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**EMAIL TO CHIEF DEB CHEESEBRO, MARCH 23, 2016, 5:22AM**

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**From:** David Dessler

**Sent:** Wednesday, March 23, 2016 5:22 AM

**To:** Cheesebro, Deborah

**Subject:** Re: Follow-Up

Hi Deb,

Thank you for your kind reply. You are the first official at the College to treat me with respect since November. I appreciate that very much.

As I have explained, the College has no legal basis for placing me on unpaid leave after March 24. The College cannot ask for a fitness for duty exam, because it did not notify me within five days of the start of the leave that such an exam would be required; moreover, we have no policy to ensure it is not being applied to me arbitrarily. Given these constraints, the College does have the option of identifying to me behaviors that it believes problematic or dysfunctional. This would mean I go back on regular pay while we sort out that problem. I have said I will undergo an exam of whatever type to reassure the College on this issue. I will give up rights if necessary. The College does not have to show I must take the test. I want to reassure the College I am okay. If William & Mary thinks I am not, then tell me, and we will work it out, or if I am deemed unable to fulfill essential functions, then the College can legally place me on unpaid leave.

What the College cannot do is set a condition that I can return only upon meeting a special requirement. This is disallowed by the following key provision of the FMLA:

**§ 825.214 Employee right to reinstatement.**

**General rule.** On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also § 825.106(e) for the obligations of joint employers.

HR Chief Poma says that the very fact I was placed on medical leave means I need a medical clearance (of an unspecified type) to return. Here is how he puts it:

**The most recent information we have from a qualified medical professional who has treated you advises that as of the fall of 2015 you were unable to perform your job. When a qualified medical professional advises the university that you are ready to resume those duties, we can discuss your return.**

Chief Poma's position is: On return from medical leave, an employee is NOT entitled to be returned to the same position. He or she must pass a medical exam first. This violates Federal law.

It also violates the Faculty Handbook, because Mr. Poma's conditions put the burden of proof on the employee, and not the College as far as the question of essential functions goes:

**Faculty Handbook II.H.2.**

The burden of proof that the faculty member is no longer able to perform the essential duties of the position, even with reasonable accommodation, rests with the College and shall be satisfied only by clear and convincing evidence in the record considered as a whole.

Moreover, Mr. Poma's policy violates the FMLA requirement that the policy applied to me be uniformly applied. The bolded text, it is worth noting, is from the FMLA website.

As a condition of restoring an employee whose FMLA leave was due to the employee's own serious health condition that made the employee unable to perform the employee's job, an **employer may have a uniformly-applied policy** or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work.

In addition, a fitness-for-duty exam, even if the College could require it, which it cannot, could only be sought with regard to the condition that put me on leave. I made this point earlier. No exam makes sense in this context, since we know (from medical textbooks) that the condition present on Nov 5 is gone. I will have a doctor search for a new acute trauma if the College sees evidence of one.

An employer may seek fitness-for-duty certification **only with regard to the particular health condition** that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work.

Finally, look again at Mr. Poma's stated requirement:

**The most recent information we have from a qualified medical professional who has treated you advises that as of the fall of 2015 you were unable to perform your job. When a qualified medical professional advises the university that you are ready to resume those duties, we can discuss your return.**

Please note that "those duties" has no antecedent. Mr. Poma is incorrect when he says my doctor said I was unable to perform "my job." Dr. Nelson identified essential functions I could not fulfill. Is this what Mr. Poma refers to with the phrase "those duties"? There is no way to tell. But if so, again, Mr. Poma is too late. If he wants a qualified medical professional to advise the university that I am ready to resume certain functions it deems essential, he was obligated to give me a list of these functions no later than Nov 10, 2015. [From the FMLA website:]

The employer must provide notice of the requirement to provide a fitness-for-duty certification with the designation notice. If the employer has provided a list of the essential functions of the employee's job by no later than with the designation notice, an employer also may require that the certification address those essential functions.

**Let me repeat: the College has every right to put me on unpaid leave if I cannot do my job. I have said, I will voluntarily submit to any medical exam the College wants, if only the College will tell me what behaviors prompt them to ask for the examination. The burden of proof is on the College to identify the behaviors. At that point, I will accept the burden of proof of verifying that I am healthy. This is not only fair. It is the only legal pathway available.**

Reinstating me as required by law does not assure me a job. I still have to prove myself. It simply prevents the College from yet another illegal decision regarding my employment here. Mr. Poma's email of 3/17, identifying conditions for my return, lies in tatters above. The College now has no stated rationale for ending my pay. If it does end my pay, I will expect a new email with a new explanation. The one given on the 17th has been destroyed.

The right thing to do, and the only legal thing to do, is to tell me what you think my problems are, so that I can see a doctor and we can figure out what to do, if the College truly thinks I need help.

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**If the College puts me on unpaid leave on March 25 under the plan currently stated, even for one day, I will take the following actions:**

(1) On Monday, March 28, I will file a grievance with the Faculty Hearing Committee challenging this decision.

(2) At the same time, I will work with lawyers I hire Friday to file suit against the College. I will cite the FMLA, the ADA, and Title VII. This will bring up issues broader than the unpaid leave, though the unpaid leave will be the focus. This suit will also describe the hostile work environment I have faced, and address the issue of the inexplicable bans on travel and communication.

If the College respects my right to reinstatement granted to me under Federal law, I will not take either of these actions.

Since you have been open with me, Deb, let me be open with you, and tell you that I will be filing five grievances--one per week--starting Monday, March 28, no matter what happens with my return to work.

(1) Monday, 3/28: grievance concerning illegal administrative leave of Oct 26

(2) Monday, 4/4: grievance concerning illegal retaliation of Feb 2 (Mr. Poma approached Matt Lambert for emails to retaliate for my criticism of a letter he wrote me concerning my leave on Feb 1--this complaint will simultaneously be filed with the Department of Labor via their website--FMLA retaliation violates Federal law)

(3) Monday, 4/11: grievance concerning defamation of my character in department and in my classes by McGlennon, Oct-Dec 2015

(4) Monday, 4/18: grievance concerning Provost's willful and deliberate refusal to use the Faculty Handbook at any point during my medical leave, from beginning to end, despite increasing requests as the leave wore on

(5) Monday, 4/25: grievance concerning two criminal arrests made without probable cause in Feb and March as part of attempt to intimidate me into silence about the many violations of College policy (the ones at the center of the four previous grievances)

These will be rolled out and pressed forward through the FHC, and a law firm (yet to be hired) will pull all the materials together into a comprehensive lawsuit to be filed in the summer or fall.

By the way, Deb, for what it is worth, I do not intend to target W&M police in that last grievance. They were not favorably disposed toward me in their visit to my home this past Friday night, they made that clear. And on Oct 21, one of the two officers who stopped me on the way to class asked me, "What is your mental illness?" The other asked me to list the medications I take. Under the ADA, I am supposed to be outraged. But I respect the police at William & Mary. They do not have an easy job, and I consider them underpaid. I do wish one of the two here on Friday night had been a bit more polite. But this situation can only have been incomprehensible to him, and he is under the influence of actors who do not have the interests of the College at heart. The arrests will prove to be yet another catastrophe for the College. I do not blame the WMPD for this tragedy.

To repeat, if my pay continues without interruption--this is not a favor, it is Federal law--I will be willing to discuss my options as soon as next week. In other words, I will repay the College's acknowledgement of its responsibility with a favor. I hope this signal is accepted as the start of a constructive solution.

Since you have been willing to listen to me, Deb, I will reciprocate and read whatever materials you think would be helpful for me to peruse. Some of the options you want me to consider, after all, might be viable in the future. I will not be able to discuss them this week, as I must focus on preparing the possible grievances and court case until I know my pay will not be denied me illegally. Feel free to mail the materials to me at: 20 N Boulevard, Richmond, 23220-4302.

Thank you for hearing me out. I do appreciate your kindness.

Sincerely,

David Dessler

**REACTION FROM GEOFF FEISS (FORMER PROVOST) AND HIS COUSIN  
PETER KRAFT (LAWYER) TO THE "ULTIMATUM EMAIL" ABOVE**

**From:** Geoff Feiss [mailto:pgfeiss@gmail.com]  
**Sent:** Thursday, March 24, 2016 11:50 AM  
**To:** David Dessler <dadess@wm.edu>  
**Cc:** prk@maine.rr.com  
**Subject:** Re: Fw: Follow-Up

David,

I am impressed (as a non-attorney) at the level of detail and care in citing relevant portions of the rules and regulations. I only hope W&M is in a mood to cooperate. I also hope that proceeding without prior advice of counsel does not complicate matters if the College resists, but that is my cautious side responding.

Geoff

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**From:** Peter Kraft [mailto:prk@maine.rr.com]  
**Sent:** Thursday, March 24, 2016 12:02 PM  
**To:** 'Geoff Feiss' <pgfeiss@gmail.com>; David Dessler <dadess@wm.edu>  
**Subject:** RE: Fw: Follow-Up

David,

Ditto Geoff's comments—while the school sifts through your lengthy assertion of multiple gaffes, some of which they can probably address and others which will make them squirm—your discussion is, above all, a well-organized, detailed piece. Evidence of being *compos mentis* and perhaps even someone who can teach.

Nothing like a good threat to force the school to re-evaluate their actions and decisions.

Note: while I have been offering my services free of charge to date—they don't know that. You could have said that any claim being asserted will include your costs of legal counsel to date. The flip side is actually a better message- it was a great tactic to tell them you have acted without counsel thus far and if they make nice you will continue to do so.

Will be curious where things go from here.

PK

## REPLY FROM CHIEF CHEESEBRO

**From:** Cheesebro, Deborah  
**Sent:** 3/23/2016 4:10:31 PM  
**To:** David Dessler  
**Cc:** Poma, John  
**Subject:** RE: Meeting

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David,

We are going to send you the information package about employment options available to you, so you have it to review. If you decide you want a meeting or phone call to clarify any of the options, that is still available to you. You can let me (or John Poma) know and either one of us can facilitate it. That communications facilitation/coordination piece is the only role I can provide to you. I was hoping to help in that role, and perhaps, can still do that if you elect to pursue a meeting at a later time.

As Chief HR Officer, John Poma is the only one that can address your specific employment status concerns. I am forwarding your e-mail below so that he has the information and concerns you provided. You should address any additional e-mails with these kinds of employment status questions and concerns directly and solely to him.

Respectfully,

Deb

Deb Cheesebro, PhD

The College of William & Mary

*To laugh often and love much; To win the respect of intelligent people and the affection of children; To find the best in others; To leave the world a bit better; To know even one life has breathed easier because you have lived. This is to have succeeded. Attributed to Emerson*