

*State of New Jersey*

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
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RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

July 15, 2005

VIA FACSIMILE AND REGULAR MAIL

Greg Lukianoff, Director of
Legal and Public Advocacy
Foundation for Individual Rights in Education
210 West Washington Square
Suite 303
Philadelphia, PA 19106

Re: Jihad Daniel

Dear Mr. Lukianoff:

I am responding on behalf of William Paterson University to your letter dated July 5, 2005. For the reasons stated below, the recommended penalty against Jihad Daniel will stand as issued, subject to the appeal provisions of Mr. Daniel's collective bargaining agreement.

As you are aware, the University's Office of Employment Equity and Diversity had received a complaint on March 10, 2005 from Professor Arlene Scala alleging that Mr. Daniel had violated the University's non-discrimination policy as a result of his response to her e-mail dated March 7, 2005 announcing the presentation of a film and discussion entitled "Ruthie and Connie: Every Room in the House, a lesbian relationship story" as part of the co-curricular activities associated with Women's History Month. In his response by an e-mail dated March 8, 2005, Mr. Daniel stated "Do not send me any mail about 'Connie and Sally' and 'Adam and Steve.' These are perversions. The absence of God in higher education brings on confusion. That is why in these classes the Creator of the heavens and earth is never mentioned." In her complaint, Professor Scala stated that the message "sounded



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threatening" and that she did not want to feel threatened at her place of work when she sent out announcements of events that address lesbian issues.

The University is bound by and strictly enforces the *Interim State of New Jersey Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace* (attached). That policy states "The State of New Jersey is committed to providing every State employee and prospective employee with a work environment free from discrimination or harassment. Under this policy, all forms of employment discrimination/harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, religion, color, national origin/nationality, ancestry, age, sex/gender (including pregnancy), marital status, familial status, affectional or sexual orientation, gender identity or expression, domestic partnership status, atypical hereditary cellular or blood trait, genetic information, disability, (including perceived disability, physical, mental and/or intellectual disabilities), or liability for service in the Armed forces of the United States." More specifically, that policy provides that it is a violation to make remarks that are "derogatory or demeaning" to the members of the named protected groups.

The Office of Employment Equity and Diversity conducted a thorough investigation of the complaint made against Mr. Daniel. The investigator found that Mr. Daniel violated that policy. By a letter dated June 15, 2005, President Arnold Speert notified Mr. Daniel that he agreed with the investigator's conclusion and that, subject to his appeals, a letter of reprimand would be placed in Mr. Daniel's permanent employee file. Mr. Daniel was further advised that he could submit a written appeal to President Speert within 10 days and pursue an appeal under the provisions of his collective bargaining agreement.

By e-mails dated June 20 and 23, 2005, Mr. Daniel submitted an appeal to President Speert. By a memorandum dated June 24, 2005, President Speert advised Mr. Daniel that the finding that he violated the policy and the assessed penalty of a written reprimand would stand as issued. In that letter, Mr. Daniel was further advised that Human Resources would issue formal written charges in accordance with civil service regulations and his collective bargaining agreement. By a Preliminary Notice of Disciplinary Action dated June 30, 2005, Human Resources issued an Official Written Reprimand to Mr. Daniel. By an e-mail dated July 8, 2005, Mr. Daniel appealed that disciplinary action.

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In your letter, you assert that Mr. Daniel's due process rights were violated because he was not given a formal hearing to refute the charges and that the matter was improperly considered by President Speert instead of being handled by a hearing officer. Your assertion that Mr. Daniel's due process rights have been violated is premature since he has not yet exhausted his appeal rights under his collective bargaining agreement.

In more specific response to your assertion, under the University's *Employee Procedures for Complaints Alleging Discrimination, Harassment or Hostile Environments in the Workplace*, an employee does not have the right to a formal hearing to refute charges during the investigatory process. However, Mr. Daniel had an opportunity to respond to the charges. Mr. Daniel availed himself of that opportunity by submitting an e-mail dated March 24, 2005. Accordingly, Mr. Daniel has been given the due process to which he was entitled under the investigatory process. Further, the University's procedures provide that the President review investigatory reports issued by the Office of Employment Equity and Diversity and make a determination as to whether a violation occurred. Those procedures further provide that, in this case, an appeal of the determination be made to the President, not a hearing officer.

You further assert that the University violated Mr. Daniel's free speech rights. As an employee of the University, Mr. Daniel is required to comply with the *Interim State of New Jersey Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace*. As stated previously, the policy provides that it is a violation to make remarks that are "derogatory or demeaning" to members of protected groups. As President Speert noted in his memorandum dated June 24, 2005, not every utterance is protected under the First Amendment. Clearly speech which violates a non-discrimination policy is not protected.


Your argument appears to be two-fold. First, you state that it is ridiculous, even in a workplace, to conclude that a one-time e-mail constitutes unlawful discrimination and harassment. Under the *Interim State of New Jersey Policy prohibiting Discrimination, Harassment or Hostile Environments in the Workplace*, a single act of discrimination is prohibited. Second, you state that a policy prohibiting "derogatory or demeaning" speech is both unconstitutional and unwise. The policy at issue does not broadly prohibit "derogatory or demeaning" speech but prohibits such speech when it is directed at members of protected categories or, in other words, when it is discriminatory.

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I hope that this addresses your concerns.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: 
Cheryl R. Clarke
Deputy Attorney General

CRC/rd

c: Board of Trustees, WPU
President Arnold Speert, WPU
Stephen Hahn, Interim Provost, WPU
Ofelia Garcia, Dean, WPU
John Sims, Director, WPU
Allison Boucher, Director, WPU



**INTERIM
STATE OF NEW JERSEY POLICY PROHIBITING DISCRIMINATION,
HARASSMENT OR HOSTILE ENVIRONMENTS
IN THE WORKPLACE**

I. POLICY

a. Protected Categories

The State of New Jersey is committed to providing every State employee and prospective employee with a work environment free from discrimination or harassment. Under this policy, all forms of employment discrimination/harassment based upon the following protected categories are prohibited and will not be tolerated; race, creed, religion, color, national origin/nationality, ancestry, age, sex/gender (including pregnancy), marital status, familial status, affectional or sexual orientation, gender identity or expression, domestic partnership status, atypical hereditary cellular or blood trait, genetic information, disability, (including perceived disability, physical, mental, and/or intellectual disabilities), or liability for service in the Armed Forces of the United States.

b. Applicability

Discrimination/harassment undermines the integrity of the employment relationship, compromises equal employment opportunities, debilitates morale and interferes with work productivity. Thus, this policy applies to all employees and applicants for employment in State colleges/universities, departments, commissions and agencies ("State entities"). The State of New Jersey will not tolerate harassment or discrimination by anyone in the workplace including supervisors, co-workers, or vendors and/or contractors.

This policy also applies to both conduct that occurs in the workplace, and conduct that occurs at any location which can be reasonably regarded as an extension of

the workplace (i.e., any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed).

It is a violation of this policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the above protected categories. This policy pertains to all employment practices including, but not limited to recruitment, selection, hiring, training, promotion, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, job assignment, compensation, fringe benefits, working conditions, and career development.

II. PROHIBITED CONDUCT

a. Defined

It is a violation of this policy to engage in conduct relating to any of the protected categories outlined in paragraph (D)(a) which has the effect of harassing an individual or creating a hostile work environment. Harassment or the creation of a hostile work environment can occur even if there was no intent on the part of an individual to harass or demean another.

Examples of Behaviors That Constitute A Violation Of This Policy Include, But Are Not Limited To:

- Treating an individual differently because of the individual's race, color, national origin or other protected category, or because an individual has the physical, cultural or linguistic characteristics of a certain racial, religious or other protected category.
- Treating an individual differently because of marriage or partnership status to, or association with, persons of a certain racial, religious, or other protected category; or due to the individual's membership in, or association with, an organization identified with the interests of a certain racial, religious or other protected category; or because an individual's name or spouse's /partner's name is associated with a certain racial, religious or other protected category.
- Calling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more of the above protected categories.
- Using derogatory references with regard to any of the above protected categories.

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- **Engaging in threatening, intimidating, or hostile acts towards another individual in the workplace because that individual belongs to, or is associated with any of the above protected categories.**
- **Displaying or distributing material (including electronic communications) in the workplace that contains derogatory or demeaning language or images pertaining to any of the above protected categories.**

b. Third Party Harassment

Third-party harassment is unwelcome behavior involving any of the protected categories outlined in paragraph (D)(a) that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do the job. Third-party harassment based upon any of the protected categories is prohibited by this policy.

c. Sexual Harassment

It is also a violation of this policy to engage in sexual harassment of any kind (including hostile work environment harassment, *quid pro quo* harassment or same-sex harassment). For the purposes of this policy, sexual harassment, with or without sexual conduct, is defined, as in the Equal Employment Opportunity Commission Guidelines to include: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when, for example:

- **Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.**
- **Submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual.**
- **Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.**
- **Suggesting or implying that failure to accept a request for a date or sex would result in an adverse employment consequence with respect to any employment practice such as performance evaluations or promotional opportunity.**
- **Generalized gender-based remarks and comments.**

- Unwanted physical contact such as intentional touching, grabbing, pinching, brushing against another's body, or impeding or blocking movement.
- Verbal, written or electronic sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mails, text messages, invitations, gestures or inappropriate comments about a person's clothing.
- Visual contact, such as leering or staring at another's body, gesturing, displaying sexually suggestive objects, cartoons, posters, magazines or pictures of scantily-clad individuals.
- Explicit or implicit suggestions of sex by a supervisor or manager in return for a favorable employment action such as hiring, compensation, promotion, or retention.
- Continuing to engage in certain behaviors of a sexual nature after an objection has been raised by the target of such inappropriate behavior.
- The display of pornographic material on a bulletin board, on a locker room wall, or on a screen saver.

III. EMPLOYEE RESPONSIBILITIES

Any employee who believes that she or he has been subjected to any form of prohibited discrimination/harassment, or who witnesses others being subjected to such discrimination/harassment, is encouraged to promptly report the incident(s) to either a supervisor or manager, or directly to their State employer's Equal Employment Opportunity/ Affirmative Action Officer, or to any other persons designated by their State employer to receive workplace discrimination complaints.

All employees are expected to cooperate with investigations undertaken pursuant to this policy. Failure to cooperate in an investigation may result in administrative and/or disciplinary action, up to and including termination of employment.

IV. SUPERVISOR RESPONSIBILITIES

Supervisors must make every effort to maintain a work environment that is free from any form of discrimination/harassment. Supervisors must immediately refer any and all allegations of discrimination/harassment to their State employer's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the employer to receive complaints of workplace discrimination/harassment.

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A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment.

A supervisor is defined broadly to include any individual who has authority to control the work environment of any other staff members (e.g., a project leader).

V. DISSEMINATION

Each State entity shall distribute this Policy, or a summarized notice of it, to all state employees (including part-time, seasonal, and contract employees) annually. It must also be posted in conspicuous locations throughout each State entity (i.e., bulletin boards, or the agency's intranet site).

VI. COMPLAINT PROCESS

Each State entity shall follow the State of New Jersey Model Procedures for Processing Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in the Workplace with regard to reporting, investigating, and where appropriate, remediating claims of discrimination/harassment. Each State entity is responsible for designating an individual or individuals to receive complaints of discrimination/harassment (including sexual harassment), investigating such complaints, and recommending appropriate remediation of such complaints.

In addition to the Equal Employment Opportunity/Affirmative Action Officer, each State entity must designate an alternate person to receive claims of discrimination/harassment.

All investigations of discrimination/harassment claims shall be conducted in a way that respects, to the extent possible, the privacy of all persons involved. The investigations shall be conducted in a prompt, thorough and impartial manner. The results of the investigation shall be forwarded to the respective appointing authority head to make a final decision as to whether a violation of the policy has been substantiated. Prompt remedial action will be taken when appropriate.

The remedial action taken may include counseling, training, intervention, mediation, and/or the initiation of disciplinary action, up to and including termination of employment.

Each State entity shall maintain a written record of the discrimination/harassment complaints received. Written records shall be maintained as confidential records to the extent practicable and appropriate.

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VII. PROHIBITION AGAINST RETALIATION

This policy prohibits retaliation against any person who either: (1) alleges that she or he was the victim of discrimination/harassment; or (2) who provides information during the course of an investigation into a claim of discrimination/harassment. No person bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy, shall be subjected to adverse employment consequences based solely upon such involvement.

Appropriate administrative and/or disciplinary action, up to and including termination of employment, will be taken against any individuals who are found to have retaliated against a complainant, witness, or participant involved in an investigation.

Examples of Behaviors That Constitute Retaliation In Violation Of This Policy Include, But Are Not Limited To:

- Terminating someone for filing a complaint of discrimination, participating in an investigation, or objecting to an unlawful activity prohibited by this policy.
- Failing to promote someone because they filed a complaint, or participated in an investigation.
- Suddenly altering a work assignment for reasons other than legitimate business reasons.
- Unwarranted disciplinary action, or the threat thereof.
- Ostracizing an individual for filing a complaint or participating in an investigation.

VIII. FALSE ACCUSATIONS AND INFORMATION

An employee who knowingly makes a false accusation of prohibited discrimination/harassment, or who knowingly provides false information in the course of an investigation of a complaint, may be subjected to administrative and/or disciplinary action, up to and including termination of employment. Complaints made in good faith, however, even if found to be unsubstantiated, will not be considered a false accusation.

IX. CONFIDENTIALITY

All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate, confidentiality shall be maintained throughout the investigatory process. In the course of an investigation, it may be necessary to discuss the claims with the person against whom the complaint was filed and other persons who may have relevant knowledge or those who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned.

Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

X. ADMINISTRATIVE AND/OR DISCIPLINARY ACTION

Any employee found to have violated any portion(s) of this policy may be subjected to appropriate administrative and/or disciplinary action which may include, but is not limited to: referral for training, referral for counseling, written or verbal reprimand, suspension, reassignment, demotion or termination of employment.

XI. TRAINING

All State entities shall provide all new employees with training on the within policies and procedures within a reasonable period of time after the date of hire.

Refresher policy training shall be provided to all employees, including supervisors and managers, within a reasonable period of time.

All State entities shall provide supervisors and managers with training on their obligations and duties under the within policies and procedures on a regular basis.

Issued: December 16, 1999

Revised: June 3, 2005

See N.J.A.C. 4A:7-3.1

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