gave them a plug, volunteering FIRE had been very helpful to Ole Miss.

Later, Wallace told us he’s responsible for almost 40 policies. He was already disturbed his school didn’t have green-light status when he met Creeley at last year’s ASCA conference.

“I think that people are very defensive about FIRE,” he says, and “don’t understand how helpful they could be.”

But what about FIRE’s tactics? Wallace hadn’t heard about the “Red Alert List” ad until we mentioned it. Then he sighed deeply. “You know,” he said, “they have good intentions. Their tactics are a little ... *different*, though. Everybody fears FIRE. Fear the FIRE! People are very threatened by FIRE. I think you could see it in the room. But they are really helpful.” How helpful?

“They can help you stay out of court,” he specifies.

### Watchdog – or Attack Dog?

OK, we admit that’s huge – but still had trouble getting past the aggression. So we called Creeley to ask if he worries FIRE might be alienating the very people it needs to work with in order to protect students’ rights.

“FIRE makes no apologies,” he says firmly, “for demanding that public universities meet their legal obligation under the First Amendment and that private universities deliver the free speech guarantees that they promise to their students and faculty.”

But then he added they want to work *with* schools – a main reason FIRE lawyers don’t litigate but instead pass the lawsuits along to other lawyers. “We want universities to feel free to talk to us,” he said.

But, we pointed out, its aggressive tactics still make it come off as the enemy.

Creeley agreed but said, as he did at the conference, “Sometimes that’s necessary.” The annual ad, for example, was a last resort after FIRE repeatedly contacted the “worst of the worst” schools with no results.

And the violations aren’t harmless. Student discipline is a very important thing to get right.

Especially now, with degrees so linked to jobs (and the market so tough), suspensions and expulsions can



## ... FACING THE FIRE

have a devastating impact on students' lives.

So you and FIRE actually share a goal. You both want what's best for the students.

And here's the thing: They're specialists on campus rights – and *want* to share their expertise with you.

### A Kinder, Gentler FIRE?

Creeley insists FIRE only gets aggressive to get your attention.

It would much rather work with you to ensure your policies and practices pass constitutional muster than talk to the ACLU about suing you.

And Creeley says working with FIRE needn't be complicated. They have "very simple phone calls and very simple dialogues" with university administrators.

Solutions can be simple, too. One university solved a serious constitutional problem by adding a few lines to its civility principles to clarify students couldn't be disciplined for violating them.

"We really appreciate working with administrators who are interested in making the often relatively simple changes necessary to get policies in order," says Creeley. "It doesn't even have to be about policies," he adds. "It can be about certain questions on campus."

Which is not to say they won't call the ACLU if they

see a rights violation and a university won't address it.

"I don't want to sound tough or unrelenting," says Creeley, "but we don't do the work we do to make friends." That said, FIRE is working on outreach.

It's sent the booklet they brought to ASCA to around 300 schools. It also plans to add much more info for administrators to its website – things like best practices for free speech on campus; maybe even videos of FIRE lawyers addressing "what certain developments in the law mean for the daily life of administrators."

### Call Now!

They're also anxious to hear from you – so much so that Creeley OK'd printing his e-mail address here. It's [will@thefire.com](mailto:will@thefire.com). Or you can call 215-717-3473. "Our operators are standing by," he joked.

Wallace says that in his experience, FIRE gets back to schools fast "and that's their whole mission. They want to help. They want to help institutions."

So FIRE is not your enemy. But it's still a watchdog. So don't expect the intimidating letters, the full-page ad or FIRE's calls to lawyer friends to stop.

And don't expect those red lights to go out any time in the near future, either.

## One University's Response to a Tough Free-Speech Challenge

In case all this talk of red lights and full page ads has left you feeling hopeless about universities ever getting free-speech calls right, we have an inspirational true-life story.

What's your idea of a bad day at work? How about this: The Ku Klux Klan (KKK) calls to say it wants to demonstrate on your campus.

### Song Causes Trouble at Games

That's what happened in 2009 after the University of Mississippi banned the song "From Dixie with Love" at athletic events.

It did this because it had turned into a custom for some fans to shout, "The South will rise again!" as the song concluded – which other fans saw as applauding a segregationist past.

The chancellor asked for this to stop. It didn't. So the chancellor banned the song – and the KKK gave notice it wanted to come on campus to stage a protest. What would you do?

Ole Miss Dean of Students Dr. Thomas Reardon didn't say no – but did set reasonable time, place and manner restrictions – such as,

cordoning off the protesters and making sure there was a police presence.

And when the day came, no one got hurt – despite a strong counter-protest by the Ole Miss community (tellingly, around 200 of them to about 12 klansmen, according to one report).

Ole Miss avoided the horrors: violence, rights violations, bad publicity and lawsuits.

"It's never good when the Klan comes to your campus," says Scott Wallace in his understated way. "But I think we did a fairly good job of providing them an opportunity for free speech."

### 'As Hard as It Gets'

When Wallace told Will Creeley about it later, he agreed. "Boy," Creeley comments. "They should teach that one at Administrator 101, because that's as hard as it gets."

He calls it not only "an example of a situation that was handled well" but "a classic example of a teachable moment" – because students learned to respond to hateful speech "with more speech – not censorship."