

THE CITY UNIVERSITY OF NEW YORK

Office of the General Counsel and Vice Chancellor for Legal Affairs

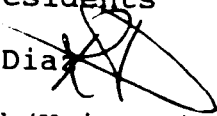
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January 7, 1992
Briefing Memorandum 1-92

To: Chancellor Reynolds
College Presidents

From: Robert E. Diaz 

Re: Hate-Speech/University of Wisconsin

In my memorandum of February 8, 1991 regarding hate crimes, I indicated that the University of Wisconsin had promulgated an anti-bias code which had been challenged in court. At that time, a decision had not yet been rendered. Subsequently, on October 11, 1991, the United States district court for the eastern district of Wisconsin issued a decision invalidating the university's code. UMW Post, et al v. Board of Regents of the University of Wisconsin System, 1991 U.S. Dist. Lexis 14527. The following is a discussion of that case.

In response to an increase in incidents of discriminatory harassment, the Board of Regents of the University of Wisconsin System (hereinafter "the Board") amended its student conduct code. The Board adopted a rule permitting the university to discipline a student for:

racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally: 1) demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and 2) create an intimidating, hostile or demeaning environment for education, university - related work or other university activity. Id at 4

Plaintiffs challenged the rule on the grounds that it violated their First Amendment rights. In support of their argument, plaintiffs alleged that the rule was facially overbroad in that it was a content-based rule which regulated a substantial amount of protected speech.

At the outset, the court noted that while the First Amendment generally protects speech from content-based regulations, the Supreme Court has recognized certain limited classes of unprotected speech. These categories of speech, which are considered to be of such slight social value that any benefit that may be derived from them is clearly outweighed by their costs to order and morality, include fighting words, obscenity and, to a limited extent, libel. The Board in this case argued that the rule regulated speech which falls into the category of fighting words.

In addressing this issue, the court noted that the scope of the fighting words doctrine has been narrowed and

clarified by the Supreme Court to include only words which: 1) tend to incite an immediate breach of the peace; 2) naturally tend to provoke violent resentment; and 3) are directed at the person of the hearer. Applying this doctrine, the court concluded that "since the elements of the UW Rule do not require that the regulated speech, by its very utterance, tend to incite violent reaction, the rule goes beyond the present scope of the fighting words doctrine." *Id* at 12. Specifically, the court found that speech may demean an individual's race, sex, or religion without tending to incite that individual or others to an immediate breach of the peace. Moreover, the court determined that speech which creates an intimidating, hostile or demeaning environment does not necessarily tend to incite violent reaction.

The Board further argued that the rule was constitutional because its prohibition of discriminatory speech which creates a hostile environment has parallels in the employment setting. In support of this position, the Board noted that under Title VII, the Supreme Court has held that an employee has a duty to take appropriate corrective action when it learns of pervasive illegal harassment. The court flatly rejected this argument on the grounds that Title VII addresses employment, not educational settings. Furthermore, the court stated that while agency law may hold an employer liable for its employee's actions, it would not

generally hold a school liable for its students' actions since they normally are not agents of the school.

Thus, the court determined that the rule was unconstitutional on the grounds that it clearly reached beyond the narrow confines of the fighting words doctrine and prohibited protected speech. In reaching this conclusion, the court noted:

The problem of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on fear of violent reaction. Content based prohibitions such as that in the University of Wisconsin rule, however well intended, simply cannot survive the screening which our Constitution demands.

Accordingly, the court permanently enjoined the Board from enforcing the rule.

c: Deans of Students
Legal Affairs Designees

DK/ip/acb/je
HATESPEE.