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September 23, 2020

BY EMAIL

Kristin Gilger
Kristin.Gilger@asu.edu

Michael Crow
Michael.Crow@asu.edu

Re: Rae'Lee Klein

To Kristin Gilger, Michael Crow:

Please be advised that this law firm represents Rae'Lee Klein. As you know, Ms. Klein is station manager of "Blaze Radio" at Arizona State University. This letter is in reference to the attached emails received on Thursday, September 17th at 9:59 AM and Tuesday, September 15th at 2:30 PM from Kristin Gilger, in her capacity as Interim Dean of the Walter Cronkite School of Journalism and Mass Communication.

On August 23, national media reported that a man named Jacob Blake was shot and wounded by police officers in Kenosha, Wisconsin. Video circulated of the incident which showed that Blake was black, and the shooting officer was white. Subsequently, a number of news reports and commentary implied or alleged that the shooting was racially-motivated. *See e.g.* "Jacob Blake's shooting shows America has a long way to go in its journey toward a racial reckoning," <https://www.cnn.com/2020/08/30/us/jacob-blake-shooting-one-week-later/index.html> (quoting Columbia University lecturer who referred to shooting as a "lynching" and stated that it was a "reminder of pervasive and entrenched racial violence in America"); "The Shooting of Jacob Blake is a Wake-Up Call," <https://www.theatlantic.com/ideas/archive/2020/08/the-shooting-of-jacob-blake-is-a-wake-up-call/615616/>). It was also reported that the shooting was being investigated by the Justice Department's division of criminal investigation, and that protestors demanded an arrest of the shooting officer. *See e.g.* "Student-Led Protest Pushes For Arrest Of Rusten Sheskey," <https://www.wortfm.org/student-led-protest-pushes-for-arrest-of-rusten-sheskey/>; "What we know about Rusten



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Sheskey, the officer involved in the Kenosha shooting,” <https://www.washingtonpost.com/nation/2020/08/29/what-we-know-about-rusten-sheskey-officer-involved-kenosha-shooting/>.

In August, Ms. Klein read an article in the New York Post which reported that Jacob Blake had an active warrant out for his arrest “for violating a restraining order stemming from alleged sexual assault.” Mr. Blake had allegedly committed sexual assault against a woman by digitally penetrating her in front of her child, before stealing her car. Prior to the New York Post article being published, those facts had not been widely reported by news media. From her personal Twitter account, Ms. Klein tweeted out a link to the New York Post story with the comment, “Always more to the story, folks. Please read this article to get the background of Jacob Blake’s warrant. You’ll be quite disgusted.”

Subsequently, certain students demanded that the University remove Ms. Klein from her position as station manager. A “board” of students who are involved with the station, and whom Ms. Klein helped appoint, demanded that she resign.

One of the core tenets of journalism is that a journalist must “[s]upport the open and civil exchange of views, even views they find repugnant.” *See* the Society of Professional Journalists “Code of Ethics,” <https://www.spj.org/ethicscode.asp>. Journalists must also “[e]ncourage a civil dialogue with the public about journalistic practices, coverage and news content”; “[e]xpose unethical conduct in journalism”; and “give a “voice to the voiceless.” *Id.* Finally, for any story, a journalist must “[g]ather, update and correct information throughout the life of a news story.”

In this instance, numerous media outlets immediately reported and/or gave voice to the idea that the shooting of Jacob Blake was motivated by Blake’s race. Ms. Klein shared a factual report which supported that Blake had an outstanding arrest warrant for a violent crime, which would tend to support that the police interaction with Blake was primarily for criminal justice reasons. Ms. Klein’s decision to share the New York Post article was consistent with journalistic ethics, which require that contrary viewpoints or information be openly shared, even though some may find them repugnant. Further, the tweet was from her personal account, and it clearly expressed her personal and objectively uncontroversial opinion that Mr. Blake’s alleged crime, which was raping a woman in front of her child, was repugnant. Her presentation of the article and opinion were civil and not intended to, nor did they, incite violence or harm.



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Rather than support Ms. Klein’s efforts to exchange contrary facts or views, the University has instead taken actions which tend to suggest that it joined the chorus of immature voices seeking to censor Ms. Klein and remove her from her professional position. In particular, Dean Gilger told Ms. Klein that as a result of her personal tweet, “staying on as station manager is not an option.” (See Sep. 15, 2020 email sent at 2:30 PM, attached as Exhibit “A” hereto.) I understand that Ms. Klein has also been prevented from carrying on her duties as station manager.

Unfortunately, it falls to Ms. Klein – a twenty-one year old student of journalism – to stand up for the principles of journalistic integrity and freedom of thought that schools of journalism are supposed to teach. And it falls to me, her lawyer, to explain that it violates her state and federal constitutional and statutory rights for the University to take any action to remove her from her position because of this personal tweet. This includes the painfully obvious (and patently illegal) shifting pretexts that I am already seeing emerge here, such as that claiming that she is no longer a “leader,” or that she no longer has certain other students’ “confidence” because of her tweet, or that the Dean disapproves of how she has responded to the demand that she step aside. In any employment context, as explained below, these are common (and commonly-disregarded) pre-textual reasons for termination, because they amount to nothing more than using your own or others’ First Amendment discrimination as a basis for removal.

As a preliminary legal matter, the First Amendment is applicable to Arizona State University through the Fourteenth Amendment. *See e.g. Brooks v. Auburn Univ.*, 412 F.2d 1171, 1172 (5th Cir. 1969). The Arizona constitution provides even broader protections for free speech than the First Amendment. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281, 448 P.3d 890, 902 (2019). Finally, Arizona statute, A.R.S. § 15-1864, provides that “[a] university or community college shall not restrict a student’s right to speak, including verbal speech, holding a sign or distributing fliers or other materials, in a public forum, but may impose reasonable time, place and manner restrictions as permitted below.” A.R.S. § 15-1864(A). “An individual student or a faculty or staff member of a university or community college may take a position on the public policy controversies of the day, but the institution is encouraged to attempt to remain neutral, as an institution, on the public policy controversies of the day unless the administrative decisions on such issues are essential to the day-to-day functioning of the university or community college.” A.R.S. § 15-1864(G). “The university or community college may not take action, as an institution, on the public policy controversies of the day in a way that requires students or faculty members to



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publicly express or endorse a particular view of a public policy controversy.” A.R.S. § 15-1864(H). Any person whose rights are violated under any one of the foregoing provisions is entitled to seek an injunction from the Court as well as reasonable attorneys’ fees and costs and “damages of one thousand dollars or actual damages, whichever is greater.” A.R.S. § 15-1864(J).

In general, under federal law, “[a] state, division of the state, or state official may not retaliate against a person by depriving him of a valuable government benefit that that person previously enjoyed, conditioning receipt of a government benefit on a promise to limit speech, or refusing to grant a benefit on the basis of speech. Those limitations apply even if the aggrieved party has no independent or affirmative right to that government benefit.” *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 869 (9th Cir. 2016). “[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.... Such interference with constitutional rights is impermissible.” *Id.* In an action for injunctive relief under 28 U.S.C. § 1983, Ms. Klein would also be entitled to seek her attorneys’ fees and costs.

The tweet at issue here was a personal tweet and clearly “on the public policy controversies of the day.” There is no plausible argument that Ms. Klein’s personal tweet impacts the “day-to-day functioning” of the university; nor does other students’ reaction to it. Further, “[o]therwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment.” *Id.* It is undeniable that Ms. Klein’s engagement in First-Amendment protected activity is the “but for” cause for the Dean’s demand that she step down, whether the cause has been filtered through other students’ false outrage or not. In any employment suit, including a claim for retaliatory termination under the First Amendment *inter alia*, the Court is entitled to infer that the University’s shifting or circuitous reasons for a termination are simply a pretext for violating her First Amendment rights.

But most important of all, the University must remain neutral on issues and matters such as this. Taking the decision to remove Ms. Klein is not remaining neutral – it is picking a side. It also exposes the University to an immediate lawsuit for injunctive relief, attorneys’ fees, and damages of one thousand dollars or actual



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damages, in this case Ms. Klein's lost income over the course of the school year, pursuant to A.R.S. § 15-1864(J).

Please confirm within five business days that the university is permitting Ms. Klein to resume her duties as station manager (and will publicly confirm the same), and that it will behave neutrally with respect to the purported controversy surrounding Ms. Klein's tweet.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Wilenchik', with a stylized flourish at the end.

Jack D. Wilenchik, Esq.

attachments: Exhibits A and B

EXHIBIT A



----- Forwarded message -----

From: **Kristin Gilger** <Kristin.Gilger@asu.edu>

Date: Tue, Sep 15, 2020 at 2:30 PM

Subject: RE: It's past noon

To: Rae'Lee Klein <raelee.klein18@gmail.com>

As we've discussed, staying on as station manager is not an option. You have three options:

- Reassignment to another student worker position
- Remain on the board with the assignment I outlined
- Start your own station

Which of these do you prefer?

Kristin Gilger

Interim Dean

Reynolds Professor in Business Journalism

Walter Cronkite School of Journalism and Mass Communication

480-273-6128

@kristingilger

<http://cronkite.asu.edu>

<http://businessjournalism.org>

Co-author: ["There's No Crying in Newsrooms: What Women Have Learned about What It Takes to Lead"](#)

From: Rae'Lee Klein <raelee.klein18@gmail.com>
Sent: Tuesday, September 15, 2020 1:31 PM
To: Kristin Gilger <Kristin.Gilger@asu.edu>
Subject: Re: It's past noon

Hi Dean Gilger,

After long consideration about the situation, I am declining to willingly step down from my position as Station Manager. I truly believe I did nothing wrong that is worthy of removal. No one has communicated to me any law, written standard, or rule I violated with my actions. I shared a factual argument, and although I shared an opinion, that I was disgusted by the sexual assault of a woman, I have done nothing more erroneous than my peers. The board of directors issued a written opinion of me, and published it. From that fact alone, we should all be punished equally. Other students wrote highly opinionated statements in regards to articles on this situation, and many others. I was told to tweet as part of my assignment at Cronkite News, and as a student, am learning how to do so to standard. The issue remains, many students at the school don't know what that standard is.

I stand by the belief I am being treated unfairly, and the school and faculty advisers have failed to protect me and my rights as a student and individual. I am fully confident I can lead this station forward, and have shared the various propositions in how to do so with the board and other members. I'm struggling to understand how removing anyone from their position is even an option, as we should be learning to work together through challenging circumstances, not against each other.

Thank you for your time and consideration, I hope you and the school make the right decision moving forward.

Best,

Rae'Lee Klein

On Tue, Sep 15, 2020 at 12:37 PM Kristin Gilger <Kristin.Gilger@asu.edu> wrote:

I really do need a response from you right away. I don't want to make this decision for you, but we need to make a decision.

Kristin Gilger

Interim Dean

Reynolds Professor in Business Journalism

Walter Cronkite School of Journalism and Mass Communication

480-273-6128

@kristingilger

<http://cronkite.asu.edu>

<http://businessjournalism.org>

Co-author: ["There's No Crying in Newsrooms: What Women Have Learned about What It Takes to Lead"](#)

EXHIBIT B



----- Forwarded message -----

From: **Kristin Gilger** <Kristin.Gilger@asu.edu>

Date: Thu, Sep 17, 2020 at 9:59 AM

Subject: Your position

To: Rae'Lee Klein <raelee.klein18@gmail.com>

Rae'Lee,

Let me first clarify that we are not saying you are unfit to be a station manager. If that were the case, we would not have included as an option going forward the opportunity to start your own station. As I have proposed, you will be station manager for a new internet radio station that the school and the university would support financially and with access to studio space as well as the usual support we provide all student clubs (i.e. a faculty advisor, listing on our clubs page, invitation to student org night, etc.). You will retain your title, rank and pay as a station manager.

As this shows, you are not being punished for your tweet. To your credit, you apologized for the tweet and, as I told you from the start, I would not remove you as a station manager because of it. Allowing you to continue as a station manager is not a punishment.

When I said that staying on as station manager is not an option I was referring to continuing as station manager of Blaze. That is simply a reflection of the reality that Blaze Radio is a student organization and the relationship between you and the board of directors, and a majority of the student staff members and producers has deteriorated to the point that they have lost confidence in you as a leader. This is the result not simply of the tweet, which you admitted was poorly worded and gave the wrong impression of your views, but of subsequent actions that left students unsatisfied that those who disagree with you would nevertheless be able to participate fully in Blaze Radio.

Heading up a new radio station will give you a fresh leadership opportunity. To ensure your success, and in response to your request for a further explanation as to the issues that have been raised, let me add that there are lessons to be learned here: As you yourself have acknowledged, your tweet was not consistent with the "Social Media Guidelines for Student Journalists." <https://cronkite.asu.edu/degree-programs/admissions/student-resources/social-media-guidelines> The applicable provisions include:

Avoid posting information to social networking sites or blogs that could call into question your ability to act independently as a journalist. This includes expressing political views, sports fandom or opinions about newsmakers or sharing internal communications, even if you are participating in what is supposed to be a private group. Recognize that even hashtags can imply support and take care to avoid those instances.

Station managers have a special responsibility to maintain apparent neutrality for the benefit both of the organization's overall credibility and its internal climate as an organization that welcomes all members regardless of their views. As stated in your job description, "The General Manager sets the standards for organization, respectful and inclusive conduct and collaboration with all Blaze volunteers and stakeholders."

Rae'Lee I do hope that you will accept this proposal. It gives you a chance to use the lessons learned from this experience and to move on to what I believe will be a successful tenure as a station manager.

Sincerely,

Kristin Gilger

Interim Dean

Reynolds Professor in Business Journalism

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