



# WARTBURG AAUP

*"Committed to Academic Excellence"*

## NEWSLETTER

November 13, 1995

### **FACULTY-ADMINISTRATION DIALOG ON SEXUAL HARASSMENT POLICY CONTINUES**

Over fifty faculty turned out for the two FRC-sponsored forums (Tuesday, October 31, and Wednesday, November 1) to discuss board-proposed amendments to the sexual harassment policy passed by the faculty on April 6. Although few objections were raised to the editorial revisions, the vast majority of faculty at both forums expressed strong opposition to the substantive changes. The amendment evoking the most strenuous objections was the alteration of clause C of the definition, where the sentence describing prohibited speech and conduct was changed from "persistent, pervasive, AND not germane to the subject matter" to "persistent, pervasive, OR not germane to the subject matter" (emphasis added). Many faculty claimed that the substitution of "or" for "and" had the effect of making it extremely difficult—if not impossible—for them to teach effectively in their academic disciplines (for more on this, see the next article).

Faculty also voiced strong concerns about the absence of due process rights for faculty who are demoted, suspended, or docked in salary as a consequence of being accused of sexual harassment; about the inclusion of non-tenured faculty on the hearing panel; and about the keeping of files of unsubstantiated complaints that would be used to establish a "pattern" of harassing conduct.

At both forums Vice-President James Pence was present to explain the proposed changes. Since almost all of them were said to have been made "on advice of legal counsel," a faculty member at the Tuesday forum asked why the college attorney—Ivan Ackerman of the Waverly law firm of Englebrecht, Ackerman, and Hassman—was not present. A number of faculty then asked that he be invited to attend the Wednesday night forum. Ackerman, however, was reportedly out of town on Wednesday.

At the end of the Tuesday forum, faculty asked Wartburg AAUP members to contact Association headquarters to request a legal analysis of the policy by AAUP's legal staff, which has expertise in higher education law. Ann Franke, AAUP associate secretary and legal counsel, has agreed to write such an analysis, according to Wartburg AAUP president Warren Zemke.

### **PROPOSED CHANGES THREATEN ACADEMIC FREEDOM AND ACADEMIC EXCELLENCE**

*The following statement is excerpted from an e-mail memorandum distributed to Wartburg AAUP members on October 29 by the Executive Committee of Wartburg AAUP (Zemke, McCluney, Vallem, and Scholtz).*

Despite some improvements, [the board/ administration] revision of the faculty's sexual harassment policy contains at least two changes that would constitute a serious threat to academic freedom and due process at Wartburg College. The executive committee of Wartburg AAUP has reached this conclusion after comparing the document with the policies and procedures recommended by the AAUP and after consulting with AAUP associate secretary Robert Kreiser.

The first change that we find unacceptable is in clause C of the definition of sexual harassment. The definition that the faculty approved last April (which is based on the new AAUP policy) stated that a "hostile learning environment" was caused by verbal conduct that falls under all three categories of "persistent, pervasive, AND not germane" to the subject matter. "Persistent" is necessary because the very meaning of "harass" is "to irritate or torment persistently" (*American Heritage Dictionary*); for behavior to be considered harassment, it can't just occur just once or twice. "Pervasive" is necessary because we are talking about a hostile environment. In other words, the verbal conduct so permeates the course that the student cannot ignore it, making his/her continuance in that course unbearable. The reason for "not germane" is obvious. There are many courses that are "about" sex, sexuality, sexual ideas, and gender, or that contain sexual imagery, etc.

According to the [administration/board] definition, however, a "hostile learning environment" can be produced by "verbal conduct of a sexual nature" that is "persistent," "pervasive," OR "not germane." In other words, to be considered sexually harassing, "verbal conduct" need only fall into ONE of the three categories. Thus, one instance of objectionable speech would be sexual harassment as long as it fell into the category of "not germane," contradicting the very meaning of "harassment." Even more troubling, the revised definition in essence states that any sexual content that is "persistent" or "pervasive" could be considered harassment even if that content is the subject matter of the course.

In other words, this definition would make it highly unsafe to treat any subject matter containing ideas, images, or language related to sex, sexuality, gender, or the human body. How could one teach human physiology, or film studies, or Freud, or D.H. Lawrence, or sexual ethics, or Old Testament, or art history? The definition has equally dangerous ramifications for professors in disciplines—such as music or physical education—where certain kinds of physical contact are critical for effective instruction.

The second change, which Kreiser views as just as dangerous as the first, is to the procedures for imposing severe sanctions on faculty members accused of sexual harassment. The faculty policy required the administration to bear the burden of proof when imposing a severe sanction on a faculty member accused of sexually harassing conduct. Except when dismissal is the sanction, the administration's policy does not afford faculty members these due process rights. A faculty member can be demoted, reduced in pay, or even suspended without the administration's having to substantiate the charges.

It is our hope that the board, the administration, and the faculty can work together in formulating a definition and a set of procedures that will serve the long-term best interests of Wartburg College as an academic institution.

#### **BILL SHIPMAN: BOARD-AMENDED DEFINITION TRIVIALIZES SEXUAL HARASSMENT**

My colleagues on the Executive Committee of the Wartburg Chapter of AAUP have made clear the threat to academic freedom that is posed by the definition of sexual harassment included in the Board/ Administration document. My purpose here is not to attempt to duplicate their argument, but rather to raise two additional points regarding problems with the Board/ Administration definition.

The first point is that although the academic freedom issue has focused on the faculty, the threat to students is no less great. Under the proposed definition, it would probably be wise to warn students that certain positions/ideas/language, even if espoused in the classroom, may lead to sexual harassment charges.

The second point is that the adoption of the proposed definition will lead to the "trivialization" of the notion of hostile environment. The courts have consistently held that there are two "types" of sexual harassment. "*Quid pro quo*" harassment exists when the threat of economic and/or psychological harm is used to extort sexual favors. Since most people recognize this threat as being only one short step from the threat of using physical harm to obtain sexual favors (rape), there is little debate about the appropriateness of prohibiting this type of sexual harassment. The second type of sexual harassment, "hostile environment," exists when a work environment has been created that is so intolerable (hostile), that an individual is unable to function in that environment. Using this definition, it is clear that the potential economic and/or psychological effects of a hostile environment are no less significant than the *quid pro quo* type of harassment. Therefore, hostile environment ought to be, and was intended to be, accorded the same degree of seriousness as *quid pro quo* harassment.

The problem has been that while *quid pro quo* harassment is reasonably easy to define and recognize, it has been very difficult, even in the workplace, to define hostile environment in such way as to make it clear what kind of speech/behavior might constitute such an environment. This difficulty was noted by Justice Scalia in the *Harris v. Forklift Systems* decision.

The extension of hostile environment to the classroom creates even more serious difficulties. The attempt to use the definition and guidelines developed for the workplace, especially the inclusion of the phrase "or of creating an intimidating, hostile, or offensive working, social, or residential environment" is particularly inappropriate when the classroom environment is considered.

The result of attempting such an extension to the classroom has been the plethora of recent claims of sexual harassment that include the case of a professor accused of sexual harassment for using the example of a

vibrator as an illustration in class, the case of a professor accused of sexual harassment for using an example of unintentional sexual intercourse to illustrate a point of difference between the Talmud and the Bible, the removal of a Goya painting of a nude female from a classroom because it created a hostile environment, the claim of sexual harassment by a male student in a psychology class where female masturbation was graphically discussed, and the list goes on. It is probably worth noting that in the first two instances, the respective administrations initially reacted by imposing sanctions against the accused. There may be pedagogical issues raised regarding each of these instances, but to argue that any of them were sufficient to constitute a hostile environment cheapens the definition. Indeed, all of these cases have been used as arguments *against* the application of hostile environment to the classroom.

The definition of sexual harassment adopted in June by the American Association of University Professors deals with this problem by making it as clear as possible what conditions must be met in order to establish a hostile environment, even though the specific term "hostile environment" is not used. The requirement that the behavior be persistent, pervasive, and not germane to the subject matter are *all* necessary. The absence of any one of the three simply begs for complaints that trivialize concerns about the very real and serious nature of hostile environment.

It is for these reasons that I urge the faculty to send as strong a message as is possible to the Board of Regents that the adoption of the proposed definition poses a serious threat to academic vitality and strength of Wartburg College and is not consistent with the mission of this institution. Further, the adoption of the proposed definition will actually make it *more difficult* to deal with cases of hostile environment because of the lack of clarity of what constitutes a hostile environment.

—Bill Shipman

*Faculty will have at least two more opportunities to heed Bill's call "to send as strong a message as . . . possible to the Board of Regents": The Groups meet on Tuesday, November 14, and the full faculty will consider the proposed changes on Thursday, November 30. —The Editors*

#### **"HOT" CAREER: LAWYERS GET BIG BUCKS FOR TAKING ON SEX HARASSMENT CASES**

One of the "hot job tracks" listed in the October 30 *U.S. News and World Report* is employment lawyer, mainly because of the huge increase in litigation involving sexual harassment complaints. Last year the Equal Employment Opportunity Commission received 14,420 such complaints, up from 5,623 only five years ago. Average salaries: \$63,001-\$77,131 for an associate, \$173,774-\$191,300 for a partner. Who says that there are no real winners in sexual harassment cases?

#### **WARTBURG MAY LOSE RACE TO BE FIRST TO ADOPT NEW AAUP SEX HARASSMENT POLICY**

At its annual meeting in June, the American Association of University Professors adopted as official Association policy the report entitled "Sexual Harassment: Suggested Policies and Procedures for Handling Complaints," which was initially drafted by Committee W on Women's Issues in the Profession. Wartburg faculty had advance notice of the new AAUP document and thus were able to include elements of it in the sexual harassment policy approved last April. Now, it appears that other institutions are eager to rewrite their sexual harassment policy / procedures in an effort to make them accord more closely with the new Association standard.

According to two recent postings on the AAUP listserv for conference officers, Marymount College-Tarrytown (NY), a women's liberal arts college associated with the Roman Catholic Church, and the University of Nebraska-Lincoln are both in the process of drafting revised policies based on the new AAUP recommendations.

### **WARTBURG IS NOT A CARNEGIE LIBERAL ARTS I INSTITUTION, SAYS AUTHOR**

Wartburg does not belong in the Carnegie Liberal Arts I classification, says David W. Breneman, author of *Liberal Arts Colleges: Thriving, Surviving, or Endangered?* (Brookings Institution, 1994).

In 1987 the Carnegie Foundation listed 540 private liberal arts colleges and divided them into two categories: Liberal Arts I (140 colleges) and Liberal Arts II (400 colleges). Liberal Arts I colleges include "highly selective institutions . . . that award more than half of their baccalaureate degrees in arts and science fields." Liberal Arts II colleges are "less selective" and "award more than half of their degrees in liberal arts fields."

But according to Breneman, Wartburg awards more than sixty percent of its degrees in professional areas, a statement borne out by last year's graduation summary, which reveals that of 291 graduates, 183 (63%) majored in professional fields.

Among the benefits of Wartburg's Liberal Arts I classification is its listing in *U.S. News and World Report's* annual college guide, entitled "America's Best Colleges." The magazine has regularly included Wartburg among the 161 institutions that it calls "national liberal arts colleges," a category based on the Liberal Arts I classification. Other schools commonly included are "peer" institutions like Augustana (IL), Central, Coe, Concordia, Cornell, Grinnell, Gustavus, Luther, and St. Olaf.

Colleges that lack the Liberal Arts I classification are relegated to the category of "regional liberal arts colleges," based on the Liberal Arts II classification. Although 423 schools belong to this group, only the "top" forty merit a listing in the magazine. (This year Augustana [SD] and Simpson made that list.)

### **SPICY FOOD FOR THOUGHT: "HURRICANE CAMILLE" ON SEX HARASSMENT POLICIES**

*The following comments are excerpted from "No Law in the Arena," an essay from Camille Paglia's Vamps and Tramps (1994). Paglia, a libertarian and a feminist, is Professor of Humanities at the University of the Arts in Philadelphia. Her Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson (1990) was a runaway best-seller. Paglia's opinions are not necessarily consistent with the views of Wartburg AAUP.*

"I support moderate sexual harassment guidelines: after evaluating sample academic codes in my 'Women and Sex Roles' class in 1986, I lobbied for their adoption at my university. . . . [Young middle-class women] seemed especially to need help in self-definition and self-expression, and sexual harassment guidelines were a promising way to embolden them to decide how they wanted to be treated. On the other hand, I was concerned about the possibility of false charges by grandstanding neurotics, with whom I'd had quite enough contact at Bennington [College]. Every sexual harassment code should incorporate stiff penalties for false accusations.

"The *quid pro quo* ruse—where a sex act is demanded for a promotion or job security—is the most grievous of sexual harassment offenses and should be suitably punished. . . . The "hostile environment" clause, on the other hand—which has become an integral part of sexual harassment policy and has even, to my regret, passed review by the Supreme Court—seems to me reactionary and totalitarian. Mere offensiveness, which is open to subjective interpretation, is not harassment. The problem with the "hostile environment" concept is that it is culturally parochial: it imposes a genteel white lady's standard of decorum on everyone. . . .

"In a highly publicized incident, a dowdy English instructor pressured Penn State administrators to take down a print of Goya's *Naked Maja* from her classroom in an arts building, where it had hung unmolested for decades. She complained that the students were looking at it instead of her (I can't imagine why). . . . This is insane. We are back to the Victorian era, when table legs had to be draped lest they put the thought of ladies' legs into someone's dirty mind.

"My libertarian position is that, in a democracy, words must not be policed. Whatever good some people feel may be gained by restrictions on speech, it is enormously outweighed by the damage done to any society where expression is restricted. History shows that all attempts to limit words end by stifling thought."