

**UNIVERSITY OF COLORADO
FACULTY SENATE COMMITTEE ON PRIVILEGE AND TENURE**

CONFIDENTIAL PERSONNEL MATTER

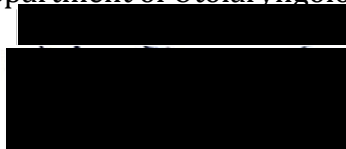
**INITIAL PANEL REPORT REGARDING DISMISSAL FOR CAUSE
OF DAVID BARNETT**

January 12, 2015

Respectfully submitted by the Dismissal for Cause Panel
(Members in alphabetical order)



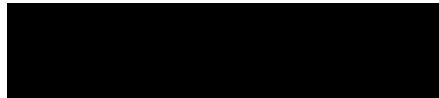
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Introduction

On Aug 18, 2014, Chancellor Philip P. DiStefano issued a Revised Notice of Intent to Dismiss Professor David Barnett, of the University of Colorado Boulder Department of Philosophy, from employment as tenured faculty member for cause citing conduct that violated the University of Colorado's policies and procedures prohibiting discrimination and harassment and conduct that falls below minimal standards of professional integrity (5.C.1 Regents Policy). As permitted by the Laws of the Regents, Professor Barnett appealed the intent to dismiss to the Faculty Senate Committee on Privilege and Tenure which convened this panel on December 2-5, 2014 to hear his appeal.

Background

The situation began with a sexual harassment complaint to the Office of Discrimination and Harassment (ODH) on October 29, 2012 made by the Complainant, a graduate student in the department of Philosophy, against the Respondent, a newly employed Ph.D. lecturer and former graduate student in the Department of Philosophy. The complaint arose from events that occurred at a small, off-campus party in August of 2012. The ODH investigated the complaint by interviewing several witnesses and issued a final report on January 22, 2013 finding that the Respondent engaged in sexual harassment in violation of the University Of Colorado's Sexual Harassment Policy (Exhibit 5). Based on the ODH report, the Respondent was dismissed from the University.

The Respondent had contacted Professor Barnett (who was his unofficial mentor and friend) for advice about the situation. Both the Respondent and Professor Barnett felt the ODH conclusion was wrong and with the professed intent of helping the Respondent appeal the ODH finding and to uncover ODH misconduct, Professor Barnett began interviewing witnesses and collecting information in order to support a letter of complaint against ODH and an appeal for the Respondent.

Chancellor DiStefano's intent to dismiss Professor Barnett was triggered by two events. First, on August 12, 2013, the Complainant reported to the ODH concerns about retaliation connected to the sexual harassment complaint of October 29, 2012. The second event was a 41-page letter with supporting documents dated August 27, 2013 that Dr. Barnett prepared and submitted by email to the Chancellor of UCB and the President of CU. The stated purpose of the letter was to report willful misconduct of the ODH and to request that the Chancellor investigate this possibility. A similar email from the Respondent framed as an appeal of the ODH finding was received by the Chancellor on August 30, 2013.

Chancellor DiStefano responded to both of these events by designating Mr. David Fine, an external attorney with McKenna, Long and Aldridge, to conduct an investigation into whether the ODH misrepresented or manipulated witness

testimony, suppressed any evidence, or was biased, and whether the ODH investigation was conducted in accordance with due process and University of Colorado policy and procedures. Mr. Fine was not tasked with reconsidering the merit of the ODH decision. Mr. Fine was also asked by Chancellor DiStefano to investigate whether Professor Barnett retaliated against the Complainant in violation of University of Colorado Sexual Harassment Policy and Procedures.

On November 25, 2013, Mr. Fine issued a report on his Investigation of the ODH Investigation that concluded that the ODH did not misrepresent or manipulate witness testimony, suppress any evidence, and was not biased, and that the ODH investigation was conducted in accordance with due process and University of Colorado policy and procedures. On May 5, 2014, Mr. Fine issued a report on his Investigation of Claim of Retaliation that concluded Professor Barnett's enquiry and letter to the Chancellor and CU President did constitute retaliation against the Complainant by violation of the University of Colorado Sexual Harassment Policy but did not constitute retaliation in violation of Title IX. Mr. Fine also concluded that statements made by Professor Barnett to Professor Mitzi Lee constituted retaliation in violation of both the University of Colorado Sexual Harassment Policy and Title IX.

Panel Comment

The correctness of the ODH Report Finding was not an issue the panel was asked to consider nor did the panel consider it relevant to the panel's charge. The panel did consider the overall quality of the ODH report as relevant to the motivation for Professor Barnett and the Respondent to appeal the ODH finding. The fact is that the ODH report left much of the rationale for its conclusions unstated leading the Respondent and many of the ODH witnesses to feel misrepresented and to consider the ODH conclusion to be wrong. A more complete report that included the rationale and criteria for how the ODH handled all or most of the important witness statements would have been reasonable and appropriate for such an important investigation and the lack thereof became a motivating factor for the Respondent and Professor Barnett to undertake their subsequent activities.

The Charge to the Panel

Based on the prehearing order dated 11/20/14, the issues which are properly before the hearing panel are:

- (1) whether Professor Barnett engaged in conduct falling below the minimum standards of professional integrity;
- (2) whether Professor Barnett engaged in sexual harassment;
- (3) if so, whether Professor Barnett's misconduct was sufficiently serious that it merits his dismissal as a tenured faculty member of the University of Colorado.

According to Regent Policy, the University bears the burden of proof by clear and convincing evidence (evidence that is highly probable).

FINDINGS

Because Professor Barnett's actions in interviewing witnesses and students, and preparing a letter and supporting document in connection with the ODH Report on behalf of the Respondent are central to the allegations of retaliation and failure of professional integrity, it is appropriate to first review in general terms the arguments on both sides of the question of whether these actions were justifiable actions for a faculty member. This report will then consider the questions of retaliation and failure of professional integrity in turn.

Were Professor Barnett's actions in interviewing witnesses and students, and preparing a letter and supporting document in connection with the ODH Report on behalf of the Respondent justifiable actions for a faculty member?

Argument for Yes:

- Faculty carry a responsibility to advise and advocate for their students and mentees.
- The Respondent (a mentee of Professor Barnett) sought advice and help from Professor Barnett.
- Professor Barnett, based on discussions with the Respondent and the lone credible witness (Witness 1) of the events of the night in question, believed several factors that were conveyed to ODH that should have contributed to the weighing of evidence were omitted or were, due to bias, not considered relevant by ODH to their decision.
- Professor Barnett believed the ODH report was unfairly biased in favor of the Complainant, and thus unfairly biased against the Respondent, Professor Barnett's mentee.
- Professor Barnett did not believe it was reasonable that the Respondent was considered guilty by the ODH.
 - The panel did consider the ODH report and testimony regarding the quality of the report as it pertained to Professor Barnett's motivation to proceed with his letter and supporting document. The panel members unanimously agreed that Professor Barnett's concerns about the ODH report were reasonable.

- In order for Professor Barnett to support a convincing complaint/appeal, enquiry into the event was needed and thus justified. His point was not to make a full investigation but only to provide compelling evidence that the ODH investigation was biased against the Respondent.
- He appropriately did not interview the other side (in this case the Complainant and W6) which could have reasonably been perceived as retaliation.

Argument for No:

- Faculty carry a responsibility to advise and advocate for their students and mentees. However, advocacy has limits and several portions of Professor Barnett's letter and supporting document were above and beyond those limits.
- As a CU faculty member Professor Barnett was not authorized to re-visit the ODH investigation and report nor was he following standard university procedure to register a complaint (e.g. Ombuds Office, Faculty Affairs, etc.).
- Professor Barnett had completed University Sexual Harassment Policy online training and was highly aware of the ongoing climate concerns within the Department of Philosophy. He reasonably should have known that a university professor, advocating at this level in the context of a Title IX investigation was questionable.

1) Did Professor Barnett retaliate against the Complainant?

Panel Comment

Issue of differences between the wording of the University of Colorado Sexual Harassment Policy pertaining to retaliation versus the Title IX definition and requirements for retaliation.

This required some interpretation of the CU sexual harassment policy and the related portions of Title IX policy. Both sides in this case agree that under Title IX, there is an intent requirement in that Professor Barnett must have been motivated by retaliation. This was made clear in David Fine's testimony and David Fine's report on p. 16 stating that "for purposes of a Title IX analysis... we must still determine whether his [Barnett's] actions were motivated ultimately by a desire to retaliate against the" Complainant. The University's retaliation policy is worded differently than Title IX and does not explicitly address intent. This is why Mr. Fine came to different conclusions with respect to the question of whether Barnett's

enquiry and letter constituted retaliation under Title IX versus under the University's Policy.

For the following reasons, the panel concluded that the retaliation claim against Professor Barnett should be judged against the Title IX definition and requirements that require intent to retaliate:

- Retaliation is, by definition, an intentional act.
- The University policy must ultimately conform to Title IX standards.
- The University policy is worded differently from the pertinent sections of Title IX policy resulting in confusion.
- The University policy requires a "causal connection" and while the University policy does not go on to fully define causal connection, it is reasonable to assume that the intended meaning is the same as when the term "causal connection" is used in the pertinent Title IX policy.
- The University Sexual Harassment Training Module clearly describes intention as integral to the definition of retaliation.
- Applying the University of Colorado retaliation policy wording (without reference to intent) to the current situation implies that conversations of several philosophy faculty members could be considered retaliatory sexual harassment. Examples: Faculty member's failure to maintain confidentiality (causally connected and resulting in materially adverse effect) and Faculty member conversation with claimant warning about potential effects on the department of a sexual harassment complaint (causally connected and materially adverse effect).
- The University did not explain or justify why the CU policy is worded differently than Title IX.

Allegation of Retaliation

To begin with, it is informative to consider the Complainant's allegation of retaliation by Professor David Barnett reported to ODH (Exhibit 43):

- The Complainant alleged that Professor Barnett was conducting his own investigation into the underlying incident, and this was very distressing to her.
- The Complainant alleged that Professor Barnett had made retaliatory statements against her to other faculty and students that disparaged her reputation and implied that she was not a victim of sexual harassment. According to David Fine's report, the Complainant alleged that [Barnett's] widespread discussion of her sexual harassment allegations with others in the Philosophy Department had humiliated her, perpetuated rumors....and disparaged her reputation. (Ex. 16, p. 2).
- The Complainant stated these allegations were only 'hearsay' from others in the department about what Barnett may have said about her, but this still affected her.

- The Complainant reported speaking to Professor Jaggar where she was told of Barnett's alleged actions and that Professors Jaggar and Cleland were very concerned about the situation and wanted to file a retaliation complaint for the Complainant or that the Complainant could file a complaint herself.
- The Complainant has been diagnosed with depression and Post-Traumatic Stress Disorder and alleges that this is the result of learning about Professor Barnett's reinvestigation of the incident and 'spreading negative rumors about her.'

Additional Allegations of Retaliation

In addition, based on David Fine's investigation, the University cites a specific conversation between Professor Barnett and Professor Mitzi Lee and considers the Barnett Report itself as retaliatory behavior.

1a) Did Professor Barnett retaliate against the Complainant by conducting an enquiry and writing a letter and supporting document to rebut the ODH investigation and report?

We find that the University did not show by clear and convincing evidence that Professor Barnett engaged in sexual harassment by retaliation. We have not seen (or heard) clear and convincing evidence that would indicate that Professor Barnett conducted his enquiry and wrote his letter and supporting document to the Chancellor and President with the purpose of retaliating against the Complainant.

- Professor Barnett asserts that his aim was to identify flaws in the ODH investigation and report and to help the Respondent appeal the ODH finding. The panel did not see or hear any evidence to the contrary.
- Testimony that touches on Professor Barnett's antipathy for the ODH based on his prior interactions with ODH add credibility to his motivation to discredit the ODH report.
- Professor Barnett resolutely maintains it was not his purpose to sully the Complainant's reputation. However, he was also not sensitive to the effects his enquiries would have on the Complainant. As his efforts on behalf of the Respondent became known within the department, they became the subject of further hearsay and rumor that may have adversely affected the Complainant and provided a reason for the retaliation complaint. However, rumors and hearsays were circulating within the department even before Professor Barnett begin his enquiry and the evidence submitted suggests that the Barnett enquiries, letter, and supporting document were not done with the intent to retaliate against Complainant but to bring a complaint against the ODH and to argue in support of an appeal for the Respondent.

- The panel's conclusion is in agreement with Mr. Fine's investigation and analysis that taken a whole, Barnett's investigation did not have the purpose to retaliate against the Complainant (exhibit 16, page 20).

1b) Did Professor Barnett retaliate against the Complainant by his discussion within the Department of Philosophy of the sexual harassment complaint?

We find that the University did not show by clear and convincing evidence that Professor Barnett engaged in sexual harassment by retaliation by allegedly spreading rumors within the Department of Philosophy.

- The panel concludes that the Complainant's allegation/perception (in her retaliation complaint) that Professor Barnett was spreading rumors in a retaliatory fashion is not correct. While Professor Barnett did widely communicate to the faculty his negative opinion about the ODH report and his plans to formulate a complaint against ODH and an appeal for the Respondent, he did not reveal details or disparage the complainant (with one exception to be discussed below). The panel found no evidence for retaliatory motive or intent in these actions.
- Testimony and exhibits affirm that Professor Barnett communicated with other faculty within the Department of Philosophy that there was "another side to the story", that the "ODH report had numerous flaws", and that he was "conducting enquiries " to support a complaint against ODH and an appeal for the Respondent.
- Other than testimony by Professor Mitzi Lee about one private conversation where it is alleged that disparaging comments were made by Professor Barnett about the Complainant, there was no testimony or other evidence provided to support the claim that Professor Barnett made disparaging comments about the Complainant to other faculty or students.
- It is clear that a "rumor mill" relating to the initial incident and subsequent ODH report developed within the Department of Philosophy and this played a large role in creating an uncomfortable environment for the Complainant. Some rumors would be expected since the Respondent was abruptly removed from teaching responsibilities (4 classes had to be taken over by other faculty). While there is some discrepancy in the testimonies of faculty as to who told who what, the evidence suggests that the Respondent was a primary source of confidential information.
 - The Complainant's initial conversation in the fall of 2012 with Professor Cleland also did not remain confidential as Professor Cleland informed Professor Pasnau and possibly others.

- Professor Pasnau informed Professor Mitzi Lee furthering the rumors.
- Professor Jaggar appears to also have contributed to the rumor mill around Dr Barnett and the Complainant, potentially further distressing the Complainant. (Complainant's ODH retaliation complaint, exhibit 43)
- The Complainant testified that she couldn't be sure who was spreading the rumors, and admitted that it could have been the Respondent or others.
- The Panel's conclusion is in agreement with Mr. Fine's investigation and analysis (Exhibit 16, page 17, C).

1c) Did Professor Barnett retaliate against the Complainant by making retaliatory statements to Professor Mitzi Lee?

- According to Professor Mitzi Lee's testimony, Professor Barnett told her in Feb 2013 that the Complainant was very drunk, sitting on the laps of multiple students, making passes at the men at the August 2012 party, etc. However, Professor Barnett was not present at the Aug 2012 party, and therefore he is not a witness, and consequently his comments about the Complainant should be considered second hand hearsay or rumor. Professor Mitzi Lee claims to have been shocked by Professor Barnett's comments and felt sorry for the Complainant (whom she did not know at this time).
- Professor Barnett testified that it was "very likely" that he cited to Professor Mitzi Lee some examples of witness testimony that was "suppressed or omitted" from the ODH, he claims he didn't tell Mitzi Lee that the Complainant was propositioning men at the party or characterize the Complainant as "asking for it" and cites emails that followed the meeting that are silent on the conversation.
- However, taking Dr. Barnett's behavior as a whole, no clear and convincing evidence was presented that this conversation had a specific purpose of retaliation against the Complainant:
 - Lack of retaliatory intent is supported by the fact this conversation is the only one presented as retaliatory amongst all the emails reviewed and interviews performed by the University for the entire hearing.
 - Testimony of multiple faculty members did not reveal any instances of disparaging comments.
 - Testimony of several graduate students (interacting with Professor Barnett at the time) and Professor Ajume Wingo (who had Complainant as his TA) assert that he never made any comments or reference to the Complainant.
 - It should be noted that Professor Mitzi Lee did not know the Complainant personally or have her as student at the time, and

Professor Lee had initially learned about the underlying incident from Robert Pasnau, not David Barnett.

1d) Did Professor Barnett retaliate against the Complainant by submitting a complaint/appeal letter (Barnett report) to the Chancellor and President?

We find that the University did not show by clear and convincing evidence that Professor Barnett engaged in sexual harassment by retaliation by writing and submitting his letter and report of complaint against ODH.

- It is clear that the Complainant was not aware of Professor Barnett's report or its contents at the time of her complaint of retaliation. The Barnett Report was not part of the Complainant's retaliation complaint and was received by the Chancellor two weeks following the retaliation complaint.
- The evidence substantiates that the report was initially intended by Respondent and Professor Barnett to persuade lawyers to take the case to defend the Respondent on a contingency fee basis, as the Respondent was a newly minted PhD graduate who did not have the funds to pay up front. There was no evidence presented for retaliatory motive. Their decision to send the letter to the Chancellor and President came only after they failed to secure legal representation.
- Professor Barnett's letter seriously offended the Chancellor. Given the unflattering and sensitive nature of the events in question, describing additional details of the event (details that the ODH had deemed not relevant) could not help but be offensive. The letter also used an alternative construct approach to make a case for ODH bias that necessitated creation of an alternate hypothesis (hypothesis #1) that was further unflattering to the Complainant. 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.
- Ultimately, the question before the panel is, did Professor Barnett carry out his enquiries or write his letter and lengthy supporting document with the intent of retaliating against the Complainant for filing her sexual assault complaint? The panel unanimously agrees that based on the evidence presented that Professor Barnett did not have the objective of defaming or damaging (retaliating) against the

Complainant as the Barnett letter and supporting document was most clearly an attempt to refute the ODH report. However, the Barnett letter and supporting document as fashioned did disparage the Complainant as a way to condemn ODH.

- The Panel's conclusion is in agreement with Mr. Fine's investigation and report that "Barnett's purpose, however poorly executed, was to vindicate the Respondent and to challenge the investigatory policies of the ODH" (Exhibit 16, page 20).

2) Did Professor Barnett's conduct fall below minimum standards of professional integrity?

Minimal standards of professional integrity are by nature somewhat subjective and open to interpretation. Pertinent guidance is outlined in Board of Regents Policy 1C Principles of Ethical Behavior (Exhibit 4) and the Academic Affairs Policy on Professional Rights and Duties of Faculty Members (Exhibit 6, Part II, page 8).

There are several actions to be considered here:

- a) Professor Barnett communicating with other faculty that there was "another side to the story", that the ODH report had numerous flaws, and that he was gathering facts and writing a letter to support a complaint against ODH and an appeal for the Respondent;
- b) Professor Barnett's enquiries and letter arguing against the ODH investigation and report that was sent to the Chancellor and President of CU;
- c) Professor Barnett's conversation with Professor Mitzi Lee;

2a) Did Professor Barnett's actions in conducting enquiries into the ODH investigation and submitting a letter and supporting document arguing against their findings fall below minimum standards of professional integrity?

The Panel acknowledges that University faculty have a responsibility and obligation to advise and advocate for their students and mentees. When the Respondent (a mentee of Professor Barnett) sought advice and help from Professor Barnett, it was appropriate to discuss the situation with the Respondent and at the request of the Respondent to talk to Witness 1, (the roommate of the Respondent), who indicated that his testimony was not adequately or correctly reflected in the ODH report, about the events of the night in question, and to further advise his mentee. Gathering some information to support the Respondent's side of the story is appropriate. A CU faculty member has every right to file a complaint and to appeal to higher authority. They can suggest some new evidence be considered and request an independent investigation of the evidence.

Nevertheless, we find that the University showed by clear and convincing evidence that Professor Barnett engaged in conduct that **falls below** the minimal standards of professional integrity in conducting his enquiries and filing this letter and supporting document as written as discussed below:

- Professor Barnett's arguments in the letter and supporting document filed with the Chancellor and the President went well beyond what was needed to register a complaint/appeal. The alternative options of sending a letter of concern that focused on the ODH omissions and conclusions but omitted the excessive details, unnecessary arguments and alternative scenarios regarding the evening in question would have been a more effective means of registering a complaint.
- Many of the comments in the Barnett letter and supporting document were inappropriate (e.g., hearsay (Witness 3), sarcasm, etc.).

Four of the five panel members further note:

- His approach was unwise (not independent nor did it involve opposing viewpoints), and his goals (to force CU to do what he considered the "right thing") went beyond the rights and privileges of a CU faculty member.
- Professor Barnett maintains it was not his purpose to sully the Complainant's reputation; however, he was also not sensitive to the adverse effects his enquiries would have on the Complainant. His investigation was well known in the department and it is reasonable to conclude this would add to the distress of the Complainant.

In dissent as regards the two points above the fifth panel member notes:

- Dr. Barnett was advocating for his mentee, the Respondent, and making the point that ODH had unfairly reached its conclusion that the Respondent was guilty of sexual misconduct; thus, there should not be an expectation that his information gathering or letter with arguments be unbiased. Because that letter was meant only for the ultimate supervisor(s) of ODH (i.e. 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 innocence, his obligation.
- The extent to which the Barnett investigation was well known in the department was mainly due to the indiscretion of others.

2b) Did Professor Barnett's conversations within the Department of Philosophy about the sexual harassment complaint fall below the minimal standards of professional integrity?

It is clear from witness testimonies that Professor Barnett told some faculty (5-6 according to our count) that the ODH report was flawed and that he planned to formulate a complaint against ODH and an appeal for the Respondent. The evidence also supports that Professor Barnett did not reveal details or disparage the Complainant (with one exception to be discussed below).

We find that the University did not show by clear and convincing evidence that these actions falls below the minimal standards of professional integrity. In our opinion, Professor Barnett has the right to disagree with the report and did not reveal details or disparage the Complainant.

2c) Did Professor Barnett's conversation with Professor Mitzi Lee fall below minimal standards of professional integrity?

We find that the University showed by clear and convincing evidence that Professor Barnett engaged in conduct that falls below the minimal standards of professional integrity by engaging in second hand hearsay with Professor Mitzi Lee that disparaged the Complainant.

- According to Professor Mitzi Lee's testimony, Professor Barnett revealed confidential details from the ODH investigation and his own enquiries that were disparaging to the Complainant. Professor Barnett testified he didn't say the disparaging comments Mitzi Lee reported.
- The conflicting testimony of Professor Mitzi Lee and Professor Barnett creates a "he said she said" situation where is it possible that neither Professor Barnet nor Professor Mitzi Lee remember exactly the conversation and the truth lies somewhere between the two statements.
- Nevertheless, the panel found Professor Mitzi Lee's testimony credible and that the disparaging comments about Complainant apparently made by Professor Barnett fall below minimal standards of professional integrity.

2d) Did Professor Barnett's letter and supporting document to the Chancellor and President fall below minimum standards of professional integrity?

We find that the University showed by clear and convincing evidence that Professor Barnett's letter and supporting document falls below the minimal standards of professional integrity for a faculty at CU.

- The Barnett letter and supporting document is offensive and derogatory towards the Complainant. For example, Professor Barnett's letter unnecessarily paints a very negative picture of the Complainant's behavior and character (e.g., is the type of person who would fabricate a story, regardless of its consequences....'). Many comments were unnecessary if the primary reason for writing the report was to point out that the ODH report is flawed, rather than to paint a negative picture of the Complainant.
- Professor Barnett's 'evidence' in the letter and supporting document is not entirely based on factual evidence (e.g., Witness 5 report is clearly hearsay and her opinion; The three hypotheses and ensuing arguments have several elements that are not based in witness testimonies).
- Even though Professor Barnett claimed that he did not intend for his letter and supporting document to be circulated widely, in the end this did occur. It is reasonable that he should consider that loss of confidentiality could occur with resultant adverse effects on the Complainant. For example, if he wanted to be sure that this didn't happen he could have delivered a hard copy to the Chancellor and President and not circulate electronic copies to the Respondent and Witness 1. The fact that Barnett apparently permitted Witness 1 to have access to all other witness names and statements and drafts of his letter and supporting document was inappropriate. Professor Barnett's failure to adequately protect the Complainant (a student in his department) from the effects of his actions falls below minimal standards of professional integrity.

SUMMARY OF CONCLUSIONS

- 1) Professor David Barnett did not engage in sexual harassment or retaliate against the Complainant.
- 2) Several of Professor David Barnett's actions fell below the minimal acceptable standards of professional integrity.
- 3) The violations of professional conduct do not rise to the ultimate penalty of termination.

RECOMMENDATIONS

Is dismissal an appropriate sanction? Does the "good of the University require such action"?

The panel is unanimous in finding that the University **did not show** by clear and convincing evidence that Professor Barnett engaged in sexual harassment. The panel is also unanimous in finding that the University **did show** by clear and convincing evidence that Professor Barnett engaged in conduct that falls below minimal standards of professional integrity in several instances, although the extent of behavior felt to fall below standards of professional integrity varied among the panel members. The Laws of the Regents provide that a faculty member who engages in conduct below the standards of professional integrity may be dismissed, if the University requires it. Accordingly, the panel has considered various arguments for and against dismissal.

Arguments against Dismissal

- Dr. Barnett was motivated by legitimate goals 1) to advocate for a mentee whose career was severely threatened by what he reasonably believed was a false conclusion by ODH, 2) to inform the ultimate authority over ODH, namely the UCB Chancellor and CU President of these concerns. In this context, Dr. Barnett's motivations and actions provide an example of appropriate professional conduct.
- Although the letter did prompt the Chancellor to act, e.g. by hiring David Fine to evaluate the ODH investigation, the charge to Mr. Fine and hence his report fell short by deliberately avoiding reevaluation of the merits of the ODH conclusion or their decisions to include or disregard various testimony.
- The severity of Professor Barnett's unprofessional behavior should be assessed by its contribution to adverse effects on the Complainant. In totality, the adverse effects on the Complainant 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), Professor Barnett's inappropriate level of advocacy (re-interviewing students and witnesses about a sexual harassment allegation). There are multiple examples where some faculty seemed chiefly concerned for the impact on the Philosophy Department. All of these activities added to the Complainant's distress and failed to protect her to the fullest extent possible. Despite concerns for the Complainant expressed by some faculty, overall there was what one might call a "systemic failure" within the Philosophy Department to protect the Complainant from any adverse effects. In this context, David Barnett's actions contributed to, but were by no means the sole cause of adverse effects on the Complainant.
- The panel does not find that the fact that the University elected to pay the Complainant \$825,000 is relevant to these proceedings. This complaint and its mediation were not presented in this hearing. Also, the Chancellor

testified to other reasons for why the University decided to settle (e.g., to protect the University from a lawsuit).

Arguments for Dismissal

- The University has legitimate concern that the kinds of behavior described here not be repeated by this faculty member or any other faculty member at the University. Dismissal would send a strong message that unprofessional behavior that is harmful to its students, Departments, and the University as a whole will not be tolerated.
- The good of the University requires firmness in enforcing its policies and procedures, in particular to this case, as they pertain to sexual harassment and the policies that define enforcement and investigation of complaints.

What is the appropriate sanction?

a) Majority opinion for nontermination (four panel members)

Professor Barnett should:

- 1) Agree to never serve on any committee that makes decisions about the Complainant's work or compensation (e.g. thesis committee or scholarship committee).
- 2) Never respond to anyone seeking a recommendation or reference for the Complainant with any response other than to indicate that he is unable to comment.
- 3) Be barred from entering the CU Boulder campus for one year.
- 4) Be suspended without pay for one year.

b) Minority position for termination (one panel member)

Prof. Barnett had a number of avenues to both state and promote his grievances within the CU system ranging from the Boulder Faculty Assembly (BFA) Ombudsman to the BFA executive itself. The BFA was also studying the ODH and its practices and this would have been compatible with Professor Barnett's desire to explore ODH policy and practices. Instead Professor Barnett decided to take this task on himself and ignore the CU faculty governance that was established and

available to him. As a result he carried out a very flawed and incorrect investigation that resulted in a very biased and slanderous report. The fact that none of the lawyers that Professor Barnett consulted were willing to take his case suggests that his case was seriously flawed and not something that was defensible. His evidence was all one-sided, collected by a biased individual and not by an impartial investigator. He ignored a number of warnings that doing such an investigation and writing a report were inappropriate behavior for a faculty member but he decided to do it anyway.

By ignoring the CU system, which he was working under, his only defense is that he wanted to change the CU system but it doesn't appear that his actions are consistent with this goal. If he wanted to change the ODH system he would need to consult with the provost and eventually the Chancellor about changing the system. Instead Professor Barnett chose to make an example of the ODH case with the Respondent in his effort to change the CU system. If he did not get any traction from either the Chancellor or the President he should have realized that this was a lost cause. At that point he had two choices: a. swallow his pride and go back to his regular duties or b. leave CU. His persistence in ignoring the CU system is alone grounds for dismissal. None of us as faculty have the right to redesign an administrative system just because we don't like the work that they have done. Anyone who thinks that does not belong in the system.

Additional Panel Recommendations (Unanimously Agreed to By All Panel Members)

- 1) The University should develop and publish clearly stated procedures for appeal of an ODH finding. This is in line with recommendations of the BFA Task Force on ODH.
- 2) The University should revise its definition of retaliation in its administrative policy statement to be clearly consistent with Title IX policy (Fine Testimony pages 395 11-18).