

## **A Most Peculiar Document: The Privilege and Tenure Committee Report**

Everyone I have talked to views the “Initial Panel Report regarding Dismissal for Cause of David Barnett” as very odd. It as if it had been produced by two very different groups, with the first part, which centers upon the question of whether Professor Barnett had retaliated against the Complainant, on the whole a model of clearheaded discussion and argument, followed by a second part –which is concerned with whether Professor Barnett’s conduct fell below minimum standards of professional integrity – in which the panel’s conclusion is supported by considerations so feeble that it could have been written by the Administration’s own lawyers.

Consider the first part. There, after some preliminary matters, the panel turns to the most crucial issue at all – whether Professor Barnett retaliated against the Complainant. The panel begins by pointing out a crucial difference between the wording of the University of Colorado Sexual Harassment Policy pertaining to retaliation and that of the Title IX definition and requirements for retaliation, namely, that an *intent* to retaliate is part of the latter, but not of the former. The panel argues very cogently that the University of Colorado’s formulation is unsound, and it therefore concluded, “the retaliation claim against Professor Barnett should be judged against the Title IX definition and requirements that require intent to retaliate . . .” This also led them to say, at the end of their document, “The University should revise its definition of retaliation in its administrative policy statement to be clearly consistent with Title IX policy . . .”

The panel then proceeded to address four issues, namely, whether Professor Barnett had retaliated against the Complainant either (a) “by conducting an enquiry and writing a letter and supporting document to rebut the ODH investigation and report,” or (b) “by his discussion within the Department of Philosophy of the sexual harassment complaint,” or (c) “by making retaliatory statements to Professor Mitzi Lee,” or (d) “by submitting a complaint/appeal letter (Barnett report) to the Chancellor and President.” The panel concluded that in none of these ways had the University offered “clear and convincing evidence” that Professor Barnett had been guilty of retaliation against the Complainant – a conclusion for which the panel offered careful and completely cogent support.

In discussing the fourth of these issues, however, the discussion starts to go off the rails. First of all, after remarking that the Chancellor was “seriously offended” by Professor Barnett’s letter – a remark that has no bearing on the issues, but that may partly explain the second part of the panel’s report – the panel proceeds to complain about the detailed descriptions of events in Barnett’s letter, descriptions that they say “could not help but be offensive.” Secondly, the panel objects to Barnett’s introduction of alternative “hypotheses” about what transpired at the party in question, saying, “While creating alternative hypotheses may be useful in philosophical argument, its use and excessive elaboration in building supporting and refuting arguments in a sensitive sexual harassment context definitely showed extremely poor judgment.”

Neither point is sound. As regards the second point, the question at issue in the investigation by ODH – the Office of Discrimination and Harassment – was whether it was more likely or not that a certain person had been guilty of sexual harassment, and one of the most effective ways of answering that question is to consider different accounts of what happened, and to consider which account squares best with the hard evidence. Then, as regards the second point, the question is precisely which of the alternative accounts is more likely in the light of the *total* evidence, and Professor Barnett simply provided as detailed an account of the evidence as he judged necessary to make plausible his claim. The panel's complaints on these two matters, then, are badly misguided.

Summing up, the panel's discussion of the most serious charge against Professor Barnett – that he retaliated against the Complainant – was, with the one exception just noted, very careful, and fully served to establish the conclusion that in none of the four arguments that the University advanced had it offered clear and convincing evidence that Professor Barnett had been guilty of retaliation.

Moreover, besides being very important in itself, this conclusion raises a serious question as to why the University Administration decide to pay the Complainant \$825,000 to avoid a lawsuit that, given the panel's conclusion, the University could clearly have won. Did the University receive bad advice from its lawyers? Or did it, as some have suggested, pay the \$825,000 in an attempt to convince the public at large, and the Privilege and Tenure Committee in particular, that Professor Barnett must have been guilty of retaliation?

The panel then turns in the second main part of their report to the question of whether Professor Barnett's conduct fell "below minimum standards of professional integrity," and I think that very few readers of the report could have predicted what the panel would go on to say at this point.

Here the panel addresses four issues, namely, whether Professor Barnett failed to meet minimum standards of professional integrity either (a) "in conducting enquiries into the ODH investigation and submitting a letter and supporting document arguing against their findings," or (b) with regard to his "conversations within the Department of Philosophy about the sexual harassment complaint," or (c) with regard to his "conversation with Professor Mitzi Lee," or (d) with regard to his "letter and supporting document to the Chancellor and President." The panel's conclusions were that while the University did not show by clear and convincing evidence that Barnett failed to meet minimum standards of professional integrity with regard to his conversations within the Department of Philosophy about the sexual harassment complaint, they did show this in the case of the other three matters.

As regards the first, the panel contended that it "would have been a more effective means of registering a complaint" if Professor Barnett had "omitted the excessive details, unnecessary arguments and alternative scenarios regarding the night in question." But as I noted earlier, first of all, not to have alternative accounts on the table is to deprive oneself of one of the most effective ways of arriving at a

judgment concerning whether the account advanced by ODH was more likely to be true than not, and secondly, given that one wants to determine what is most likely in the light of *all* of the evidence, the panel's complaint about "excessive details" seems misguided. The main point here, however, is that even if were true that Professor Barnett could have formulated his complaint in a "more effective" fashion, a failure to do so seems completely irrelevant to the claim that he fell below the minimum standards of professional *responsibility*.

However four of the five panel members offer further support for the panel's claim. First, they argue that Professor Barnett's approach was "unwise," in that it was "was not independent nor did it involve opposing viewpoints." But Barnett explicitly considered the hypothesis that ODH accepted, and cited the testimonial evidence they had cited in support of that hypothesis, evidence that he argued was outbalanced by the evidence against the hypothesis. In addition, and unlike ODH, Barnett seriously considered alternative accounts of what happened, and evidence both for and against those alternative accounts. So what is there here that involves failing to meet even high standards of professional responsibility, let alone failing to meet minimum ones?

Next, four of the five panel members contend of Professor Barnett, "his goals (to force CU to do what he considered the 'right thing') went beyond the rights and privileges of a CU faculty member." Are these four members of the panel then saying that if a member of the University of Colorado believes that the University has committed a serious injustice, that person has no right to attempt to convince the University to correct the injustice? This seems like an extraordinary claim, and if there are any regulations in the University that prohibit a member from attempting to correct injustices, those regulations need to be changed. Indeed, on this matter the fifth member of the panel says of Professor Barnett's collecting of evidence and writing a letter to the Chancellor and President, "it was within the rights of a CU faculty member, and in fact, given Dr. Barnett's conviction regarding the Respondent's innocent, his obligation."

Finally, four of the five members of the panel also appeal to the fact that Barnett's "investigation was well known in the department and it is reasonable to conclude that this would add to the distress of the Complainant." Here the observation of the fifth member of the panel is very much to the point: "The extent to which the Barnett investigation was well known in the department was mainly due to the indiscretion of others." Since the other members of the panel admit this point, the question that immediately arises is whether they believe that the other members of the Department of Philosophy who were guilty of the indiscretions in question should also be charged with failing to meet minimum standards of professional responsibility, and be appropriately disciplined.

With regard to the third charge – that Professor Barnett's conversation with Professor Lee fell below minimum standards of professional integrity, the panel concluded that the University had showed that by "clear and convincing evidence." But how did the panel arrive at this conclusion, given that it admitted that the "conflicting testimony of Professor Mitzi Lee and Professor Barnett creates a 'he said

she said' situation where it is possible that neither Professor Barnett nor Professor Mitzi Lee remembers exactly the conversation . . .?" The answer is that "the panel found Professor Mitzi Lee's testimony credible," though they do not say why. But in arriving at this view, they decided in effect that Professor Barnett must have said things to Professor Lee that he did not say to any of the other five or six people in the Department of Philosophy with whom he talked. In all of those conversations, Professor Barnett was very careful neither to say anything about the Complainant nor to express any view about what really happened on the night in question, and this was so even when he was directly asked for his opinion. Is it really at all plausible then that he said anything in this *one* conversation – with Professor Lee – that disparaged the Complainant?

Secondly, I know personally of another person who did express negative remarks about the Complainant, and that were probably passed on to one or more graduate students. That seems to me a much more likely source of any details that Professor Lee may have acquired about the events in question than an inadvertent statement by Professor Barnett.

Finally, Professor Lee appears to have been strongly influenced by one of her colleagues – Professor Alison Jaggar – who, in a letter of May 17, 2013, said, Following his questioning, DB produced an account of the evening's events which placed much of the blame on [the woman], accusing her of being extremely drunk and sexually provocative. He told this tale to a number of faculty members, including at least each of you three and our chair, Graeme Forbes. I would guess that he also told it to other colleagues.

Leaving aside the case of Professor Lee, these claims are entirely false. The part of Professor Jaggar's letter that is most relevant here, however, is the part where she proceeds to consider what crimes Professor Barnett might be guilty of, at which points she says, "I am also wondering if DB's activities seeking to discredit [the woman] might fall within ODH's definition of retaliation." Professor Jaggar was convinced that this was the case, and Professor Lee came to share that conviction, as is evidenced by the fact that the two of them, together with Professor Carol Cleland, and another, retired member of the Department of Philosophy, published a piece in the Boulder *Daily Camera* on December 19, 2014 – a piece which some have suggested was an attempt to influence the Privilege and Tenure Committee – in which they referred to complaints that "included violations of sexual harassment policy, including violations of its anti-retaliation clause." I would have thought that Professor Lee's strong commitment to the view that Professor Barnett was guilty of retaliation – a view that the panel has argued cannot be sustained – would have provided a reason for not concluding that Professor Lee's testimony was more credible than Professor Barnett's.

The panel's final claim was that Professor Barnett's letter and supporting document fell below minimum standards of professional integrity. Here the contention is that "Professor Barnett's letter unnecessarily paints a very negative picture of the Complainant's behavior and character," but the panel does not say how there could be an account of what happened at the time in question that was both incompatible with the account that ODH judged to be more likely than not to be true and also such as would not involve a very negative account of the

Complainant's behavior and character, given that any such account would necessarily imply that the Complainant's own testimony as to what happened was untrue.

The panel also objects to the fact "[t]he three hypotheses and ensuing arguments have several elements that are not based in witness testimonies." But how is this to fall below minimum standards of professional responsibility? The whole point of the approach that Professor Barnett follows is to set out alternative hypotheses that might, or might not be true, for all one initially knows, and then to consider which of those hypotheses is more likely to be true in light of all the evidence. This is a methodologically sound procedure, and there is nothing at all here that violates any standards of professional responsibility.

Finally, it is claimed that Professor Barnett's sharing the results of his ongoing investigation with Witness 1 was somehow "inappropriate". This seems to imply that it would have been inappropriate for Professor Barnett to have consulted with anyone else concerning the document that he was producing, including even the Respondent. But if Professor Barnett had a right to investigate to see if ODH had arrived at a justified verdict – as the panel allows – then it is hard to see how the involvement of another person in a consideration of the relevant evidence can be deemed appropriate. If so, then who better than a person who witnessed the events, and knew the other people involved? So once again the panel has not provided anything even approaching adequate support for its view that there was any failure to meet minimum standards of professional responsibility here.

The panel then concludes with its recommendations, including the view – accepted by four of the five panel members – that dismissal is not an appropriate sanction. Here the discussion returns to the reasonably high level of the first part of the report. First of all, the panel notes that Professor Barnett was "motivated by legitimate goals," and they conclude that his "motivations and actions provide an example of appropriate professional conduct."

Secondly, the panels exhibits a welcome willingness to criticize the University Administration, pointing out that both the Chancellor's charge to the lawyer, David Fine, who was hired to investigate the complaint against ODH, and David Fine's report on the case "fell short by deliberately avoiding reevaluation of the merits of the ODH conclusion or their decisions to include or disregard various testimony."

Thirdly, the panel observes in detail that any adverse effects on the Complainant, rather than resulting from Professor Barnett's investigation, "were related to a combination of factors including the original event, subsequent rumors amongst the graduate students, failure of confidentiality involving various faculty members (minimally Cleland, Pasnau, Jaggar, Barnett)," in addition to what the panel claimed – implausibly – to be Professor Barnett's "inappropriate level of advocacy (re-interviewing graduate students and witnesses about a sexual harassment allegation." Thus they conclude, "In this context, David Barnett's actions

contributed to, but were by no means the sole cause of adverse effects on the Complainant.”

Aside from the claim about an inappropriate level of advocacy, all of this seems quite reasonable. But when the panel, having rejected the dismissal option, moves on to consider what sanction would be appropriate, we are confronted once again with a conclusion that is not at all plausible, namely, that Professor Barnett should be suspended without pay for one year.

What support does the panel offer for this recommendation, which was accepted by four of the five members the panel? The answer is that it offers *no support at all*. What immediately follows this recommendation, rather than being a defense of the recommendation, is a description of the views of the one member of the panel who favored dismissal even though Professor Barnett was not found to be guilty of retaliation.

How reasonable is the panel’s recommendation that Professor Barnett be suspended for one year without pay? First of all, as we have seen above, the panel does not provide anything approaching good support for the claim that the University provided “clear and convincing evidence” that Professor Barnett fell below minimum standards of professional responsibility. Moreover, even if one had a very generous view of what counts as good support, I think that one would still have to conclude that the panel has cited a number of considerations that are not relevant at all, and that the case is at best extremely tenuous.

In the second place, one needs to consider what sort of sanctions the University has meted out in other cases. One rumor that has circulated, for example, is that one person who was found guilty of sexual harassment was not suspended at all, and then when the person was found guilty a second time, the suspension was for a semester without pay. If that rumor is right, then the suggestion that Professor Barnett should be suspended for a year without pay is way out of line.

In accessing this matter, I am handicapped by the fact that information concerning most previous sanctions is not available to the general public. But the Privilege and Tenure Committee could surely have had access to such information, as it could have been given to them in a way that did not identify the persons involved.

The conclusion, in short, is that if the panel believes that its recommendation of suspension for a year without pay is justified, it needs to offer evidence of the sort just mentioned. Otherwise the view – which I think is already rather widespread – that the recommendation of a year’s suspension without pay is essentially a sop, offered to the Chancellor to soften the panel’s complete rejection of his claim that Professor Barnett was guilty of retaliating against the Complainant, will look rather plausible.