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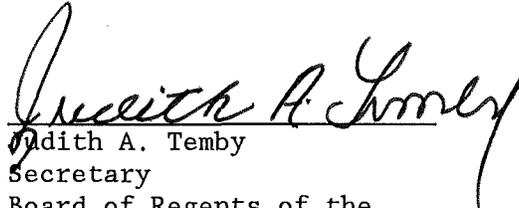
JUL 8 1992
2:00 pm
Revisor of Statutes
Bureau

STATE OF WISCONSIN)

BOARD OF REGENTS OF)
THE UNIVERSITY OF)
WISCONSIN SYSTEM)

I, Judith A. Temby, Secretary of the Board of Regents of the University of Wisconsin System and custodian of the official records, certify that the annexed rule, relating to student nonacademic misconduct and discriminatory harassment, was duly approved and adopted by the Board on May 8, 1992. I further certify that this copy has been compared by me with the original on file with the Board and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Board of Regents of the University of Wisconsin System at 1860 Van Hise Hall, 1220 Linden Drive, in the city of Madison, this 8th day of July, 1992.


Judith A. Temby
Secretary
Board of Regents of the
University of Wisconsin System

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ORDER OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF WISCONSIN SYSTEM
REPEALING AND RECREATING RULES

Agency contact persons: Patricia B. Hodulik (262-6497); Judith A. Temby (262-2324)

[INTRODUCTORY CLAUSE]

The Board of Regents of the University of Wisconsin System proposes an order to repeal and recreate s. UWS 17.06(2), Wisconsin Administrative Code, relating to student nonacademic misconduct and discriminatory harassment.

[PLAIN LANGUAGE ANALYSIS PREPARED BY THE UW SYSTEM]

Pursuant to ss. 36.35 and 227.11, Wisconsin Statutes, the Board of Regents of the University of Wisconsin System ("Board") is authorized to promulgate rules governing student conduct and procedures for the administration of violations. The Board's rules governing nonacademic misconduct are set forth in Chapter UWS 17, Wisconsin Administrative Code. In 1989, the Board created s. UWS 17.06(2), prohibiting certain types of discriminatory expressive behavior directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities. The constitutionality of this rule was challenged in UW-M Post, Inc., et al., v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991). In a decision issued October 11, 1991, the court sustained this challenge, holding that s. UWS 17.06(2) was, on its face, overbroad and vague, in violation of the First Amendment.

The court determined that the rule was unconstitutionally overbroad because it went beyond the "fighting words" doctrine. The "fighting words" doctrine holds that speech which tends to incite an immediate breach of the peace, or tends to provoke a violent reaction, is not protected under the First Amendment. The court found that s. UWS 17.06(2), by its terms, reached a "substantial number" of situations where no breach of the peace would be likely to result. Thus, the rule was unconstitutionally overbroad. In addition, because the rule covered speech beyond "fighting words," the court found that society's interest in free speech outweighed the university's interest in increasing minority participation in campus life and providing equal educational opportunity. The court also noted some ambiguity in the rule, since it did not make clear whether the speech prohibited must actually demean the listener and create a hostile environment, or whether the speaker must merely intend that the speech have this result.

The proposed language repealing and recreating s. UWS 17.06(2) responds to the constitutional problems identified by the court. The overbreadth problem is addressed with a more specific description of the expressive conduct prohibited by the rule. References to "discriminatory comments" and "other expressive behavior" have been deleted, leaving "epithets" as the only prohibited type of speech. The term "epithet" is, in turn, narrowly defined to include only those words, phrases or symbols that "reasonable persons recognize to grievously insult or threaten persons" because of a protected characteristic, and which--in addition--have the effect of making the

educational environment hostile for the person to whom the epithet is directed, and which tend to provoke an immediate violent response on the part of members of the group insulted. The definition also provides, however, that the tendency of an epithet to provoke a violent response is "without regard to the gender or physical characteristics of the individuals involved," so that a violation of the rule would not depend on the whether the particular individual addressed was likely to respond violently to the particular speaker. These clarifications in the definition of the expressive conduct being restricted make the rule consistent with the "fighting words" doctrine.

The revised language also clarifies the university's compelling interest in maintaining a safe, non-violent learning environment. It eliminates the ambiguities discussed in the court's decision by providing that, to be prohibited, the epithets must be both intended to demean and to create a hostile environment, and have the effect of making the environment hostile and provoking a violent response. Further, the revised rule makes explicit that the use of epithets in statements addressed to a general audience--regardless whether the epithets were intended to demean and to create a hostile environment--is not prohibited.

Finally, the proposed language provides that no disciplinary action may be invoked unless a "person designated by the President of the University of Wisconsin System" has first determined that the conduct alleged to have occurred constitutes a violation. The purpose of this provision is to ensure that the rule is applied in a manner consistent with constitutional principles.

[TEXT OF THE RULE]

SECTION 1. UWS 17.06(2) is repealed and recreated to read:

(2)(a) For addressing directly to a specific member, or specific members, of the university of Wisconsin system student body an epithet, as defined in par. (b), that is:

1. Intended to demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the person addressed; and

2. Intended to make the environment at the university hostile or threatening for the person addressed because of his or her race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) In this subsection, "epithet" means a word, phrase or symbol that reasonable persons recognize to grievously insult or threaten persons because of their race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age, and that:

1. Would make the educational environment hostile or threatening for a person to whom the word, phrase or symbol is directly addressed; and

2. Without regard to the gender or other physical characteristics of the individuals involved, would tend to provoke an immediate violent response when addressed directly to a person of average sensibility who is a member of the group that the word, phrase or symbol insults or threatens.

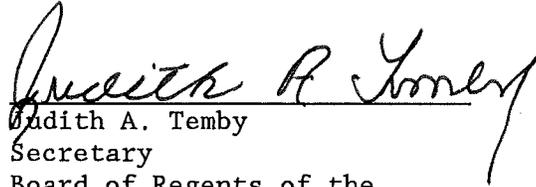
(c) The use of epithets in statements addressed to a general audience rather than directly to a specific individual, or specific individuals, shall not be a violation of this subsection even though the speaker's intent is to demean and create a hostile environment and even though a member or members of the group demeaned by the epithet constitute part of that audience.

(d) The intent of a person charged with violating this subsection shall be determined by consideration of all relevant circumstances.

(e) No disciplinary proceeding under this subsection shall be instituted unless a person designated by the president of the university of Wisconsin system has determined that the conduct alleged to have occurred constitutes a violation of this subsection. If disciplinary proceedings are thereafter instituted, and a violation is found, the proposed disciplinary sanction shall also be reviewed by the President's designee to assure that it is appropriate to the offense and comparable to sanctions that have been imposed for similar violations.

It is proposed that this rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22(2)(intro.), Stats., and applies only to conduct occurring after that date.

Dated: 7-8-92



Judith A. Temby
Secretary
Board of Regents of the
University of Wisconsin System

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Board of Regents of The University of Wisconsin System

Office of the Secretary
1860 Van Hise Hall, 1220 Linden Drive
Madison, Wisconsin 53706
(608) 262-2324

July 8, 1992

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JUL 8 1992

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Gary Poulson
Revisor of Statutes
119 Martin Luther King Boulevard
2nd Floor
Madison, WI 53703

Dear Mr. Poulson:

Enclosed for filing with your office are one certified copy and one uncertified copy of an administrative rule concerning student nonacademic misconduct and discriminatory harassment. This rule was approved by the Board of Regents on May 8, 1992 and submitted to both houses of the legislature on May 19, 1992. The legislative review period has now expired, and publication is therefore appropriate.

Thank you for your assistance in this matter.

Sincerely,


Judith A. Temby
Secretary

Enclosures

cc: Regents
President Lyall
Vice Presidents
Teresa Arenas
Patricia Hodulik

G:\COUNSEL\PBH\17GP