

A10-1440

STATE OF MINNESOTA

IN SUPREME COURT

Amanda Tatro,

Appellant,

vs.

University of Minnesota,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

I. WHETHER THE UNIVERSITY VIOLATED APPELLANT’S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREE SPEECH BY DISCIPLINING HER FOR SATIRICAL FACEBOOK POSTS PREPARED OFF-CAMPUS THAT WERE NOT DIRECTED AT AND DID NOT DISCLOSE INFORMATION ON ANY IDENTIFIABLE PERSONS?

The court of appeals ruled in the negative.

Apposite Authorities:

Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972)

DeJohn v. Temple University, 537 F.3d 301, 314 (3rd Cir. 2008)

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)

J.S. v. Blue Mountain School District, 650 F.3d 915, 925-33 (3rd Cir. 2011)

II. WHETHER THE UNIVERSITY HAD JURISDICTION UNDER ITS OWN RULES TO CONDUCT A DISCIPLINARY HEARING WHERE THE ALLEGED MISCONDUCT OCCURRED OFF-CAMPUS AND DID NOT VIOLATE ANY CRIMINAL LAWS OR PRESENT A DANGER OR THREAT TO OTHERS, AND WHERE SOME OF THE RULES WERE NOT COVERED BY THE STUDENT CONDUCT CODE?

The court of appeals ruled in the affirmative.

Apposite Authorities:

University of Minnesota Student Conduct Code

III. WHETHER THE UNIVERSITY PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A DETERMINATION THAT APPELLANT COMMITTED DISCIPLINARY OFFENSES WHERE NONE OF THE ALLEGED CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED?

The court of appeals ruled in the affirmative with respect to most alleged violations, but found insufficient evidence for two violations and did not address whether

that affected the University's decision..

Apposite Authorities:

State v. Coleman, 661 N.W.2d 296 (Minn. Ct. App. 2003)

State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).

Kolender v. Larson, 461 U.S. 352, 103 S. Ct. 1855 (1983)

University of Minnesota Student Conduct Code

IV. WHETHER THE UNIVERSITY HAD AUTHORITY TO IMPOSE DISCIPLINARY SANCTIONS THAT INCLUDED CHANGING A PASSING GRADE TO A FAILING GRADE ITS RULES DID NOT AUTHORIZE SUCH A SANCTION?

The court of appeals ruled in the affirmative.

Apposite Authorities:

University of Minnesota Student Conduct Code

STATEMENT OF THE CASE

This matter originated under the authority of the University of Minnesota which charged Appellant with violations of the Student Conduct Code on December 29, 2009. An evidentiary hearing was held before the Campus Committee on Student Behavior (CCSB) on March 25, 2010. The CCSB found that Relator had violated University rules and imposed sanctions in a decision dated April 2, 2010. (Addendum 26A-31A). Appellant exercised her right of administrative appeal by timely submitting an appeal to the Provost's Appeal Committee (PAC). The PAC held a hearing on May 27, 2010. It recommended to the Provost that the discipline and sanctions be upheld in a letter dated May 31, 2010. (Addendum 32A-41A). The Provost, E. Thomas Sullivan, issued a final decision affirming the discipline and sanctions by memorandum dated June 24, 2010. Appellant initiated his appeal of the University's action by writ of certiorari on August 20, 2010. The court of appeals affirmed the University's decision. The Supreme Court has now granted Appellant's petition for review.

STATEMENT OF FACTS

1. Background of Parties.

Appellant Amanda Tatro became interested in mortuary science after taking care of her mother who suffered from a traumatic brain injury for 11 years and serving as her legal guardian, and thereby becoming familiar with dying and grieving. (Hearing Tr. 257-58). Tatro herself is physically handicapped. Her central nervous system does not

function properly, and she needs electric spinal chord stimulators in her body to be able to move. (Hearing Tr. 261). Tatro was completely immobile for many years until medical advances caught up. (Id.). She needs to joke and express humor, or “I’d be the most miserable person on the planet.” (Id.)

Tatro relies on Facebook to keep in contact with friends and family. (Hearing Tr. 258). Due her all-encompassing obligations, Facebook was her “whole social outlet.” (Id. 258-59). At the time of her controversial Facebook posts, her privacy settings were set to only include friends of friends. (Id. 259). She subsequently restricted her privacy settings to only friends. (Id.) Tatro’s Facebook friends included friends and family, and people in the Mortuary Science program. (Id.)

The Program of Mortuary Science is a Bachelor of Science degree program. (Transcript of Hearing before Campus Committee on Student Behavior on March 25, 2010 [hereinafter “Hearing Tr.”] at 41). The primary purpose of the program “is to prepare people to be funeral directors.” (Id. 43). The degree is required to receive a mortician license in Minnesota, which encompasses embalming and funeral service arrangements. (Id. 44). The program requires a variety of courses, including in science, business, grief psychology, “death and dying across cultures and religions,” and technical aspects of caring for the deceased. (Id. 45-46). There are laboratory courses in anatomy, embalming and restorative art, and a clinical rotation in an embalming laboratory in a funeral home. (Id. 46-47). There is no course on ethics in the program. (Id. 108-09).

2. Description of Disciplinary Charges

In December, 2009, staff at the Mortuary Science Program became aware of Facebook posts that they deemed offensive. They ultimately claimed that the following posts violated University Rules:

Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve... *(November 12th)*

Amanda Beth Tatro is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. *(December 6)*

Who knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code... *(December 7th)*

Amanda Beth Tatro realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. *(Undated)*

(Addendum 1A-6A; Hearing Tr. 12- 13). Ms. Tatro was accused in the disciplinary complaint of sharing the postings with the media. (Addendum 6A; Hearing Tr. 13).

The complaint alleged that she "posted statements on Facebook which could constitute violations of the University of Minnesota Student Conduct Code." (Addendum 6A; Hearing Tr. 12). The regulations alleged to have been violated included provisions of the Student Conduct Code, Subdivision 6, "Threatening, Harassing, or Assaultive Conduct", and Subdivision 16, "Violation of University Rules." (Addendum 7A, 12A-

13A).

The University Rules alleged to be violated included Anatomy Laboratory Rules: Rule #6, "Human material should always be treated with greatest respect"; Anatomy Laboratory Rule Number #7, "Blogging about the anatomy lab or the cadaver dissection is not allowable"; and Anatomy Laboratory Rule #9, "Anatomical material must not be removed from the dissecting laboratory." The Anatomy Laboratory Rules are attached to the syllabus for the course MORT 3171 on anatomy. (Hearing Tr. 131).

The Complaint further alleged violations of the Policies and Procedures of the Program Mortuary: Science Student Conduct Code 1c, "Students shall carry out all aspects of funeral service in a competent and respectful manner"; and Mortuary Science Student Conduct Code 2a, "All deceased persons should be treated with proper care and dignity."¹ (Addendum 7A, 19A-21A).

The Complaint finally alleged violation of the rules listed on the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure which Tatro had signed, but did not specify which rules. (Addendum 7A; Hearing Tr. 13-14; Addendum 25A).

3. Evidence Presented at Hearing.

Faculty and staff at the Mortuary Science Program became aware of the Facebook posts on December 11, 2009. (Hearing Tr. 144). The University's witnesses did not

¹ The Policy and Procedure Manual relied upon and introduced into evidence was for the 2008-2009 academic year. (Addendum 19A). The incident in question occurred in December 2009, during the 2009-1010 academic year.

explain how the posts first became an issue but Tatro testified that a classmate brought the posts to the Mortuary Science staff. (Hearing Tr. 260).

The director of the Mortuary Science program, Michael LuBrant, testified he was “very much concerned” when he saw the Facebook entry about wanting to stab someone with a trocar, but because he “didn’t know what they meant or what they were referring to, who they were talking about.” (Hearing Tr. 55). LuBrant claimed that he later heard from other people that Tatro might have been referring to him, but there was no evidence presented to indicate this was the case. (Id. 56, 89-90). Tatro’s professor in the laboratory course MORT 3171 on anatomy for the embalmer, Angela McArthur, testified she heard “rumblings briefly that that was supposed to be in regards to Michael LuBrant.” (Hearing Tr. 131, 151-52). LuBrant, despite subsequently meeting with Tatro on December 14, never asked Tatro who or what she was referring to in her posts. (Hearing Tr. 86:11-15, 90).

A trocar, an instrument for embalming, is a long hollow needle with a sharp end that is used to aspirate liquids, fluids and gases out of body cavities. (Hearing Tr. 53-54, 203-06). It is only used in the embalming lab and never removed from the lab. (Id. 214, 216-17). Ms. Tatro testified she had never even handled or used a trocar at the time of her Facebook post, and did not have an opportunity to use a trocar that day. (Id. 221, 265). Her instructor in the embalming course where a trocar is used, Jody LaCourt, had never seen Tatro do or say anything threatening. (Id. 209). LaCourt considered Tatro a good

student. (Id. 210). She never spoke with Tatro about the Facebook posts or asked her for an explanation. (Id. 212-13).

Tatro did not mention or indicate anywhere in the Facebook posts any specific person she wanted to stab with a trocar. (Addendum 1A-5A; Hearing Tr. 241). She explained at the hearing that she was thinking of an ex-boyfriend who had just broken up with her. (Id. 265-66). Tatro was also upset because she had just given consent for her mother to have surgery. (Id. 270). Tatro assumed that her friends and family who saw the post would know she was not serious because they knew she was “sarcastic” and has “a morbid sense of humor.” (Id. 266). She did not expect a negative reaction or intend to cause any fear in anyone. (Id. 266-67).

LuBrant testified there was fear about Tatro’s post that she hid a scalpel up her sleeve. (Id.). The post in question, however, actually stated, “Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve.” (Addendum 1A-2A). LuBrant also claimed this post violated the policy to treat deceased persons with “proper care and dignity.” (Hearing Tr. 77).

LuBrant testified that the Facebook entries about stabbing “a certain someone in the neck with a trocar” and “I will spend the evening updating my ‘Death List #5’ and making friends with the crematory guy. I do know the code . . . “ were threats to harm another person or harassment. (Hearing Tr. 74). He asserted that the posting about looking forward to the embalming lab and taking out aggression with a trocar violated the

Mortuary Science Code provisions, 1c, about carrying out “all aspects of the funeral service in a competent and respectful manner” and 2a, that “All deceased persons shall be treated with proper care and dignity.” (Id. 74-75). LuBrant also claimed this could be a threat to another person, and the lab instructor felt threatened. (Id. 75). Force is needed to get the trocar into the body tissue. (Id. 218). Tatro explained that her comment about aggression was meant as a reference to an incident in the lab where one student was using both hands on the trocar and other students joked about aggression. (Id. 322).

McArthur believed that the Facebook comment, “Amanda Beth Tatro Gets to play, I mean dissect Bernie today,” violated the Anatomy Laboratory Rules 6 that “Human material should be handled with the greatest respect, ” Rule 7 that “Conversational language of cadaver dissection outside the laboratory should be respectful and discreet” and prohibiting blogging, and Rule 11 prohibiting “Crude or off color remarks regarding the cadavers or other students.” (Hearing Tr. 146). She also thought the post about the opportunity to aspirate and taking out aggression with her trocar violated the laboratory rules about blogging and constituted crude and off color remarks. (Id. 148-149).²

Tatro explained to McArthur that her reference to a donor³ as “Bernie” came from the movie *Weekend at Bernie’s*. (Hearing Tr. 139-140). McArthur did not have a problem

² The rule regarding off color remarks, Anatomy Laboratory Rule 11, which McArthur cited, was not cited in the original complaint against Mr. Tatro and she therefore did not have notice of said violation before McArthur’s testimony. The Rule was not ultimately cited as a grounds for discipline. (Addendum 27A).

³ “Donor” is the term used in the profession for a cadaver.

with students giving a donor a name, such as “Harry,” as long as its respectful. (Hearing Tr. 190-91). The mortuary student who testified on behalf of the University stated that it is a common practice for students to name their donors. (Id. 233). McArthur thought the choice of the name Bernie was in bad taste because the movie was a comedy involving bringing around a dead person to various events as if he was still alive. (Id. 140-41). There was no mention in Tatro’s Facebook posts about the reason for the choice of the name Bernie. (Addendum 1A-5A). McArthur had not provided Tatro with any feedback that she did not believe reference to a donor as “Bernie” was appropriate, even though Tatro had also written “I heart Bernie” on the blackboard in class within a week of the Facebook post.⁴ (Hearing Tr. 178-180).

None of Tatro’s Facebook posts actually identified any donor. (Addendum 1A-5A; Hearing Tr. 246).

When Tatro met with LuBrant and administrative staff after the incident on December 16, 2009, she explained that “Bernie was a metaphor that I used for a deceased person.” (Hearing Tr. 274). She did not intend the word “play” disrespectfully, but it was based on her sense of humor. (Id. 275). Tatro believed she could use humor with her friends, but also believed there were limitations which is “precisely why I didn’t go into graphic detail on what I do in embalming labs or in the anatomy lab.” (Id.; see also Hearing Tr. 286-87). She did not believe she was violating the conduct code because she

⁴ Tatro was part of a group of three students working with a donor. (Id. 131).

did not describe explicitly any procedure performed. (Id. 305). Tatro also believed she followed rules about respect and dignity by not making jokes in the lab. (Id. 276).

McArthur testified that the comment on Facebook about the “Lock of hair in my pocket” violated the rule against blogging about the donor, and if it was really done, would be a “very, very serious issue.” (Hearing Tr. 149-150). There was no evidence whatsoever that Tatro really took hair from the donor. (Id. 150-51, 169). Tatro meant the post as a reference to a song by Black Crow, one of her favorite bands. (Hearing Tr. 289).

LuBrant and other faculty also did not know what Tatro was talking about in her Facebook comment, “I do know the code.” (Hearing Tr. 106-07). Tatro explained that she was referring to a code she guessed would be needed get into the crematory in St. Paul. (Id. 320-21). She did not know if a code was needed; Tatro was joking. (Id. 321).

McArthur testified that the purpose for rules requiring that human material be treated with respect is to protect the interests, identities, and modesty of the donors, and preserve public trust in the program. (Hearing Tr. 135). The rule restricts conversations about dissections outside the laboratory and prohibiting blogging because it upsets donors and potential donors. (Id. 135-36). McArthur claimed that she told students during orientation that blogging includes Facebook, Twitter and My Space. (Id. 136). However, in response to the question, “So you specifically tell them that essentially any Internet sites like Facebook is not acceptable to write about the dissection or the cadaver?” There is no recorded response in the transcript. (Id. 137). Tatro testified that there was no

discussion at orientation of Facebook or what constituted blogging. (Id. 295).

It was common for students to make general comments about lab classes on Facebook. (Id. 300-01). Jesse Clarkson, the student who testified for the University, did not recall if McArthur mentioned anything about Facebook, Twitter or My Space in reference to blogging when he attended orientation one year before Tatro. (Hearing Tr. 231).

McArthur conceded that “blogging” was not defined in the course rules or anywhere in the University rules or policies. (Hearing Tr. 167). She conceded that there are no rules which specifically prohibit posts on Facebook. (Id. 168-69). McArthur testified that it was not necessary to define the term that “anybody can look up in a dictionary.” (Id. 167-68). She claimed at the hearing to rely on a definition of blog from Webster dictionary, “A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” (Hearing Tr. 193-94). McArthur did not share this definition in any materials provided to students. LuBrant did not know the difference between Facebook and blogging. (Hearing Tr. 91-92).

The University elicited testimony from LuBrant over objections that there were news reports about the Facebook postings, and that students, community members and persons in the funeral business were upset about the posts.⁵ (Hearing Tr. 79-83).

McArthur testified that as a result of this incident, she received letters and phone calls.

⁵ Tatro contacted the media in response to being banned from campus on December 14, believing she had no other avenue for making her voice heard. (Hearing Tr. 280-82).

(Hearing Tr. 153-54). She testified regarding a specific letter from a donor's child complaining about Tatro's conduct. (Id. 154; Record Doc. 32, R 0080). McArthur was permitted over defense objection to read the entire letter during the hearing despite the fact that the physical letter was introduced into evidence so the panel could read the letter on their own. (Hearing Tr. 154-55).

The Anatomy Bequest Program had 323 donors in 2007 and more in 2009. (Hearing Tr. 113-14). There is concern about public image in order to encourage donations. (Hearing Tr. 119). There was no evidence that the incident caused a decrease in the number of donors. (Hearing Tr. 159).

LuBrant could not say whether there is room for any humor within the Mortuary Science Program. (Hearing Tr. 90). He did not know if there was ever any joking or kidding or light-hearted banter among students and faculty in the program. (Id. 91). LuBrant claimed that he personally never made a joke. (Id. 91).

LuBrant and other staff called police to report the Facebook posts. (Id. 56, 67-68). LuBrant called Tatro to his office on December 14, 2009, and banned her from coming to the Mortuary Science Program offices, classroom or teaching spaces while the matter was being investigated by police and the student conduct office. (Hearing Tr. 68-70). He took this action notwithstanding his claim that he was concerned about due process. (Id.) LuBrant claimed that Tatro was not suspended. (Id. 71, 88-89). However, according to the police report, LuBrant stated that Tatro was being suspended from the program. (Id.

87; Record Doc. 38, R 0118). Tatro was told by LuBrant that she was suspended at their meeting on December 14, 2009. (Hearing Tr. 280-84, 316-18). The police decided that no crime had been committed. (Hearing Tr. 71; Record Doc. 38, R0117).

Ms. Tatro was allowed to return to the program three days later. (Hearing Tr. 71). Sharon Dzik, the student conduct code administrator, called Tatro at the end of the day on December 16, 2009, and told Tatro she could finish her final exams. (Id. 284).

Tatro was subsequently informed by McArthur by email on December 22, that she had made a complaint to the Office of Student Conduct and Academic Integrity. (Hearing Tr. 284; Record Doc. 37, R0115). McArthur's email informed Tatro that she had earned a C+ in MORT 3171, but that she would recommend that the Office of Student Conduct and Academic Integrity change grade to an "F" as a sanction. (Id.) Dzik emailed the University's complaint to Tatro on December 29, 2009. (Addendum 6A).

LuBrant complained that in his conversations with Tatro about the Facebook postings, she did not believe what she did was wrong, and that she "straightened her back and looked at me and she said, what about my right to free speech?" (Hearing Tr. 84). LuBrant stated, "I don't believe Ms. Tatro believes she did anything wrong, and I think she's firm in that conviction. I think that's why we're here today." (Id.) LuBrant testified that it was because Ms. Tatro had not expressed remorse for her action, "the core faculty believed that she should be expelled from the program." (Id. 85). None of the faculty members who recommended Tatro's expulsion at the hearing had ever asked her for an

explanation of her Facebook posts. (Id. 269-270).

According to the Anatomy Laboratory Rules, the consequences of violation “may result in your eviction from the cadaver lab and the course.” (Addendum 17A). There is no mention of any other disciplinary consequences.

Ms. Tatro had no previous discipline. (Hearing Tr. 93, 171). She had successfully performed academically. (Id. 93, 257) There had not been any complaints from families involved in the clinical programs about Ms. Tatro. (Id. 96-97). She did not have any performance problems with dissection. (Hearing Tr. 187).

Ms. Tatro believes her discipline constituted retaliation by LuBrant for her interaction with him several days before the Facebook incident about a dispute with medical faculty over a handicap parking space. (Hearing Tr. 278-79, 325-26). LuBrant described his interactions with Tatro regarding a note she placed on the faculty member’s car. (Hearing Tr. 56-58). LuBrant claimed he “was appalled that anybody would write a message or leave a message like this on anybody’s car.” (Hearing Tr. 59). The University presented the documentation and testimony regarding this incident even though it did not claim it violated any rule, and was not the subject of any discipline. (Id. 60-61, 96). LuBrant testified that he requested Tatro write a letter of apology, and that she responded that she would submit a complaint to the Student Conflict Resolution Center. (Id. 62-63).

4. Administrative Procedure and Decisions.

At the beginning of the disciplinary hearing, Tatro’s attorney argued that the

allegations against her were not within the jurisdiction of the University its rules of student conduct. (Hearing Tr. 20). He argued that there was no rule restricting private internet communications from one's own private off-campus residence. (Id.) Her attorney pointed out that no specific person was identified as a target of any threat. (Id.) He argued that Subdivision 6 of the Code of Student Conduct requires endangering the health, safety of, or welfare of another person, and there is no basis for Facebook postings to be used a violation of the University's code. (Id. 21-22).

Tatro's attorney also requested a continuance because he has just engaged his client two days prior, and had not yet been able to review the substantial documentary materials and prepare to present testimony. (Hearing Tr. 27). He requested another week to get ready. (Id. 28).

The Student Conduct Code Panel announced that it did have jurisdiction and denied Tatro's request for a continuance. (Id. 33). It provided no reasoning or any explanation for these decisions. At the subsequent Provost's Appeal Committee Hearing, the chair of the Student Conduct Board, Jeanne Higbee stated that based on the applicable procedures, the CCSB did not have jurisdiction to "rule on our own jurisdiction." (Transcript of Provost's Appeal Committee Hearing, May 27, 2010 at 50, 112, 114).

Higbee repeatedly made clear the hearing was "not a court of law" and rules of evidence such as hearsay and foundation did not apply. (Hearing Tr. 7, 11, 40, 72, 79).

On April 2, 2010, the CCSB issued a written decision which found Tatro

“Responsible” for all of the alleged rule violations except for Anatomy Laboratory Rule #9 which prohibits removing human material from the laboratory. (Addendum 26A-30A). The CCSB placed Tatro on probation for the remainder of her undergraduate career, and imposed the following sanctions: Her grade in MORT 3171 was changed to an “F”; she was required to enroll in a clinical ethics course; she was required to write a letter addressing the issue of respect; and Tatro was required to complete a psychiatric evaluation and fulfill any recommendations. (Addendum 30A-31A).

Pursuant to applicable procedures, Ms. Tatro appealed the CCSB’s decision to the Provost’s Appeal Committee (PAC). The appeal raised issues of lack of jurisdiction, denial of due process and a fair hearing, retaliation, and unauthorized sanctions. (Record Doc. 41, R0128-0130). A hearing was held on May 27, 2010. The purpose of the PAC is “to determine whether the grounds, as presented in the student’s appeal, are sufficient and convincing to cause further action.” (Provost Appeal Committee Transcript [hereinafter “Appeal Tr.”] 5). The PAC is an advisory panel that only makes a recommendation to the Provost. (Id.) At this hearing, the parties made arguments and officials from the Student Conduct proceedings were questioned..

Ms. Tatro’s advocate moved to dismiss the proceedings based on lack of jurisdiction because the conduct occurred off-campus. (Appeal Tr. 11-13). The Committee chair responded that the issue would be incorporated into the committee’s discussions and recommendations to the Provost. (Id. 14). On further argument regarding

jurisdiction, Tatro's advocate pointed out that the Facebook posts had nothing to do with her University activities. (Id. 24-25). There was no course on "embalming therapy" and Bernie had "no identifiable characteristics as any person living or dead." (Id. 26-27). There was no one named in the posts. There was no threat since Tatro indicated she felt like stabbing someone rather than indicating an intent to do so. (Id. 28-29). The advocate further disputed that Facebook is a blog. (Id. 30). He pointed out that Facebook is a social networking platform. (Id. 37). The chair of the Student Conduct Board, Jeanne Higbee conceded, "perhaps instead they should say electronic media or whatever." (Id. 118).

Higbee explained her position that CCSB did not have jurisdiction to "rule on our own jurisdiction." (Appeal Tr. 50, 112, 114). Higbee claimed that the Board determined Tatro had threatened others even though her statements were not directed at any individuals based on testimony by faculty that they perceived her statement as a threat. (Appeal Tr. 160). Tatro's advocate argued in his closing statement that the disciplinary action had a chilling effect on free speech. (Appeal Tr. 170).

The PAC recommended by a split vote that the decisions and sanctions imposed by CCSB be upheld. (Addendum 32A-41A). It rejected the claim of lack of jurisdiction without addressing the arguments about the conduct occurring off-campus. (Addendum 37A). The PAC was split 2-2 on issues of whether Tatro was denied fair notice because the original Complaint contained wording that was different from the Rules found to be violated and because a Facebook entry is not "blogging." (Addendum 40A). However,

the PAC recommendation stated that a tie vote was insufficient for Tatro to prevail. (*Id.*)

With respect to the other charges, a dissenting PAC member aptly recognized,

the supposed threats in the facebook entries were not credible. The lack of specificity of the alleged target and the conversational tone make it clear that the threat was metaphorical. Furthermore, the current pop culture references (e.g. "Death List #5", in quotation marks, from the movie *Kill Bill*) would be readily recognized by the appellant's college-aged peers (the audience to which the note was drafted) as further indication that the alleged threat was merely a literary device expressing emotion.

The Provost issued his "final decision" on June 24, 2010, which affirmed the CCSB's findings and sanctions. (Addendum 42A-44A). The terse decision rejected the arguments of lack of notice or due process, that Facebook is not blogging, or that the alleged threats were not sufficiently specific. (Addendum 43A-44A). The Provost did not address the issue of jurisdiction.

Ms. Tatro appealed the University's decision to the court of appeals by writ of certiorari. The court of appeals affirmed the University's decision, and rejected all of Tatro's challenges except for determining there was a lack of evidence to support two of the alleged rule violations. (Addendum 45-64A).

ARGUMENT

This case invites the Court to define the boundaries of where a University can regulate a student's expression of her personal views on the internet. Respondent University of Minnesota's imposition of discipline on a student Facebook entries that were literary expressions of her feelings, violated Appellant Tatro's constitutional rights

to free speech and due process, was arbitrary, and lacked support under the University's rules. The University's Student Conduct Code that governed the disciplinary proceedings did not authorize discipline for the conduct in question, and the University lacks constitutional authority to regulate such off-campus conduct..

Ms. Tatro's Facebook entries were not in violation of any of the rules cited by the University based on any reasonable interpretation. Her metaphorical and unspecific statements could not be reasonably construed as threats to anyone, did not reveal any privileged or specific information about her work with cadavers in the labs, and cannot be definitively construed as "blogging." The language of most of the rules in question is vague and confusing, and not sufficiently applicable to Ms. Tatro's conduct to put her on notice that she was committing disciplinary infractions. The University's sanction of giving Ms. Tatro a failing grade for a course that she had already passed was not within the range of sanctions authorized by the Student Conduct Code or the Mortuary Science Program's rules.

Standard of Review⁶

Unless otherwise provided by statute or appellate rule, a party must petition the Court of Appeals for a writ of certiorari to obtain review of a quasi-judicial decision an administrative body that does not have statewide jurisdiction. Willis v. County of

⁶ This Brief contains one section on Standard of Review rather than a separate one for each argument because the applicable standards are common to the different issues or intertwined.

Sherburne, 555 N.W.2d 277, 281 (Minn. 1996); Micius v. St. Paul City Council, 524 N.W.2d 521, 522 (Minn. Ct. App. 1994). The appellate courts' jurisdiction to review this matter has not been disputed.

Although the University is part of the executive branch of state government so that its decisions are given deference by the appellate court under the principle of separation of powers, Maye v. University of Minnesota, 615 N.W.2d 383, 385 (Minn. Ct. App. 2000), the Due Process Clause protects a student's interest in attending a public university. Abbariao v. Hamline University School of Law, 258 N.W.2d 108, 112 (Minn. 1977); Schuman v. University of Minnesota Law School, 451 N.W.2d 71, 74 (Minn. Ct. App. 1990). A student is afforded more due-process protection when school-imposed sanctions are for misconduct rather than for academic failings. Id. If a student's discipline results from arbitrary, capricious, or bad-faith actions of the university officials, the court will intervene and direct the university to treat the student fairly. Id. An executive body's decision "may be modified or reversed" on certiorari review if it "made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted." Montella v. City of Ottertail, 633 N.W.2d 86, 88 (Minn. Ct. App. 2001). The "substantial evidence" needed to support an administrative decision has been held to consist of:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;

3. More than some evidence;
4. More than any evidence; and
5. Evidence considered in its entirety.

Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 668 (Minn. 1984).

Challenges to constitutionality of laws or government action, however, are questions of law which are reviewed de novo. See e.g. State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998). When reviewing a claim that an adjudication “violates the First Amendment, we view the evidence in the light most favorable to the state, but independently determine whether the conduct falls outside constitutional protection.” In re Welfare of W.A.H., 642 N.W.2d 41, 47 (Minn. Ct. App. 2002)(citing In re Welfare of M.A.H., 572 N.W.2d 752, 757 (Minn. Ct. App. 1997)). An appellate court's review is unique in the context of a First Amendment claim, which requires “an independent examination of the whole record ... to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression.” New York Times Co. v. Sullivan, 376 U.S. 254, 284-85, 84 S.Ct. 710 (1964).

In the instant case, the issues of whether the University’s decision violated Ms. Tatro’s constitutional rights to free speech and due process warrant de novo review. The University’s determinations that Tatro violated any rules were arbitrary and capricious, not supported by substantial evidence, and violated the University’s own procedures.

I. THE UNIVERSITY VIOLATED APPELLANT’S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREE SPEECH BY DISCIPLINING HER FOR SATIRICAL FACEBOOK POSTS PREPARED OFF-CAMPUS THAT WERE NOT DIRECTED AT AND DID NOT DISCLOSE INFORMATION ON ANY IDENTIFIABLE PERSONS.

Ms. Tatro’s literary expressions on her Facebook page are constitutionally protected free speech that cannot be disciplined by the University. The court appeals risks setting dangerous precedent chilling free expression by holding that Tatro could be disciplined for off-campus writings that did not pose any specific threat to anyone or violate anyone’s privacy merely because they upset people and were deemed harmful to the University’s image. The court of appeals’ decision was fundamentally erroneous on several levels: 1) it held that adult University students are bound by similar free speech restrictions applied to high school and junior high school students contrary to all applicable precedent; 2) the court of appeals rejected the established principle that allegedly threatening speech needed to constitute a “true threat” in order to be penalized by government authorities; and 3) it created an unprecedentedly broad standard for “substantial disruption” of school activity to justify restriction of student speech based on unjustified perceptions of the speaker’s intent and harm to a school’s image.

A. Free Speech Right are the Same for University Students as the Public.

It is well-established that protections for free speech extend to public schools, and more so to institutions of higher education. U.S. Supreme Court and published appellate decisions have applied the same free speech principles to college students as to the

general public. “The government may not regulate speech based on its substantive content or the message it conveys.” Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995)(citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290 (1972)). “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” DeJohn v. Temple University, 537 F.3d 301, 314 (3rd Cir. 2008)(finding a harassment policy overbroad because it restricted free speech)(quoting Saxe v. State College Area School Dist., 240 F.3d 200, 209 (3d Cir.2001)(quoting Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989))). “The mere dissemination of ideas-no matter how offensive to good taste-on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670, 93 S.Ct. 1197 (1973).

The Supreme Court has recognized the college environment, in particular, to be “the marketplace of ideas.” Healy v. James, 408 U.S. 169, 180, 92 S.Ct. 2338, 2346 (1972). Healy explained, “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ ” Id. Unlike in an employee-employer relationship, a

student's speech need not be a matter of public concern to be protected from retaliation by a University, but may also be on a matter of private concern. Qvyjt v. Lin, 932 F.Supp. 1100, 1109 (N.D. Ill. 1996).

Even in school settings for children, the Supreme Court has long held that state-operated schools may not be "enclaves of totalitarianism," Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511, 89 S.Ct. 733, 739 (1969). The court of appeals, however, committed serious error by relying almost exclusively on case law setting forth the boundaries of free speech in high schools and junior high schools rather than colleges and universities. (See Addendum 58A-61A).⁷ The appeals court stated, "We also reject Tatro's contention that the *Tinker* substantial-disruption analysis does not apply in a university setting. We discern no practical reasons for such a distinction and note that other courts have acknowledged *Tinker*'s broad applicability to public-education institutions." (Addendum 61A). Although acknowledging case law holding that "what constitutes a substantial disruption in a primary school may look very different in a university," (Addendum 61A), the court of appeals did not apply any different standard for substantial disruption this case but in actuality, applied a looser standard than has even been applied to secondary schools.

The lower court decision's fundamental error is in assuming that the precedents

⁷ The appeals court stated, "Since *Tinker*, broader rationales have emerged for disciplining and limiting student speech in public schools and then proceeded to cite precedents involving high school and junior high school students." (Add. 59A).

permitting greater speech restrictions in secondary or pre-secondary school settings also apply to public institutions of higher education:

The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 3164 (1986), and the rights of students must be “applied in light of the special characteristics of the school environment.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).

(Addendum 58A). The application of this principle to universities flies in the face of the U.S. Supreme Court’s statement that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”

Healy, 408 U.S. at 180, 92 S.Ct. at 2346.

A 2010 3rd Circuit decision explained,

Public universities have significantly less leeway in regulating student speech than public elementary or high schools. . . . At a minimum, the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

McCauley v. University of the Virgin Islands, 618 F.3d 232, 247 (3rd Cir. 2010). The

DeJohn case which was case cited but not applied by the appeals court also recognized,

[W]e must point out that there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school. . . . Discussion by adult students in a college classroom should not be restricted. Certain speech,

however, which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.”

DeJohn, 537 F.3d at 315.

To the extent that the “substantial disruption” standard is applied to Universities, precedent makes clear that it cannot be used to deny any free speech rights available to the public at large. Ms. Tatro’s facebook posts could not be deemed illegal under any regular standards, and the court of appeals failed to set forth any grounds upon which they could be restricted under First Amendment standards applicable to the general adult population. Her posts were therefore protected speech.

B. Appellant Cannot be Penalized for “Threatening Speech” that is Not a True Threat.

The court of appeals erred in determining that Ms. Tatro’s facebook posts need not be deemed a “true threat” in order to be penalized. If she is entitled to the same Free Speech protections as anyone in the public, as argued in Section I.A., supra., then the “true threat” standard applies. However, even in high school cases, it established that the “true threat” standard applies.

Ms. Tatro had a constitutional right to use her Facebook page as a literary device to express her emotions, including her feelings about school and how they related to her personal life. Her unspecific and obviously satirical comments which included discussion of a trocar and scalpel did not come close to the sort of “threat” that could be restricted. The Supreme Court has repeatedly affirmed the principle that the government cannot

proscribe free expression except for extremely narrow categories of speech that constitute a “true threat” or somehow cause harm without any redeeming value. “Speech is often provocative and challenging.... [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895 (1949). True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Virginia v. Black, 538 U.S. 343, 349 (2003). A “true threat,” despite being pure speech, lies outside the First Amendment’s protection solely because it “play’s no part in the “marketplace of ideas.” R.A.V. v. City of St. Paul, 505 U.S. 377, 383, 112 S.Ct. 2538 (1992). Rather than contributing to the world of opinion or ideas, a true threat is designed to inflict harm. Thus, true threats are words “which by their very utterance inflict injury.” Black, 538 U.S. at 349.

The 8th Circuit has held that in making a true threat inquiry, a court must analyze the relevant facts to determine “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’ ” United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir.1982)). Dinwiddie set forth a nonexhaustive list of factors relevant to how a reasonable recipient would view the

purported threat, which include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. 76 F.3d at 925.

The application of these criteria helps illustrate the lack of any serious basis to construe Tatro's Facebook entries as true threats. Applying the Dinwiddie criteria, only the first one partially supports a threat determination - the faculty who saw the statements claimed to be frightened. However, there was no reasonable basis to from them to determine there was a threat directed at them. The "threat" was conditional in that there was no actual threat, and Tatro only claimed to "want" to stab someone. Ms. Tatro did not communicate the statements directly to the object of the threat - she could not have done so because there was no real threat. Tatro did not identify or even describe any person who might be harmed. The audience was her friends and family whom she believed understood her sense of humor. The context of the entries makes it clear she intended them as humorous and literary expressions. Ms. Tatro had no prior history of making threats against anyone. There was no reason for anyone who read the statements to believe that the speaker had a propensity to engage in violence.

The 8th Circuit has specifically applied the true threat standard when evaluating

narratives of brutal acts of violence by a high school and junior high school student, respectively. Doe v. Pulaski County Special School District, 306 F.3d 616, 619, 625-26 (8th Cir. 2002); Riehm v. Engelking, 538 F.3d 952, 958-59, 963-64 (8th Cir. 2002). The court of appeals acknowledged the application of the true threat standard for student speech in these specific cases, but refused to apply that standard in this case. (Addendum 60A-61A). The appeals court stated there was “no authority for applying the true-threat analysis to discipline of student speech by a public university, and also relied on a 2nd Circuit decision which rejected the application of the true-threat analysis in Doe and Riehm in favor of the substantial disruption test applied in a 2nd Circuit decision. (Addendum 61). This decision gravely errs by holding that a University student is actually entitled to *less* free speech protection than afforded to grade school students in prior cases, and by casting aside controlling 8th Circuit precedent.

Protection of free speech principles requires the use of the true threat standard for evaluating the permissibility of student speech, and particularly for higher education students who have no less free speech rights than the general public. Courts have required a demanding showing for speech to be a “true threat” because ambiguous language or speech not intended to be threatening can be seen as threatening by some readers or listeners. The setting aside of any restrictive standards poses grave risks that speech will be penalized without being truly threatening.

C. There are no Grounds for Finding “Substantial Disruption”.

Ms. Tatro’s facebook posts could not be reasonably and constitutionally construed as a “substantial disruption” regardless of where the standard applied is the same as for K-12 schools or one that recognizes the free speech protection appropriate in an adult higher education setting. The court of appeals found a substantial disruption based on faculty members and students expressing concern and overreacting by requesting a police investigation which found no law broken, and because press accounts of the incident reportedly caused public concern about the anatomy-bequest program. (Addendum 62A-63A). These are not adequate grounds to infringe on Ms. Tatro’s free speech rights under any precedent, and the appeals court indeed cited no precedent to support its holding. Indeed, “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.” Saxe, 240 F.3d at 315 (citations omitted).

A substantial disruption typically refers to “disorder or disturbance . . . [or] interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and left alone.” Tinker, 393 U.S. at 504, 89 S.Ct. at 733. Ms. Tatro’s facebook posts were done off-campus and did not have anything to do with anything happening at her school until others at the school brought them up. Significantly, Tinker emphasized that “undifferentiated fear or apprehension of

disturbance is not enough to overcome the right to freedom of expression.” Id. at 508, 89 S.Ct. at 733. It is insufficient when the student’s speech is merely “offensive,” Morse v. Frederick, 551 U.S. 393, 409, 127 S.Ct. 2618 (2007), or “harassing,” Saxe, 240 F.3d 200 at 209 (“‘Harassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections.”) In the absence of an actual disruption, administrators must be able to point to “a particular and concrete basis . . . to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others.” Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 257 (3d Cir. 2002).

Numerous federal decisions have held that student postings on the internet, even if offensive, are nevertheless protected speech. The 3rd Circuit issued an en banc decision shortly before the appellate decision in the instant case, J.S. v. Blue Mountain School District, 650 F.3d 915, 925-33 (3rd Cir. 2011), which held that a school district violated a middle school student’s free speech rights by suspending him for creating an internet profile containing a photograph misappropriated from the school district website with profanity-laced statements indicating he was a sex addict and pedophile, and a copy ended up in the school. J.S. relied on the speech being made off-campus, and stated that a school official or classmate bringing a statement to the school “does not turn off-campus speech into on-campus speech.” Id. at 932-33. Similarly in the instant case, the fact that

other people from Mr. Tatro's program read her facebook posts and discussed and brought them to school does not change her off-campus speech to on-campus speech. She cannot be reasonably held responsible for disrupting school activities from her personal internet posts made off-campus that did not specific mention any person at the University.

In Murakowski v. University of Delaware, 575 F.Supp.2d 571, 587-92 (D. Del. 2008), the court held that the university violated a student's First Amendment Rights by disciplining for creating a website on the university's server which included his essays describing graphic violence, murder, sex, rape and physical and sexual abuse, and contained racial slurs and derogatory remarks about homosexuals and disabled people. Although a fellow female student complained that she felt terrified, had to change her academic schedule and seek counseling, and the brother of another student complained to police resulting in a police investigation, Murakowski held that the university failed to show the writings "caused a material disruption or was likely to do so," as it did not interfere in any way with the functioning of the university. Id. at 592. Similarly in the instant case, Ms. Tatro's posts, which were far less graphic and specific, might have offended and upset people, but did not interfere in any way with the functioning of the University or her program.

See also J.C. and R.C. v. Beverly Hills Unified School District, 711 F.Supp.2d 1094 (C.D. Cal. 2010)(a student's posting of a video clip on a website making derogatory,

sexual and defamatory statements about a 13 year old classmate did not create any substantial disruption or foreseeable risk of a disruption, so his suspension violated the First Amendment); Layschock v. Hermitage School District, 650 F.3d 205 (3rd Cir. 2011)(School violated student's First Amendment rights by disciplining him for creating fake internet profile of principal with vulgar, derogatory and defamatory statements about him on social networking website, since conduct was off-campus and did not result in any substantial disruption of school); Buessink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998)(school violated student's free speech rights by disciplining him for internet homepage containing derogatory remarks about school and school officials).

The University of Minnesota far exceeded its authority by disciplining Tatro for expressive comments on her Facebook page that were far less threatening than many internet writings that have been held to be protected, and where her conduct did not have any direct connection to the University's functioning. That faculty and staff disapproved of Tatro's writings, and even misinterpreted her intent, does not alter the objective reality that they were not directly threatening to anyone. The appeals court risks dangerous precedent by holding that the decision to call police is a grounds for finding the posts disruptive. Under such reasoning, any student conduct could become grounds for disciplinary action merely because someone overreacts and contacts police.

The appeals court's holding that the potential harm to the program constitutes

substantial disruption also risks dangerous precedent where any student speech deemed harmful to the school's image can be grounds for discipline. Ms. Tatro does not become responsible for censoring her writings or speech to maintain the University's image because she is a student. As Justice Alito noted in his concurrence in Morse, that decision "does not endorse the broad argument ... that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs." Morse, 551 U.S. at 423, 127 S.Ct. 2618 (citations omitted). The determinative facts should be that Tatro did not break any professional confidentiality standards because she did not identify any donor, and did not even specifically describe any autopsy procedures. Tatro has been punished merely for upsetting persons in her program - a clearly inadequate ground for discipline under any standard.

II. THE UNIVERSITY LACKED JURISDICTION UNDER ITS OWN RULES TO CONDUCT A DISCIPLINARY HEARING WHERE THE ALLEGED MISCONDUCT OCCURRED OFF-CAMPUS AND DID NOT VIOLATE ANY CRIMINAL LAWS OR PRESENT A DANGER OR THREAT TO OTHERS, AND WHERE SOME OF THE RULES WERE NOT COVERED BY THE STUDENT CONDUCT CODE.

Not only was the University's discipline of Ms. Tatro for off-campus actions a violation of her right to free speech, but it also exceeded the University's authority as proscribed by its own rules. The disciplinary complaint against Ms. Tatro was brought pursuant to the University Student Conduct Code and was based on violations of the Student Conduct Code. (Addendum 7A, 9A). The Student Conduct Code's statement of

its jurisdiction does not extend to Ms. Tatro's Facebook posts from her home, and does not include discipline for violating rules on a course syllabus.

A. The University Lacked Jurisdiction Over Appellant's Off-Campus Conduct.

The Student Conduct Code defines its own jurisdiction as follows:

SECTION II. JURISDICTION.

The Student Conduct Code (Code) shall apply to student conduct that occurs on University premises or at University-sponsored activities. At the discretion of the president or delegate, the Code also shall apply to off-campus student conduct when the conduct, as alleged, adversely affects a substantial University interest and either:

(a) constitutes a criminal offense as defined by state or federal law, regardless of the existence or outcome of any criminal proceeding; or

(b) indicates that the student may present a danger or threat to the health or safety of the student or others.

(Addendum 10A). There was no evidence or suggestion that Ms. Tatro posted her Facebook entries on the University premises or at University-sponsored activities. The University appeared to insinuate that the entries that referenced stabbing constituted a criminal offense, but never cited any criminal law that was violated. The police officers who were contacted by the Mortuary Program administration concluded that no crime was committed. (Hearing Tr. 71; Record Doc. 38, R0117). There was no finding by any of the committees who reviewed the case or the Provost that any criminal law was violated, and no criminal law was ever cited. There are no grounds for concluding that any of the Facebook entries violated any criminal law.

The court of appeals the conduct the determination that the conduct was threatening was justified by the responses of faculty. (Addendum 54A). For reasons stated in Argument I, supra., the responses or overreactions or misinterpretations of persons reading the off-campus writings do not alter the objective reality that they were not threats towards anyone. It is disconcerting that members of the University community are so lacking in social or literary sophistication, and so lacking in respect for freedom of literary expression that they would insist on taking Ms. Tatro's literary expressions seriously, and misinterpreting them in the process. Despite three written decisions in this matter, there was no explanation as to how these Facebook entries could be deemed a threat. The Court need not fill in rationale that the University failed to provide. However, any rationale would not be rational. There were no threats and the University therefore lack jurisdiction to prosecute and discipline Ms. Tatro under its Student Conduct Code.

B. Violation of Course Rules are not Covered by the Student Conduct Code.

The discipline of Ms. Tatro was based in part on alleged violations of two Anatomy Laboratory Rules. The Anatomy Laboratory Rules were part of the syllabus for that course. Based on the Complaint, these violations fall under the Student Conduct Code based on "Subdivision 16. Violation of University Rules." (Addendum 7A). Subdivision 16 provides, "Violation of University rules means engaging in conduct that violates University, collegiate, or departmental regulations that have been posted or

publicized, including provisions contained in University contracts with students.” The Anatomy Laboratory Rules do not fit within any of these categories. They are rules specific to a course as specified in a syllabus. They are not University, collegiate or department-wide regulations. It is therefore in violation of the University’s Student Conduct Code to discipline Ms. Tatro based on these course rules.

The Anatomy Laboratory Rules themselves also provide that the sole sanction for violation is “eviction from the cadaver lab and the course.” The University could therefore place Ms. Tatro on probation and order the other sanctions based on violation of the laboratory rules.

Since the Anatomy Laboratory Rules, which pertained to disrespecting human material and blogging, were a significant basis for disciplining Ms. Tatro, the University’s decision to discipline her is severely tainted by the reliance on rules that were not properly part of the disciplinary process. This error compels reversal of the University’s decision to discipline Ms. Tatro.

III. THE UNIVERSITY FAILED TO PRESENTED EVIDENCE TO SUPPORT A DETERMINATION THAT APPELLANT COMMITTED DISCIPLINARY OFFENSES WHERE NONE OF THE ALLEGED CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED.

The University disciplined Ms. Tatro for conduct that it found objectionable and embarrassing by invoking various rules that had remote relationships to her conduct, but did not accurately or reasonably describe her conduct. There is a lack of evidence in the

record to support a finding that the specific language of any cited rule was violated. The court of appeals indeed found that there was insufficient evidence to support violations of Anatomy-laboratory rule 6, and Mortuary-science student conduct code Rules 1c and 2a, (Addendum 55A-56A), but failed to address whether these numerous errors invalidate the University's decision. Respondent has not cross-appealed this decision. The finding of insufficient evidence to support three of the rule violations leading to discipline should result in reversal and dismissal of the University's decision.

There was also a lack of evidence to support the rule violations upheld by the appeals court. The first specific rule violation listed against Ms. Tatro was Subdivision 6 of Section V, Disciplinary Offenses, of the Student Conduct Code: "Threatening, Harassing, or Assaultive Conduct. Threatening, harassing, or assaultive conduct means engaging in conduct that endangers or threatens to endanger the health, safety, or welfare of another person, including, but not limited to, threatening, harassing, or assaultive behavior." (Addendum 7A). The University alleged that Ms. Tatro's Facebook entries were construed as threats to others. For reasons explained in detail in Argument I.A., supra., the Facebook entries in question could not be reasonably construed as threats. The statements did not identify, describe or provide any basis for concluding that they were directed at any specific person. The entries, when read in context, were obviously literary expression, intended to be satirical, vent emotion, and incorporate popular cultural references. They were intended to be shared with Tatro's family and friends, and not

directed at the faculty that claimed to feel threatened. The most controversial statement about wanting to stab a someone with a trocar, merely indicated *want* and not any plan or intent. Any reasonable construction of the context makes it clear that the entries were not intended to be taken literally or seriously. As also discussed in Argument I.A., supra., it is unfortunate that so many members of the University community lack understanding and appreciation of literary and satirical expression. However, statements that were so obviously not meant to be taken literally, that are not backed by any evidence that they were meant seriously, and even when taken literally, do not evince an intent to harm anyone, cannot be legally deemed as threats against others that could violate any disciplinary rule.

The next violation found and upheld by the appeals court was Anatomy Laboratory Rule #7, “Blogging about the anatomy lab or the cadaver dissection is not allowable.” (Addendum 7A). For reasons discussed in Argument I.B., supra., this rule from the course syllabus does not fall within the jurisdiction of the Student Conduct Code. If the rule is considered, its most fatal flaw is that it does not define “blogging.” The faculty member responsible for the rule expected students to look it up in the dictionary, but she deliberately did not provide a definition or direct students to her favored dictionary. McArthur’s Webster definition, which she did not share with anyone prior to the hearing was “A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” (Hearing Tr. 193-94). It is at best ambiguous

whether Facebook is a blog.⁸ Two of the four members of the PAC believed that “A Facebook entry is not ‘blogging’. . . . It was proposed that there were 1000 University of Minnesota undergraduate students asked is a ‘facebook entry blogging’, 999 would say no.” (Addendum 40A).

As the Conduct Committee Chair conceded at the PAC hearing, if McArthur wanted to prohibit all internet communications about cadavers, she should have said so. It is unreasonable to expect Ms. Tatro to read McArthur’s mind as to the definition of blogging, and to conclude the Facebook entries are blogging when it is completely unclear if the definition fits. It is also unconstitutional to apply a rule prohibiting blogging so broadly beyond any clear common understanding of its meaning. Vague statutes are prohibited under the Due Process Clause of the Fourteenth Amendment. State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985). The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Larson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); City of Mankato v. Fetchenhier, 363 N.W.2d 76, 78

⁸ Webster’s dictionary, at least online, does not have a definition for Facebook. However, Dictionary.com defines Facebook as “a popular social networking website.” See Dictionary.reference.com/browse/Facebook. The Cambridge Dictionary online defines Facebook as “a website where you can show information about yourself, and communicate with groups of friends, classmates, etc.” See dictionary.cambridge.org/dictionary/british/facebook.

(Minn. Ct. App. 1985). The Rule of Lenity also requires that ambiguity in a penal rule be construed in favor of the accused. Coleman, 661 N.W.2d at 300. The court of appeals finding that she violated notions of respect and dignity is too vague to comport with due process requirements.

Furthermore, whether Ms. Tatro was considered to be “blogging”, or writing or posting on Facebook, she was not discussing “the anatomy lab or the cadaver dissection.” Her references to dissection were vague and unspecific, and not intended to be taken literally. She did not identify any cadaver, did not describe any specific activities or dissection that took place in the anatomy lab. There was no evidence to support a violation of this Rule.

The University’s discipline of Ms. Tatro must be reversed and vacated due to the lack of evidence that she violated any applicable rules. Even if the Court somehow found substantial evidence to support violation of some rules, the clear lack of any basis for finding violations of other rules fundamentally undermines the credibility of the University’s decision, and further makes it impossible to determine whether sanctions would have been the same.

IV. THE UNIVERSITY LACKED AUTHORITY TO IMPOSE DISCIPLINARY SANCTIONS THAT INCLUDED CHANGING A PASSING GRADE TO A FAILING GRADE ITS RULES DID NOT AUTHORIZE SUCH A SANCTION.

The changing of Ms. Tatro’s grade in MORT 3171 from C+ to failure exceeded the University’s authority. The University Student Conduct Code lists permissible

sanctions in Section VI. (Addendum 14A-15A). The Policies and Procedures for the Program of Mortuary Science also lists permissible sanctions, which are the same or similar to the sanctions in the University Student Conduct Code but does not include all the sanctions in the Code. (Addendum 23A-24A). Changing the grade that a student earned in a course is not listed as an option, and does not fit within the description of the sanctions listed in either document.

The PAC justified the failing grade as being consistent with the course syllabus that provides that failure to adhere to the rules could result in “eviction” from the course. (Addendum 39A-40A). As discussed in Argument I.B., the Student Conduct Code does not reference a course syllabus as one of the areas of “University Rules” under its jurisdiction. Since the Student Conduct Code does not specifically or generally authorize changing a grade as a sanction, a proceeding taking place under the Code’s authority cannot impose such a sanction.

Even an interpretation of the plain language of the Anatomy Rules does not authorize this sanction. “Evict” does not mean “fail.” The Webster’s online definition of evict that appears applicable to the anatomy rules is “to force out.” Ms. Tatro had completed all of the requirements of the course and earned a C+ according to her instructor. There is no authority for changing her grade under any rules.

The court of appeals’ holding that “we discern no meaningful distinction between eviction from a course and receiving a failing grade,” defies reasoned analysis. A failing

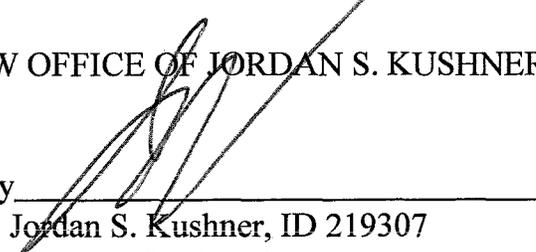
grade substantially harms a student's record, lowers her GPA, and thereby negatively impacts job prospects and future educational opportunities. Eviction from a course merely prevents a student from getting credit for it at that time.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the decisions of the University and court of appeals be reversed with instructions to dismiss all charges, take her off probation if she has not graduated by the time of the Court's decision, remove and expunge any record of discipline from Appellant's files, change Ms. Tatro's grade in MORT 3171 back to a C+ while leaving any higher grade that she receives in the make-up course, and awarding Ms. Tatro her costs and attorney fees due to the violations of her constitutional rights pursuant to 42 U.S.C. § 1988.

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