UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION – MINNEAPOLIS

JON WILLAND,

Plaintiff,

CASE NO. 01-

vs.

ROBERT ALEXANDER, in his individual and official capacities,

ANN WYNIA, in her official capacity as president of North Hennepin Community College,

WILL ANTELL, ANDREW BOSS, NANCY BRATAAS, BRENT CALHOUN, MARY CHOATE, DANIEL G. COBORN, DENNIS DOTSON, IVAN F. DUSEK, ROBERT ERICKSON, ROBERT H. HOFFMAN, JIM LUOMA, LEW MORAN, JOANN SPLONKOWSKI, JOSEPH SWANSON, and MICHAEL VEKICH, in their official capacities as members of the Board of Trustees of the Minnesota State Colleges and Universities,

DAVID FISHER, in his official capacity as commissioner of the Minnesota Department of Administration, and

JULIEN C. CARTER, in her official capacity as commissioner of the Minnesota Department of Employee Relations,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

This case is a fight against the enforcement of what is known as "political correctness" in a Minnesota college.[1] A professor of history who has been on the faculty of the North Hennepin Community College since the day that college opened in 1966 has been muzzled and had his reputation injured because he has not tailored his speech to comport with the politically correct way of discussing U.S. History, particularly in matters relating to American Indians. The speech restrictions that have been imposed upon Professor Willand are anathema to the most basic principles of the First Amendment jurisprudence as articulated by the Supreme Court:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, *which does not tolerate laws that cast a pall of orthodoxy over the classroom*. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' rather than through any kind of authoritative selection." Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 603, 87 S.Ct. 675, 683 (1967)(citations omitted)(emphasis added).

This case challenges rules of a state college that cast the "pall of orthodoxy" over the classroom. It challenges the requirement that a history professor teach only the viewpoint the student or the college administration wants to hear.

This motion is brought because Professor Willand's constitutional right to freedom of speech is being violated now. That violation may not be perpetuated while this case is being litigated. Accordingly, Professor Willand asks this Court to preliminarily enjoin the Defendants

from enforcing (a) their directives ordering Professor Willand to refrain from "offensive" speech, and (b) their directive ordering Professor Willand to refrain from using his computer and the internet for "offensive" speech.

FACTUAL BACKGROUND

The Willand Gag Orders

Professor Willand has been gagged by the Defendants by orders directed specifically to him that prohibit speech that may be "offensive" to those who hear it.

Professor Willand was first disciplined for his expression when teaching about the Jewish holocaust at the hands of the Germans in World War II. Professor Willand believes that the atrocities committed by the Germans at that time were of such inhumanity that merely using the most common terms that are used to describe those atrocities (holocaust, genocide) does not justly give the feel to the student of what was really happening. Accordingly, Professor Willand told his students that the Germans were engaging in "human recycling" – to teach the students that just like we recycle our garbage today, the Germans were attempting to use the remains of their human victims for industrial purposes. Professor Willand also compared Hitler to Stalin and asserted that Stalin's atrocities resulted in many more deaths than Hitler's. A student complained that she was offended by the use of the term "human recycling" and by the elevation of another historical figure to a place of greater infamy than Hitler.

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[1] In Levin v. Harleston, 770 F.Supp. 895 (S.D.N.Y. 1991), the court cited Random House for the following definition of "Political Correctness": "Marked by a progressive orthodoxy on issues involving race, gender, sexual affinity or ecology."

Rather than informing the student that the Germans were, in fact, attempting to recycle the remains of their victims, rather than informing the student that there is plenty of evidence that Stalin was responsible for more murders than Hitler, rather than helping this adult student learn – as college is expected by some to teach – that some facts of history *are* offensive, the defendants reprimanded Professor Willand .

The reprimand carried a directive that is in force today. That directive prohibited Professor Willand from "making comments and using phraseology which may be interpreted by a reasonable person as articulating or promoting racism, sexism, or any other ideology which incorporates stereotypical, prejudicial, or discriminatory overgeneralizations that might intimidate or insult students." (Affidavit of Jon Willand, Exhibit A.) The directive also prohibited Professor Willand from "making comments and using phraseology which do not manifest a clear concern for student sensibilities and which may promote student misunderstandings." *Id.* In short, Professor Willand was prohibited from saying anything that someone else may find offensive.

The college administration later enforced that directive. Professor Willand hung a poster on the door of his office. Faculty at the defendant college regularly post items on their doors that demonstrate (sometimes humorously, sometimes not) perspectives about a wide variety of matters – usually related in some way to their field of instruction. The poster (Willand Aff., Ex. B), as can be immediately discerned, is a parody of the famous Uncle Sam "I Want You" poster. The point of view it expresses, as stated by Professor Willand in his affidavit filed herewith, is that while the Army appeals to a person's patriotism when recruiting, the recruitee is

not always told that there are times when the Army is routed and everyone dies. The poster is satire that makes a little joke at Custer's expense.

The offensiveness in Professor Willand's speech this time was, apparently, the reference to the enemies of Custer's army – the enemies who did, in fact, arm themselves and defeat Custer and his troops in a military battle – as "militant." Rather than informing complaining students that many Sioux did, in fact, militantly resist the efforts of the United States government to force them onto reservations, and that the militant resistance actually resulted in military battles being fought, the defendants disciplined Professor Willand by tearing the poster off his door and ordering him not to post "offensive" material.

Shortly thereafter, the administration enforced its gag orders again. This time it suspended professor Willand without pay for "offensive" speech. In 1996, Professor Willand told his class that Pocahontas did handsprings nude through Jamestown. Professor Willand also told his class that in his view the ancestors of all Americans were immigrants at some time, so it is historically inaccurate to call any particular group "Native Americans." On another occasion, when teaching of when Samuel de Champlain and the Huron Indians fired their weapons upon the Iroquois Indians who fled in terror, Professor Willand recited the well worn historical quip, "God is on the side of the guys with the guns."

A student complained to the college administration that she was offended by these remarks. The administration, in response to the student's complaint did not tell the student that Professor Willand was right – that Pocahontas did, in fact, do handsprings naked through Jamestown and that Powhatan girls often went about naked in the summer at that time. Nor did the administration warn this student that if she was offended by such facts that she should be

sure never to view the official Historic Jamestown web site or the Smithsonian Institution web site lest she find that there, too, the fact of Pocahontas's nakedness will be stated. (Willand Aff., Exhibits D and E.) Instead, the college disciplined Professor Willand.

Prohibition against internet offensiveness

The above-described directives remain in force and prohibit Professor Willand from freely expressing his views within his academic field. More recently, in August, 2000, the Defendants expanded their prohibition against "offensive" speech, this time prohibiting Professor Willand and all of his colleagues from using their computers or the internet for "receipt, storage or transmission of offensive, racist, sexist, obscene, or pornographic information." (Willand Affidavit, Paragraph 18.)

The internet is now, in many ways, the lifeblood of academic research. It is the primary means by which professors rapidly exchange information and opinions about their fields. Under the August, 2000, directive, Professor Willand is now prohibited from using the internet to express what he was already prohibited from expressing in class or on his office door.[2] As in the case of the directives issued in response to the nude Pocahontas, "human recycling" and "militant Sioux" expressions, the computer directive provides no guidance as to what is "offensive," other than the language of the directive itself which indicates that "offensive" means something other than "racist, sexist, obscene or pornographic." It would appear that given the

[2] The computer directive covers not only professors, but all employees of the defendants. While the prohibitions against "offensive" speech contained in the August, 2000, directive are taken from a state government directive of wider application, and while the more broadly applied prohibition of the state directive against "offensive" speech is also in violation of the First Amendment, this action and this motion

facts of the Defendants' previous discipline of Professor Willand, his nude Pocahontas remark, if posted on the internet, would violate all five of the categories of speech prohibition.

Professor Willand does not bring this action to make a statement. He brings it because he has, in fact, been muzzled in an area of his own historical scholarship. Professor Willand has devoted a considerable portion of his work as a historian to the study of the history of Christian missionary work among the American Indians in Minnesota. Were the inference to be drawn from the Professor Willand's statements that Christian missionaries helped advance American Indian culture, a student may be offended. Professor Willand holds little doubt that if the recitation of the historical fact of the nakedness of Pocahontas is offensive to some and in violation of the defendants' directive, the expression of an opinion as to the benefits of religious missionary work is likely to lead to at least as many offended sensibilities, and, therefore, a violation of the directive. Accordingly, to be able to practice freely in his field, Professor Willand must be freed from the defendants' directives.

ARGUMENT

Every prong of the test for whether a preliminary injunction should issue is met in spades in this case. As set out in Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981), Professor Willand must show (1) that without the injunction he will be irreparably

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seek only to enjoin the Defendants – academic institutions and their administrators – from enforcing the prohibition against use of computers and the internet for "offensive" speech.

harmed, (2) that the balance of harm tips toward him; (3) that he is likely to succeed on the merits; and (4) that the public interest will not be disserved by a preliminary injunction.

A. Irreparable Harm and the Public Interest

The law on irreparable harm in a First Amendment case is settled: "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm." Elrod v. Burns, 427 U.S. 347, 373 (1976); Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999); Kirkeby v. Furness, 52 F.3d 772, 775 (8th Cir. 1995).

The law on the public interest in a First Amendment case is equally unequivocal: "It is always in the public interest to prevent the violation of a party's constitutional rights." G & V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1079 (6th Cir. 1994). "The public interest favors protecting core First Amendment freedoms." Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d at 969. "The public interest, as reflected in the principles of the First Amendment, is served by free expression on issues of public concern." Kirkeby v. Furness, 52 F.3d at 775.

B. Balance of Hardships

The balance of hardships sharply tips in favor of protecting Professor Willand's free speech rights. While Professor Willand forfeits his free speech rights in the absence of an injunction, such an injunction does not cost the defendants a penny, nor does it disrupt management of the college nor does it impose any burdensome responsibilities upon the defendants. To the contrary, scholarly learning – the *raison d'être* of any college – will be

advanced by freeing the faculty from concern about whether the exchange of information over the internet on, for example, the subject of the history of the relations between Caucasians and American Indians will run afoul of the defendants' offensiveness standards.

In Kirkeby, the court found that "the balance of equities also favors constitutionally protected freedom of expression over maintaining an insulation of privacy around a particular individual's residence…." Id., at 775. If freedom of expression outweighs insulation of privacy, it certainly outweighs insulation of students from being offended by facts and opinions in history class.

C. Likelihood of Success on the Merits

The defendants have violated the cardinal rule of First Amendment jurisprudence: they have imposed viewpoint-based restrictions on speech. Professor Willand is prohibited from "causing offense in [students]." He is prohibited from "articulating or promoting" any "ideology … that might intimidate, insult or offend others." He is prohibited from receiving, transmitting or storing "offensive" information with his computer.

Viewpoint-based restrictions are never allowed. Such restrictions are prohibited whether the forum is public or private; whether content-based restrictions are permitted or not. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 829, 115 S.Ct. 2510, 2516 (1995)("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.")

In determining whether Professor Willand is likely to succeed on the merits we ask the court to consider whether any of the following examples of speech would violate a prohibition

against offensive speech: What if professor Willand were to say that Zionism was racism? What if Professor Willand were to say that the average African-American is less intelligent than the average white American? What if he said that females are good at being chauffeurs and cooks for males? What if he satirized the Roman Catholic church? What if professor Willand were to post a picture of himself armed?

All of the foregoing examples would be examples of speech that is likely to be "offensive" to some students; they may be interpreted as promoting racism or sexism; they incorporate stereotypical, prejudicial and discriminatory overgeneralizations that might intimidate or insult students. *But every one of these specific examples have been found by the courts to be protected speech in the academic environment.* Dube v. State University of New York, 900 F.2d 587 (2nd Cir. 1990)(professor's teachings that Zionism is racism are protected); Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991) (professor's writings that the "average black is significantly less intelligent that the average white" is protected); Seemuller v. Fairfax County School Board, 878 F.2d 1578 (4th Cir. 1989)(high school gym teacher's statement, in connection with discussion of capabilities of girls in gym class, that females make good chauffeurs, cooks and housekeepers is protected); Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983) (university could not reduce funding for student newspaper based upon objections to satires of the Roman Catholic Church and Jesus that "would offend anyone of good taste"); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1998)(professors' photos of themselves armed are protected in spite of offense to other faculty and students).

Classroom speech such as Professor Willand's has been accorded First Amendment protection in case after case. Kingsville Independent School District v. Cooper, 611 F.2d

1109, 1111, 1113 (5th Cir. 1980)(use of "Sunshine simulation" technique to teach post-Civil War history, involving role-playing by students in order to recreate historical era, was protected by the First Amendment; "[w]e thus join the First and Sixth Circuits in holding that classroom discussion is protected activity"); Parate v. Isibor, 868 F.2d 821, 829-30 (6th Cir. 1989)(professor's communication of grade to a student is speech protected by First Amendment, which university officials violated in forcing professor to change grades); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (teacher's assignment of article with the word "motherfucker" in it subject to First Amendment protection); Silva v. Univ. of New Hampshire, 888 F.Supp. 293 (D.N.H. 1994)(professor's in-class comments were protected); Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996)(voiding discipline for sexual harassment based on content of classroom lectures, because the speech restriction was too vague); Stachura v. Truszkowski 763 F.2d 211, 214 (6th Cir. 1985)(teacher had First Amendment right to use controversial text and films to teach sex education), rev'd on other grounds, Memphis Community Schools Dist. v. Stachura, 477 U.S. 299 (1986).

Moreover, Professor Willand's academic field, the history of the United States, is an area of public concern of public concern lying at the heart of the First Amendment protections. Burnham v. Ianni, 119 F.3d at 679. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250-51, 77 S.Ct. 1203, 1211-12 (1957)(Academic freedom in the social sciences and political expression are fundamental principles of a democratic society and enshrined in the First Amendment of the Bill of Rights; "History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic

thought and whose programs were ultimately accepted. … The absence of such voices would be a symptom of grave illness in our society.")

Given the lengthy history of protections for offensive speech in academia, the "likelihood of success on the merits" prong of the Dataphase test is met in this case.

CONCLUSION

The defendants seek to impose a pall of orthodoxy in the classroom against which the First Amendment and its jurisprudence have revolted in every instance for 200 years. In this case the orthodox doctrine is that nothing negative may be said about the tribes or nations that inhabited this continent at the time of the arrival of European immigrants and at the time of America's westward expansion. The ostensible grounds for the orthodox doctrine is that a student may be offended by facts and opinions that contradict the doctrine. The real reason is the advancement of a political agenda.

We ask the court to imagine if the required orthodoxy was different: that a professor could not challenge the notion that the American Indians were uncivilized, that assimilation of the Indians into white American culture is good for the Indians. The very idea that such an orthodoxy could be enforced is revolting. The orthodoxy imposed by the defendants is no different. What academia needs and what the Constitution requires is that all perspectives relating to the history of Indian relations be allowed to stand or fall by the power of logic, not by the power of the state.

Professor Willand has been silenced and remains silenced on quintessential matters of public concern. The defendants' gag order must be lifted.

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Respectfully submitted,

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