



Miami University AAUP Advocacy Chapter Position on the University's Proposed "Reporting Arrests" Policy

According to an oppressive new Miami policy, employees will now be required to report to University Counsel, within three days, any police reports, arrests, charges and indictments for a range of criminal behaviors by themselves or other employees. Miami Senate approved this policy without being given time to consider its many implications. The policy is currently on hold. It has been appealed by a group of concerned faculty and awaits discussion by Faculty Assembly at its first meeting this fall.

The declared goal of the new policy is laudable: to ensure the safety and security of the University community. In fact, however, the policy would create significant risks for employees while doing very little to improve campus safety. This expansive and intrusive policy privileges the desire of the University administration to be informed over everything else, including the privacy and job security interests of employees.

The policy's defects are explained fully in the following pages. In brief, the policy

- creates undue risk to employees by providing the University with a ready means of disciplining or terminating anyone who—*regardless of proven guilt*—attracts the attention of law enforcement authorities.
- allows a single office (General Counsel) to evaluate cases and make recommendations potentially destructive to faculty and staff careers—evaluations based not on established, objective facts about employee conduct, but on subjective and potentially discriminatory judgments made before relevant facts can be established.
- places undue pressure on victims, friends, and family members who are themselves Miami employees to become informants.
- is unnecessary. Does not respond to any specific legal requirement placed upon the University. Appears to be driven mostly by a desire to avoid adverse publicity. Numerous reporting expectations already exist under University conduct policies; these are more than sufficient to enable the University to carry out its legitimate protective responsibilities.

The policy's risks outweigh its dubious potential benefits. Given its many objectionable features and potential negative consequences, this proposed policy should be rejected by the Faculty Assembly and University Senate.

What is being required?

Under this proposed policy, “Employees are required to report any formal police report, arrest, charge or indictment for alleged criminal conduct ... within 3 working days of the police report, their arrest, charge or indictment.” *Regardless of the circumstances and how blameless employees might be, they are required effectively to invite the University to take disciplinary action against their colleagues or themselves. It is an invitation that the University is unlikely to decline.*

“Any” can be read to include police reports, charges, and indictments that occurred at any time in the past. Is there an obligation, if this policy goes into effect, to report past incidents of these kinds?

The policy, although labeled a “reporting arrests” policy, goes considerably farther. The reference to “formal police report” is especially problematic. What constitutes a “formal” rather than an “informal” report? Does “formal” simply mean put into writing? Does a complaint from some individual made to a police department and recorded, by itself, constitute a “police report?” If so, the policy’s reporting requirements and possible disciplinary actions could come into play simply on the basis of a single, unfounded complaint made to the police. *Any one of us could be the subject of such a complaint. It is not only – or even primarily - “bad people” doing bad things that stand to be adversely affected by this policy.*

Being the subject of a police report or getting arrested does not automatically render an employee a threat to the safety and security of others in the University community. Police officers initiate contacts with “suspects” under a variety of circumstances. Sometimes these contacts arise out of observations made by officers themselves, which can be as circumstantial as an individual’s proximity to some incident or behaviors (e.g., walking fast, looking “out of place”) that strike officers as suspicious. Other times, police may be responding to citizen complaints or anonymous “tips.” The vast majority of such encounters do not result in arrests. When arrests occur – that is, individuals are taken into custody by the police with the intent of charging them with crimes – the individuals are frequently released without any charges being brought. Prosecutors may subsequently decide to drop cases or to substantially reduce the severity of charges. In the comparatively few cases that go to trial, the government might not be able to prove guilt beyond a reasonable doubt. Any involvement with law enforcement agents is potentially a serious matter. But there is a world of difference between coming to the attention of police officers and being convicted of, or pleading guilty to, a crime.

Clearly, police, prosecutors, and other actors in the criminal justice system exercise considerable discretion in enforcing the law. This is particularly true in the early stages of the enforcement process that are the focus of the proposed reporting policy. What matters get looked into, which records get kept, whether legal actions of any kind are taken, and how alleged offenses are labelled are all determined by these legal actors and reflect their various motives as much as the conduct of individuals suspected of wrongdoing. All of this discretion can lend itself to potential bias. The criminal justice system does not operate in a color-blind fashion. Persons of color, especially African-American males, are far more likely than whites to be stopped by police,

arrested, charged, held in pre-trial detention, convicted, and incarcerated.¹ *Thus, this policy's reporting requirements and fast-track to disciplinary action come into play based not on a set of established, objective facts about employee conduct, but on a series of subjective, potentially discriminatory, judgments made long before the relevant facts are established.*

The obligation to report under this policy is ostensibly limited to certain serious, alleged offenses. However, the list of alleged offenses is lengthy and includes thirteen categories of offenses of violence recognized under Ohio law, plus an indeterminate number of “equivalent offenses” proscribed under the laws of other states or federal law; “felony drug, fraud or theft offenses;” “conspiracy or attempt to commit or complicity in committing” any of the foregoing offenses; and “any criminal offense” that would be grounds for revocation of a certificate or license required by one’s position. The alleged offenses triggering mandatory reporting are as amorphous as they are wide-ranging. In theory, the inability of most employees to grasp the finer meanings of terms like “assault” and “menacing” should not matter because it is the actions of law enforcement agents - who presumably know these things - that must be reported. But since the reporting requirement comes into play long before an individual is actually charged with any particular offense, it is not clear how an employee is supposed to know whether a report

¹ A succinct summary of some of the voluminous literature on this issue can be found in: The Sentencing Project. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*. April 19, 2018. <https://www.sentencingproject.org/>). The U.S. Equal Employment Opportunity Commission (EEOC) has cautioned employers about potential discrimination charges arising from their reliance on arrest and conviction records in making employment decisions (EEOC. *Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*. Enforcement Guidance, No. 915.002 [April 25, 2012]). Disciplining employees based on arrests is especially problematic. According to the EEOC, “an arrest record standing alone may not be used to deny an employment opportunity.” However, “an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes” (EEOC 2012, V. B. 2.). Convictions provide stronger evidence of unfitness than arrests, but employers must still be careful to treat convictions in the same manner regardless of an employee’s race (to avoid disparate treatment) and to carefully consider the nature and gravity of the offense, the time that has elapsed since the offense occurred, and the relation of the offense to the type of job held or sought (to avoid disparate impact) (EEOC 2012, IV.; V. B. 6.). While there are circumstances under which employers can lawfully exclude all employees who have been convicted of specified types of offenses, the EEOC recommends that employers undertake a more exacting “individualized assessment” of facts surrounding an employee’s conviction and his or her post-conviction behaviors (EEOC 2012, V. B. 9.). Our purpose in raising these issues here is not to attempt to litigate whether the proposed policy is susceptible to legal challenge. Below, we express considerable doubts about whether the University will seriously investigate the circumstances of these incidents and employees’ actual conduct in relation to their jobs, as opposed to the mere fact that police reports, arrests, or charges involving serious allegations have occurred. Regardless, it is important when evaluating this proposed policy to keep in mind that it is predicated on the workings of a less than even-handed law enforcement apparatus and potentially adds to the employment disadvantages of persons of color.

or arrest involves one of the designated offenses. *In practice, employees faced with this uncertainty would have to either risk being subsequently found not in compliance with the reporting requirement or turn themselves in to the General Counsel's office for any alleged offense, knowing that they are commencing a process that is likely to harm their careers.*

To whom do these requirements apply?

Does this policy apply to prospective employees? Will the University be questioning job candidates or otherwise delving into these matters before making job offers?

Certainly, the proposed policy applies to current employees who are themselves the subjects of police reports, get arrested, charged, or indicted, related to one of the enumerated offenses. But the policy goes much further in providing that other employees are “required to report when they have knowledge of a formal police report, arrest, charge or indictment of a faculty or staff member for alleged criminal conduct.” Thus, *all Miami University employees would be required to become informants whenever they “have knowledge of” other employees’ legal entanglements. This compelled speech is more than a little bit troubling from a civil liberties perspective.*

When it comes to determining who has the relevant “knowledge,” the proposed policy states that this includes witnesses, victims, and individuals confided in by the employee. Such individuals could well be the Miami-employed neighbors, close friends, spouses, parents, or sons and daughters of the reported-on employees. *Family members in particular would be placed in the untenable position of jeopardizing the career of another family member – and on whose income they might also rely – or remaining silent and thereby placing their own University employment in jeopardy.* Indeed, a family member, such as a spouse who is the victim of a violent act, might elect to not involve law enforcement authorities at all, in light of where that would lead under this policy. *And victims, who might also be dealing with trauma, must sort these things out and make the requisite report within a brisk three working days.*

What can happen to employees under this policy?

Employees caught up in the machinery of this policy are unlikely to emerge unscathed. This is true whether or not these employees choose to report themselves. For the employee who is the subject of a “formal” police report, arrested, charged, or indicted for one of the enumerated offenses, and who reports the situation to the General Counsel’s Office, the policy calls for an initial “evaluation” by the General Counsel. The policy proclaims that “[n]o presumption of guilt will be made solely on the basis of a police report, arrest, charge or indictment for alleged criminal conduct,” but we fear that in practice, this is precisely what would happen. *Once reported to the University, the mere occurrence of one of these events would lead inexorably to a suspension and initiation of a disciplinary process that might well result in termination of employment.*

The University's pledge to evaluate "all known factors" sounds promising at first blush, but ultimately rings hollow. The University has neither the desire nor the capability to conduct an independent investigation of the facts of a case to get at what an employee has actually done or not done, especially if it involves off-the-job conduct. Nor is the University likely to wait until the facts are established through the slow-moving legal system. The "known factor" that they will rely on first and foremost is the bare existence of a police report, arrest, charge, or indictment. From the University's reputation-focused perspective, if the alleged conduct sounds bad, it is bad.² Numerous other factors are cited in the policy, but these amount to little else because they are likely to be treated as constants rather than variables. For example, the General Counsel is supposed to also consider the "nature and severity of the act" and "whether the employee poses an unreasonable risk to the safety of employees, students or visitors." The listed offenses are all, by definition, "serious." Do we really think that the General Counsel would make a different recommendation if the case involved an allegation of voluntary manslaughter versus felonious assault or a felony drug offense? Several other, ostensibly separate factors are listed, but these all reduce to the same question of whether the offense is job related.³ In general,

² While statements about how the University will enforce this proposed policy are necessarily somewhat speculative, these suspicions are grounded in other University policies and actions. For example, Miami's "Disruptive Behavior and the 1219 Procedure" policy deals with an Ohio law (H.B. 1219, as amended and codified at O.R.C. Ann. 3345.22, 3345.23) mandating procedures to follow in cases of arrests or convictions of college students or employees for certain violent offenses committed on University property or affecting University persons or property. This law contains language deferential to the customary disciplinary practices of colleges (O.R.C. Ann. 3345.23 (D) [2019]). The University clearly serves notice in its "Disruptive Behavior and the 1219 Procedure" policy that it does not intend to be constrained by the law's provisions: "The University has the right, however, to pursue disciplinary action in accordance with the policies, procedures, or rules of Miami University, up to and including dismissal, against any faculty or administrative staff member or other employee at the same time that a 1219 Procedure is engaged and/or at the same time as criminal proceedings, *even if the criminal charges involving the same incident are not complete, have been dismissed or were reduced* (italics added for emphasis). The University has successfully litigated this point. In *Franklin v. Miami University*, 2008-Ohio-2446 (Ohio Ct. Claims, May 7, 2008), the University terminated a Miami employee and refused to reinstate him despite the subsequent dismissal of criminal charges (allegedly, he had menaced, assaulted, and threatened other employees). The termination was upheld even though the University had only commenced its investigation - which purportedly found him guilty of a number of other rules violations in addition to the incidents that led to criminal charges - after his arrest by campus police. In the realms of both employee and student disciplinary actions, the University has a track record of plowing ahead and presuming guilt based on the existence of police reports, arrests, or charges. We should not expect anything different in the specific context of this proposed policy.

³ These factors are "whether or not the employee's action was work related," "whether the alleged conduct would be inconsistent with the duties of the employee's position or the employee's access to University resources or property," and whether there are "any resulting circumstances that adversely affect the employee's attendance or ability to effectively perform the duties of the employee's position."

this is a very pertinent issue. However, it seems unlikely - especially in a policy prefaced by the statement that “Miami University faculty and staff occupy a unique position of trust within the University Community” - that only some of the listed crimes, but not others, would be deemed to render an employee unfit for his or her particular job.

Thus, an empty “evaluation process” will almost certainly lead to a recommendation – if only due to the General Counsel’s acting “out of an abundance of caution” – to place the employee on suspension and commence disciplinary procedures. A lengthy suspension under these circumstances would at minimum side-track a faculty member’s career, and very possibly, end it. On-going research and mentoring relationships would be disrupted. Reputations would be tarnished, perhaps irrevocably. Tenure candidates’ prospects would be rendered dim to non-existent. Faculty in non-tenure-line positions would most likely just not be reappointed. The University pledges, as it must,⁴ that “any suspension or ensuing disciplinary action must be taken in accordance with University policy.” There are different disciplinary procedures and standards for the various categories of employees at Miami, but regardless of the particular procedural route taken, the end result is likely to be discipline or termination.⁵ And, if by chance, an

⁴ In *Chan v. Miami University*, 73 Ohio St. 3d 52, 60 (1995), the University was rebuked by the Ohio Supreme Court for ignoring its own disciplinary procedures and precipitously terminating a tenured faculty member for violation of its harassment policy: “Because the university terminated Chan's contract without complying with its express procedure for termination of tenured faculty, the university breached its contract with Chan and denied him due process of law.”

⁵ Under Miami University policy, tenure-line probationary faculty and faculty in non-tenurable positions and non-faculty employees can be dismissed without cause, although advance notice of intent to not reappoint is generally required. Absent the requisite prior notice, untenured faculty can still be terminated at any time “for cause,” as is also true of tenured faculty. In the context of the proposed policy, the University might argue that it has cause to terminate because a report by itself constitutes sufficient evidence of “commission of an act involving moral turpitude which is punishable by a criminal statute of the state of Ohio.” It is also not a large stretch to imagine that the University might scour the records of reported-on faculty in search of additional grounds for termination. In cases where a timely report is not made, the University could be expected to argue that it has cause to terminate based on “intentional or repeated violations of expressly stated University regulations or University policy” (i.e., the reporting requirement). For employees in classified staff positions, the University could argue that it has “just and proper cause” to discipline based on “violation of any policy or work rule of the employee’s appointing authority.” For unclassified administrative staff, it would be enough for the University to show any “violation of University rules, regulations and/or policies.” The various and sundry disciplinary procedures that exist at Miami University differ in their limitations periods for filing appeals, the number of levels of review available, the actors involved, the role (if any) of peers (e.g., Faculty Rights and Responsibilities Committee), and in other meaningful respects. *But for the most part, they share the fundamental limitation that they entail administrators overseeing the decisions of other administrators regarding application of the University’s own policies. The final decision makers are the Provost, President, and in rare cases, Board of Trustees.* Under state civil service laws, classified staff do have an option of making a final appeal to the State Personnel Board of Review. Fraternal Order of Police and AFSCME bargaining unit members

employee emerges from this process with his or her employment intact, the proposed policy makes no provision for restoring the standing of that employee.

However, it is in the case of the employee who fails to make the required report that this proposed policy has its greatest impact. *This policy provides the University with a new, easily invoked, justification for disciplining and terminating employees. This basis for disciplinary action does not require the University to even pretend to delve into the messy facts surrounding whether an employee actually engaged in criminal or other unacceptable conduct. Instead, the issue becomes the employee's failure to report.* Regardless of whether the failure to report was a knowing act or a product of the policy's own ambiguities, failure to report offers administrators a quick and "clean" avenue for ridding themselves of employees suspected of wrongdoing (or who just make the University "look bad"). It will be available anytime a report is made by another employee and not also by the employee in question or when the University learns through other means (e.g., media inquiries) that such an incident has occurred.

The policy's language on failure to report is mandatory in tone: *"Any failure to timely report an arrest, charge or indictment as required by the Policy will result in disciplinary action, up to and including termination."* (Italics added for emphasis. It is unclear whether the exclusion of "formal police reports" from this provision of the proposed policy is inadvertent or intended.) *Some form of discipline would apparently be automatic in cases of non-reporting and the University regards non-reporting, by itself, to be sufficient grounds for termination. And, again, these harsh consequences for non-reporting apply to all employees deemed to have had the relevant knowledge and not just those employees about whom the required reports would be made.*

Why is this policy not needed?

The foregoing shows how the proposed policy stands to adversely affect employees and leaves important details unspecified. But is this policy – with perhaps some modification – nonetheless needed? We believe that the answer to this question is "no."

This policy is couched in terms of the University's commitment "to maintaining a safe and secure living, learning and working environment for its faculty, staff and students." These are very important objectives and ones shared by this AAUP Chapter. We all have a responsibility to look out *for* one another and to get involved if we believe that others are engaging in harmful or unethical acts.

would have the greatest protection in the situations with which the proposed policy deals. Under the labor arbitration provisions of their contracts, employees subjected to discipline have recourse to a hearing before a neutral arbitrator in which the University would bear the burden of proving that it had just cause to discipline or discharge. If the arbitrator decides that the University has not met its burden, the arbitrator would be empowered to reinstate and otherwise make whole the employee.

But the focus of these efforts must, in fact, be the “living, learning and working environment” of employees and students – that is, the *actual, on-the-job performance and conduct* of faculty, staff, and (we might add, even though the policy itself does not) administrators. The University already has clear authority to regulate employees’ on-the-job conduct and ample opportunity to monitor employee compliance with its policies. Numerous University policies regulate employee conduct and call on employees to report violations, including policies prohibiting harassment; Title IX violations; drug use, possession, and sale in the workplace; and workplace violence.⁶ Existing University policies also require self-disclosure of employees’ own *convictions* for criminal offenses⁷ and provide that “employees and students are expected to report good faith concerns about illegal, unethical or otherwise inappropriate behavior in violation of Miami University’s policies.”⁸

In the face of so many conduct policies with attendant reporting expectations placed on employees, one might be tempted to conclude that there is nothing new here. But while the details of the aforementioned policies differ somewhat, the proposed policy goes much further than existing policies in placing a rigid, time-limited reporting requirement (many of these other policies refer to an “expectation” rather than a “requirement” that employees will report certain conduct and do not specify a time frame for doing so) on all employees (not just the individuals in question) and threatening that disciplinary sanctions will be forthcoming for non-reporters (none of these other policies expressly threaten discipline for non-reporting). Furthermore, while most of these other policies primarily concern conduct in the workplace, the proposed policy appears to be aimed at events occurring outside of the workplace.⁹ Indeed, the focus of the proposed policy is not even observations of the employee’s own conduct, but rather the actions of law enforcement agents that might or might not reflect the employee’s own behaviors. Also

⁶ Miami University Policy Library. Respectively, these policies are “Prohibiting Harassment and Discrimination,” “Title IX Protocol/Sexual Misconduct Policy and Procedures for Employees at Miami University,” “Drug-Free Workplace,” and “Workplace Violence.”

⁷ Miami University Policy Library. “Self-Disclosure of Criminal Convictions.”

⁸ Miami University Policy Library. “Reporting and Addressing Illegal Activity and Misconduct.”

⁹ We have presumed throughout that this proposed policy is aimed primarily at the University’s desire to learn of incidents that occur away from the University. But, in fact, the policy reaches reports made “whether for conduct that occurred on or off campus” To the extent that the reported incidents involve on-the-job conduct that transpires on campus, there is even less reason to have this policy. First, one would hope that the many layers of supervisors at Miami would be on the look-out for such things as part of their own normal duties. Second, since some of the actions to be reported are those of law enforcement personnel, it is the campus police who would normally be the parties writing the formal reports and making the arrests. At least for specified violent offenses committed on University property or affecting University persons or property, Ohio law requires that “The arresting authority shall immediately notify the president of the college of the arrest of a student, faculty or staff member, or employee of the college or university” (O.R.C. Ann. 3345.22 (B) (2019). If the campus police are not properly informing the administration of their actions, that is a problem to be worked out between the University and its police department. It is not a justification for placing onerous reporting requirements onto everyone else.

distinguishing the proposed policy is its insistence that reports be made to the General Counsel's office rather than anonymously through EthicsPoint or in-person to other parties that the employee might prefer and without any explicit protection from retaliation. We express no view about the appropriateness of existing University conduct and reporting policies here, but this draconian proposed policy goes well beyond existing policies.

Even if one feels that putting up with an obnoxious policy is acceptable if it is the price of ensuring safety and security on campus, there is little reason to believe that the proposed policy would actually make us safer and more secure. We have already pointed out that being the subject of a police report, arrest, or charge does not necessarily mean that person is a danger to the safety and security of others. But even if it *sometimes* points to real threats, individuals who are engaging in serious criminal acts are not going to report on themselves. And when it comes right down to it, we suspect that most Miami-employed family members and close friends of these individuals are not going to report them either, despite the potential consequences. So, the policy is unlikely to enhance the University's ability to more quickly identify truly unfit persons who should be removed from their jobs before they harm someone. However, the policy will make it simpler for the University to rid itself of such persons by going after them for failure to report, rather than any conduct that led to their legal problems. In the process, innocent employees who report their own brushes with the legal system, or fail to do so, may find their careers in jeopardy even if they are innocent of any crime, as will other employees who are deemed to have had knowledge of such incidents and failed to report within the arbitrary and unrealistic three-working day time frame.

This policy is not a response to any specific legal requirement placed upon the University or recent change in its legal environment. Instead, it appears that this policy was devised in reaction to recent incidents, some of which were publicized, of misconduct by employees at Miami and other Ohio public universities. As such, we suspect it has much more to do with getting out in front of potential public relations embarrassments and mitigating damage to the Miami University "brand" than with our safety and security. While the University is entitled to protect its reputational interests, these carry much less weight than the safety and security concerns advanced by the administration. But whatever the mix of motives that account for the emergence of this policy at this point in time, the ends do not justify the use of these means.

Conclusion

This proposed policy is unnecessary and tramples on the privacy and job security interests of employees without materially advancing the safety and security interests of members of the University community. Its many objectionable and ill-defined provisions likely render the proposed policy beyond repair. The fact that such an important and potentially controversial change to policy came before University Senate as a consent calendar "FYI" is an affront to shared governance at this University. A policy of this magnitude and with so many potential negative consequences deserves rigorous examination and debate.

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