

August 23, 2016

TO: FAS Faculty

FROM: Tamar Gendler
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RE: Graduate Student Unionization: Guidelines for Communications

As you may know, the National Labor Relations Board (NLRB or the Board) recently ruled in a case involving Columbia University that graduate student teaching assistants and assistants in research will now be considered “employees” covered by the National Labor Relations Act (NLRA). This is the third time in 16 years that the Board has changed its view regarding the status of graduate students as employees under the NLRA, and the current ruling could be modified or overturned by a future Board or by the federal courts. However, since the Board’s ruling is now in effect, many faculty members have asked for guidance on how this ruling affects how faculty may communicate their views on graduate student unionization. We write to share the guidelines imposed by federal labor law regarding your responsibilities now that the NLRB has changed its interpretation of the law.

The NLRB ruling does not mean that graduate students at any given university are now part of a union. It means that graduate students have rights of employees under the NLRA, including the right to seek to organize a union. Whether graduate students at Yale will be represented by a union is a question that has not been decided and could be put to them in an election.

However, with its decision, the NLRB has already changed the environment in which faculty interact with students, and it is important for all faculty members at Yale to understand the new rules. As a consequence of the Board’s decision, it is likely that the NLRB will view faculty as managerial employees who are the supervisors of graduate student teaching assistants, part-time acting instructors (PTAI’s) and assistants in research.

As a practical matter, faculty will need to follow the rules that govern communication between “employees” and their employer and supervisors when addressing union-related issues with graduate students. In general, faculty members have the right to express their opinions regarding union organizing and related issues as long as they do so in a manner that does not involve threats, interrogation, promises of benefits or surveillance. We describe the applicable rules in more detail below.

Section 8(c) of the NLRA states:

The expression of any views, arguments or opinions or the dissemination thereof, whether in

written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this ... [law], if such expression contains no threat of reprisal or force or promise of benefit.

This provision is a statutory codification of the right to free speech on these and other subjects guaranteed by the United States Constitution, as long as those expressions contain no threat of reprisal or coercion, or promise of benefit. “Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’ ” *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008).

Now that the NLRB has ruled, we anticipate that the campus will engage in a robust discussion about the pros and cons of graduate student unionization, and that this will be done in an atmosphere free from intimidation, restriction or pressure to silence any viewpoint. In exercising your right of free expression, however, we take this opportunity to remind you that certain comments and conduct may be misconstrued, especially in the context of debate. In light of the Board’s new interpretation, we are obliged to remind you to refrain from the following expression and/or conduct with regard to graduate students, even though we believe it is very unlikely that a faculty member would in fact engage in such expression or conduct:

1. **Threats.** Threats to a graduate student because of his or her activities or sympathies in support of or against the union are not permitted, e.g., threatening to give a student a poor reference, or refusing to have him or her as a teaching assistant on account of pro- or anti-union sympathies, or otherwise threatening adverse consequences because of the student’s support or activities for or against the union. Likewise, it is unlawful to make predictions of adverse consequence that are not based on objective facts, e.g., “if the union gets in, there will be fewer teaching opportunities” or “if the union doesn’t get in, the University will never increase teaching assistant pay.” Faculty should also avoid stating that certain negative or positive consequences “will” result from unionization, as opposed to stating that selection of a union “could” or “may” have such effects. Examples of lawful statements include saying that “unionization of graduate students could enhance the way that teaching assistants are treated and compensated” or that “negotiation of a collective bargaining agreement may result in rules and restrictions on teaching assistant usage.”

2. **Interrogation.** Interrogating graduate students can be unlawful under the NLRA. In particular, faculty should not interrogate graduate students about their union sympathies, whether they signed a union authorization card, or how they plan to vote if the NLRB directs a secret ballot election. This prohibition does not prevent faculty from engaging in conversations that do not constitute interrogation (i.e., conversations that are not started or interspersed with questions about union support or lack of it). Likewise, the law does not prevent faculty from expressing their opinions about unionization or GESO (Local 33), or from listening to anything anyone wants to tell them and responding in a non-threatening fashion. For example, it is lawful for a faculty member to begin a conversation with a graduate student by saying that the faculty member would like to discuss issues about graduate student unionization and share his or her views with the student. Finally, faculty are always free to listen to graduate students who openly

offer information or express opinions regarding the union.

3. **Promises.** Like threats, faculty promises of favorable treatment as an inducement to support or oppose the union are not permissible. The NLRB has held that a union is free to promise anything because it does not have the ability to fulfill its promises. By contrast, the NLRB will treat promises made by a faculty manager or supervisor as made on behalf of the University, which does have the ability to fulfill them. Faculty are free, however, to tell students that promises made by the union cannot be fulfilled without University agreement.

4. **Surveillance.** Faculty surveillance of graduate students (or creating the impression that surveillance is taking place) to determine their sympathies for or against the union is not permissible. For example, faculty should not ask graduate students to attend a union meeting and to report on who was there and what was discussed.

In sum, University faculty should not engage in conduct that constitutes unauthorized threats, interrogation, promises, or surveillance (TIPS is the often-used acronym) within the meaning of the NLRA. What remains is a broad area for the expression of opinion pro and con regarding graduate student unionization and GESO-related issues. This dialogue is squarely protected from governmental interference by the NLRA and the First Amendment, and is protected at the University level by longstanding Yale policies governing the freedom of all members of the Yale community to express their views on any and all subjects.

If you have any questions about this memorandum or what might constitute a prohibited activity, there are many resources to assist you. Please feel free to contact Jonathan Clune in the Office of the Vice President and General Counsel (432-4949). I also encourage you to view the materials we have shared with graduate students. (<http://gsas.yale.edu/about-gsas/overview-graduate-student-education-yale-university>)

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