

Memo

To: Lisa Grosskreutz, Director, Office of Employment Equity

From: Carolyn Dellatore, Associate Director, Office of Employment Equity

Date: July 31, 2018

Re: Investigation Under the Policy Prohibiting Discrimination and Harassment
Case Number: 2018-44 - University Action/Professor James Livingston

I. *Introduction*

This investigation was conducted pursuant to the Discrimination and Harassment, Workplace Violence, Sexual Misconduct and Retaliation Complaint Process, in response to various complaints brought against James Livingston, Professor of History, School of Arts and Sciences (“SAS”), New Brunswick, for posting allegedly racist content on his social media account. Professor Livingston admitted that he wrote the posts at issue but alleged that they were satirical and not a true expression of racism. He also argued that he has a First Amendment right to make such statements.

II. *Procedural History*

On May 31, 2018 and June 1, 2018, Professor Livingston posted certain statements on his Facebook page. In the coming days, the university received numerous complaints about the purported racist content of the posts, prompting the Office of Employment Equity (“OEE”) to initiate an investigation as a University Action. Ms. Lisa Grosskreutz, Director of OEE, assigned the complaint for investigation on June 5, 2018.

As part of my investigation I interviewed Professor Livingston via Skype on June 18, 2018. During that interview, I informed him of the purpose of the meeting; explained OEE’s role in the investigation; and explained that the interview should be treated as confidential and requested that he not disclose any information about the meeting to anyone without a need to know.

III. *Investigation*

Professor Livingston is Caucasian and lives in Harlem. He has been employed by the university since 1988 and he received tenure in 1990.

a. *The Posts*

On May 31, 2018, Professor Livingston went to Harlem Shake, a “fast casual” restaurant located at 100 W. 124th Street in New York City. He made the following Facebook post concerning his experience:



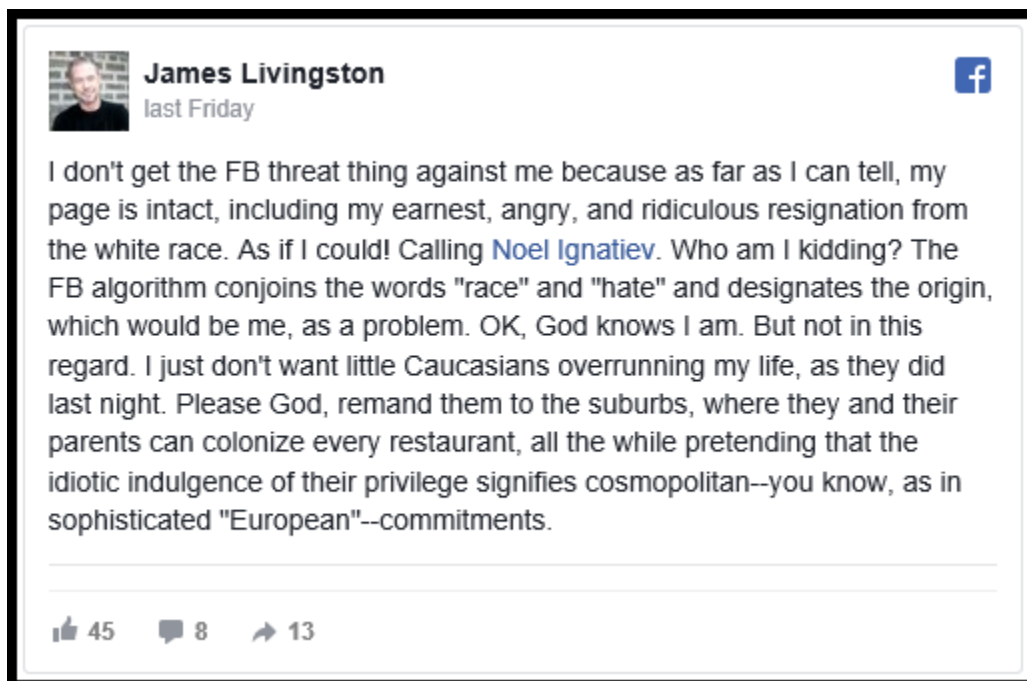
Professor Livingston explained during his OEE interview that he meant the post to be satirical, as it is obvious he cannot “resign” from being white. He stated that he only wished to convey his dismay at the gentrification of his neighborhood.

The following day, Facebook removed his post for violating its Community Standards on hate speech, which it defines as: “direct and serious attacks on any protected category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease.”¹



¹ See <https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054>

In response, Professor Livingston wrote the following on his Facebook page:



While Professor Livingston stated in his above post that an algorithm flagged and removed his content, he conceded during his OEE interview that he did not know with certainty that this was the case. Facebook detects what it defines as hate speech using artificial intelligence and review teams. In a report recently published by Facebook about its content standards enforcement, the company revealed that it removed “2.5 million pieces of hate speech in Q1 2018 — 38% of which was flagged by our technology.”²

b. Public Response

Professor Livingston relayed in a written statement to OEE that:

[a]lmost immediately the white supremacists came out of the cyber-woodwork and began sending vile messages—including a half-dozen death threats—to my email account and to Facebook. To date, I’ve received roughly 200 hate emails, in which my correspondents call me, for example, a “nigger lover,” a “filthy nigger,” a “piece of shit,” a “racist fuckstain,” a “race traitor,” and so forth.

The University also fielded complaints regarding Professor Livingston’s social media statements, many of which were made anonymously through the Rutgers Compliance Hotline. Others reached out directly to university administration to express their concerns. All the complainants generally described Professor Livingston’s statements as “racist” and demanded action from the

² See <https://newsroom.fb.com/news/2018/05/enforcement-numbers/>

university. For example, one individual wrote, “I have 2 kids and I would never send them to a university that employs someone that has such a one-way attitude towards race.” Another complainant emailed: “Racism is evil in all forms even when applied to your own race. His Caucasian students and parents should all be concerned.”

Professor Livingston “understand[s] (and regret[s]) that the Rutgers History Department has also been fielding complaints, and has received at least one death threat.”³

The media reported on the story shortly thereafter. Though Professor Livingston described the coverage as limited to ultra conservative or alt-right media, mainstream entities reported on the incident, including but not limited to:

- Newsweek – “Rutgers Professor 'Resigns' From White Race After Harlem Run-In With 'Caucasian A**Holes’”⁴
- My Central New Jersey – “Rutgers University professor James Livingston accused of racist rant against whites on social media”⁵
- The New York Post – “White professor rips ‘little Caucasian a—holes’ in white privilege rant”⁶
- NJ advanced media – “Rutgers prof says f--- white people, now the university is investigating”⁷
- Fox News - “Professor banned from restaurant for profanity-laced rant against white children, university investigating”⁸
- The Daily Targum – “Rutgers professor posts racist rant on Facebook”⁹

WPIX11 News¹⁰ and NBC New York¹¹ also did television segments. Notably, the NBC piece featured brief interviews with four university students, three of whom, Akansha Iyengar, Joseph Redling-Pace, and RJ Parla, said they were troubled by Professor Livingston’s statements. Ms. Iyengar and Mr. Parla both said they would not want to take a class with him.

On June 6, 2018, in response to the accusations that he is racist, Professor Livingston posted the following on his blog, Politics/Letters:

³ See Professor Livingston’s written statement to OEE, dated June 16, 2018.

⁴ <http://www.newsweek.com/rutgers-white-people-resign-harlem-caucasians-professor-james-livingston-971019>

⁵ <https://www.mycentraljersey.com/story/news/education/college/rutgers/2018/06/06/rutgers-professor-racist-rant-james-livingston/676688002/>

⁶ <https://nypost.com/2018/06/04/white-professor-rips-little-caucasian-a-holes-in-white-privilege-rant/>

⁷ http://www.nj.com/education/2018/06/rutgers_prof_says_f---_white_people_now_the_univer.html

⁸ <http://www.foxnews.com/us/2018/06/07/professor-banned-from-restaurant-for-profanity-laced-rant-against-white-children-university-investigating.html>

⁹ <http://www.dailytargum.com/article/2018/06/rutgers-professor-posts-racist-rant-on-facebook>

¹⁰ <https://www.youtube.com/watch?v=HhaiMXEQz4Y>

¹¹ <https://www.nbcnewyork.com/on-air/as-seen-on/ICE-Protestor-Caught-After-Scaling-Statue-of-Liberty-New-York-487362801.html>

I'd be worried, and maybe even penitent, if I thought that “reverse racism”—that’s what I stand accused of by the alt-right and their comrades among mere conservatives—was in the realm of reality, where we could measure its results.

But there’s no such thing. Racism is the exclusive property of white, mostly European people in this part of the world (the western hemisphere), because such people were able to impose their will on 9 million Africans via a labor system called slavery, *and benefit from the economic and social capital of that system unto this day—regardless of their class standing, then or now.* That is why the case for reparations is so compelling.¹²

He reiterated these points during his OEE interview. Professor Livingston opined that most, if not all, of the complaints have been made by the “alt-right” or neo-Nazis. He observed that he has never had a student or colleague file a complaint about him alleging racism and, to date, none of the complaints concerning his Facebook posts appear to have come from members of the university community. He noted, “white supremacists and neo-Nazi hate groups are targeting professors they perceive as leftists, or as insufficiently deferential to their agenda. To turn my Facebook post into the subject of an HR investigation is, then, to let a public institution be hijacked by the enemies of racial equality and of liberal education generally.” Professor Livingston also asserted that he has a First Amendment right to make such statements on his personal media account.

IV. Analysis

Determining whether Professor Livingston violated the university’s Policy Prohibiting Discrimination and Harassment requires a two-step analysis, beginning with whether his speech is protected by the First Amendment and is therefore outside the purview of university Policy.

Should his speech fall beyond the bounds of protected discourse, the question turns to whether Professor Livingston’s statements did, indeed, rise to the level of harassment and/or discrimination.

I address each question in turn.

¹² See <http://politicsslashletters.live/features/confessions-of-a-race-traitor/>

A. *First Amendment Considerations*

Rutgers is a public university and public employees do not surrender all their First Amendment rights by reason of their employment. Indeed, the university considers academic freedom and First Amendment rights “at the core of what we do” and its policy regarding speech is clear:

All members of our community enjoy the rights of free expression guaranteed by the First Amendment. Faculty members, as private citizens, enjoy the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights. In addition, they also enjoy academic freedom of expression when functioning in their roles as faculty members.¹³

The university does, however, demand that the conduct of a faculty member “be in accordance with standards dictated by law.” Moreover, the First Amendment generally affords a public employer substantial latitude to discipline employees for speech, including speech via social media platforms. Indeed, constitutional protection only applies to statements that satisfy a three-prong test, discussed below.

i. *Public Concern*

To warrant First Amendment protection speech must pertain to matters of “public concern”, which the U.S. Supreme Court has defined as “something that is the subject of legitimate news interest,” or a statement that is of value to the public at the time it is made. *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004). Comments about issues relating to politics, public safety, and public finances would fall under this category.

Here, Professor Livingston asserted that his posts were a social commentary on the gentrification of Harlem. Gentrification is a common and controversial topic in politics and as such, discourse on this issue, however unartfully or offensively phrased, is protected speech.

ii. *Speech Made Outside Employee’s Job Duties*

The second prong of the analysis requires that speech must fall *outside* of the employee’s job duties. In other words, a public employer may dictate what an employee says while performing his/her work. Professor Livingston made the statements at issue on his private social media account and did not suggest that he spoke on behalf of the university. As such, the university does not exercise unilateral control over his words.

¹³ <https://president.rutgers.edu/public-remarks/speeches-and-writings/rutgers-president-free-speech-and-academic-freedom>

iii. *Employee’s Interest in Free Expression Must Outweigh the Government’s Interest in Efficient and Effective Provision of Services*

Though Professor Livingston’s statements arguably satisfy the first two prongs of the analysis, they are not afforded blanket protection. His interest in free expression must also outweigh the government’s interest in the efficient and effective provision of services. In other words, his speech must be weighed against its potential impact on the university’s mission. Notably, a Government employer may take action against an employee for speaking on a matter of public concern if the employer’s mere *prediction* of disruption to its operations is reasonable. *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1994).

Rutgers has a core commitment to diversity, promising “everyone joining us as a student, professor, or member of staff [that] [w]e at Rutgers will accept you for who you are. That promise of inclusiveness is the foundation of our strength as an academic institution. We believe that bringing diverse groups together into an inclusive community empowers individuals and gives rise to fresh, innovative ideas.”¹⁴ Further, the university “embraces the notion that we must be global educators, researchers, students, citizens, and partners—transcending boundaries to meet the challenges of a complex and interdependent world.” In that vein, “[a] core goal at Rutgers is to prepare students to thrive in an increasingly diverse and global society. Rutgers trains students to understand cultures, languages, regions, and economic influences beyond their own—in New Jersey and around the world.”

It is reasonable to predict that the university’s core function of educating a diverse student body may be disrupted by Professor Livingston’s public statements. Indeed, the disruption has already been felt, as the university has received numerous complaints about Professor Livingston’s “racism.” His views have likewise been publicized and criticized by the mainstream media.

Professor Livingston has asserted that no university students or faculty (that we are aware of) have yet complained directly to OEE or university administration – so the response to his posts is nothing more than internet trolls attacking a liberal academic. I first note that the very fact that the complaints are anonymous means we cannot confirm that they were *not* registered by members of the university community. Many of the communications received came through an internal complaint system (*i.e.* the Rutgers Compliance Hotline), which arguably suggests that the individuals expressing those views may very well have some connection with the university. Further, it seems highly improbable that every complaint came from a neo-Nazi or an internet troll and is therefore not legitimate.

In any case, the genesis of the complaints, while relevant to an extent, is only one factor to consider when analyzing Professor Livingston’s speech and its impact on the university’s mission. Many complainants cogently reported concern about the university implicitly sanctioning racial bias against Caucasians. Students interviewed by the local news station said they would be

¹⁴ See <https://odi.rutgers.edu/>

uncomfortable taking a class with him. Such a response to Professor Livingston’s speech indicates that he damaged the university’s stated mission of inclusiveness.

I further note that Professor Livingston’s inflammatory social media activity has generated widespread media attention, with headlines that describe his words as “racist,” a “racist rant,” “profanity laced,” and an example of “white privilege.” These reports have inflicted reputational damage on the university, and the Department of History and SAS in particular, which could realistically impact recruitment and fundraising in the future. It is reasonable, therefore, to predict a disruption to university operations, rendering Professor Livingston’s speech subject to university Policy.

B. Policy Violation

The university’s Policy Prohibiting Discrimination and Harassment (“Policy”), Section 5 (A), defines “discrimination” as:

an intentional or unintentional act which adversely affects employment or educational opportunities on the basis of membership in one or more protected classes. Rutgers provides equal employment opportunity to all its employees and applicants for employment regardless of their race, religion, color, national origin, ancestry, age, sex, sexual orientation, pregnancy, gender identity and expression, disability, genetic information, atypical hereditary cellular or blood trait, marital status, civil union status, domestic partnership status, military service, veteran status, and any other category protected by law.¹⁵

The Policy further defines “harassment” in Section 5 (B) as:

conduct directed toward an individual or group based on membership in one or more protected classes. Such conduct must be sufficiently severe or pervasive to alter an individual’s employment conditions, or a student’s educational opportunities which, in turn, creates an unreasonably intimidating, offensive, or hostile environment for employment, education, or participation in University activities.

Based on the facts uncovered during the investigation, I conclude that Professor Livingston violated the Policy Prohibiting Discrimination and Harassment. My reasoning is set forth below.

Though Professor Livingston posted from his personal social media account, discrimination or harassment need not take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace. Indeed, the Equal Employment Opportunity Commission (“EEOC”) has expressed its view that an employer may rely upon an employee’s

¹⁵ Policy Prohibiting Discrimination and Harassment – 60.1.12 available at <http://uhr.rutgers.edu/sites/default/files/userfiles/policyprohibitingdiscrimin.pdf>.

personal web presence (website, Twitter, Facebook, etc.) during an investigation into allegations of harassment, depending upon the specific manner in which the social media is used. See EEOC Proposed Enforcement Guidance at 36-38. The question, therefore, is whether Professor Livingston's social media activity created an unreasonably intimidating, offensive, or hostile environment for employment, education, or participation in University activities.

Professor Livingston argues that his initial Facebook post is not racist because Caucasians, as the group holding the most "social capital," cannot be discriminated against. In other words, his position is that "reverse racism" does not exist.¹⁶

While Professor Livingston's assertion is frequently espoused in academic circles, applicable federal and state laws do not exclude any race from their protections. Similarly, the university makes no such distinction, but blanketly prohibits discrimination based on any race. As such, from a legal and Policy perspective, "reverse racism," to the extent it is defined as treating someone unfairly because they are white, is indeed possible and prohibited.

Under this rubric, Professor Livingston's Facebook posts could easily be interpreted as racist. This assessment becomes more obvious if one replaces his use of the words "Caucasian" and "white" with descriptions of any minority group. Had he posted the following, one wonders if he would have made the same nuanced arguments about gentrification and satire:

I now officially hate Black people. . . . [T]he place is overrun with little African American assholes who know their parents will approve anything they do. Slide around the floor you little shithead, sing loudly you unlikely moron. Do what you want, nobody here is gonna restrict your right to be Black.

His post the following day, in response to Facebook removing his initial post because it violated the company's hate speech policy, is equally inflammatory. Again, this becomes starkly obvious if one replaces "Caucasian" and "white" with a minority group: e.g. "I just don't want little Muslims overrunning my life, as they did last night. Please God, remand them to the suburbs, where they and their parents can colonize every restaurant. . . ."

Professor Livingston asserts that the university has no basis to find a policy violation until a member of the university community brings a complaint and shows material harm based on his statements. Under this argument, the university must sit by even when it is on notice of discriminatory conduct until an employee affirmatively comes forward to express concern. This framework for a response does not align with proposed EEOC guidance, which states that employers should take proactive and "reasonable care to prevent and correct" harassment. See

¹⁶ The fact that Professor Livingston is a member of the same protected class he maligned is not dispositive. The EEOC and applicable case law have long held that discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

EEOC Proposed Enforcement Guidance at 44. This includes monitoring the workplace to ensure adherence to the employer's policy.

Here, Professor Livingston's statements were clearly insulting and degrading to Caucasians. While he may indeed have merely meant to express his views on gentrification, he exercised astonishingly poor judgment in his choice of words. This lack of awareness was even more blatant in the second post he made *after* Facebook notified him that his first statement violated "Community Standards" for hate speech. He chose to reiterate his thoughts, including his inflammatory racial commentary, writing "I just don't want little Caucasians overrunning my life. . . . Please God, remand them to the suburbs, where they and their parents can colonize every restaurant. . ." He also made this second post after he received comments from other Facebook users accusing him of racism.

Professor Livingston clearly was on notice that his words were offensive, yet instead of clarifying that he meant to comment on gentrification, he chose to make another belligerent barb against whites. Given Professor Livingston's insistence on making disparaging racial comments, a reasonable student may have concerns that he or she would be stigmatized in his classes because of his or her race. As such, Professor Livingston's comments violated University Policy.