

Memo

To: Lisa Grosskreutz, Director, Office of Employment Equity

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

Date: November 14, 2018

Re: Remand - Case Number: 2018-44 - University Action/Professor James Livingston

I. *Procedural History*

On May 31, 2018 and June 1, 2018, Professor James Livingston, Professor of History, School of Arts and Sciences (“SAS”), New Brunswick, posted certain statements on his Facebook page. In the ensuing days, the University received numerous complaints about the purported racist content of the posts. These complaints were either anonymous or were lodged by people who appeared to have no direct affiliation with the University. The Office of Employment Equity (“OEE”) initiated an investigation as a University Action. Ms. Lisa Grosskreutz, Director of OEE, assigned the complaint on June 5, 2018 and this Office issued its report and determination on July 31, 2018, finding that Professor Livingston had violated the University’s Policy Prohibiting Discrimination and Harassment.

Professor Livingston appealed that determination on August 8, 2018. Mr. Harry Agnostak, Associate Vice President for Human Resources, affirmed OEE’s determination on August 13, 2018.

On August 29, 2018, University President Robert Barchi remanded the matter back to OEE for reevaluation.

II. *Factual Summary*

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

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:



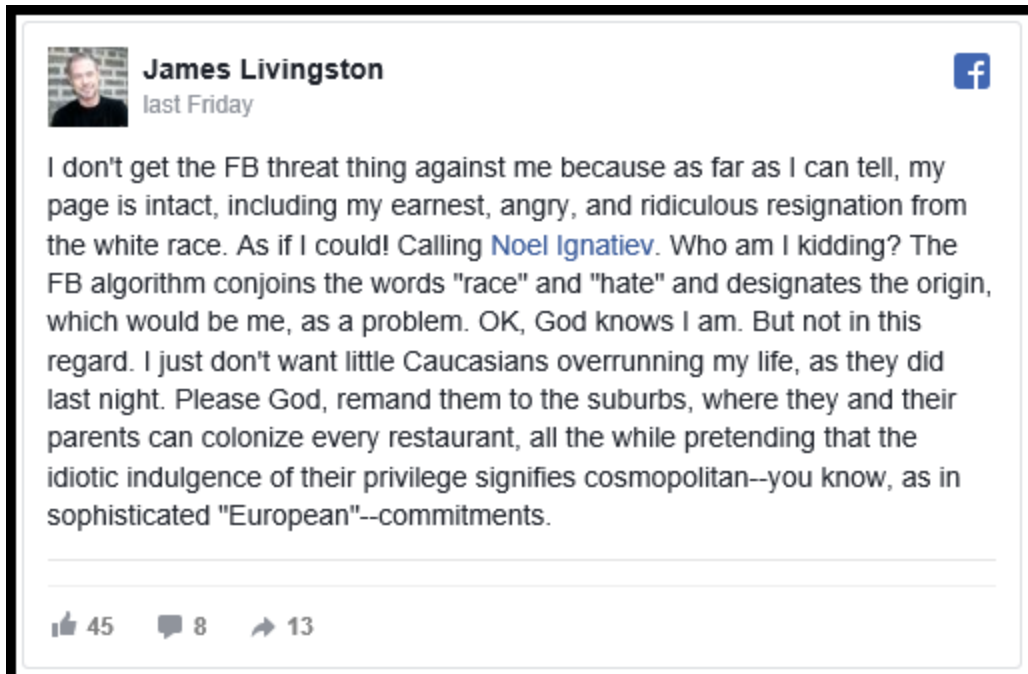
Professor Livingston explained during his OEE interview that he meant the post to be satirical, as it is obvious he cannot “resign” from being white. He stated that he only wished to convey his dismay at the gentrification of his neighborhood.

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



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

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



III. *Analysis on Remand*

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.²

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. (emphasis added)

² Policy Prohibiting Discrimination and Harassment – 60.1.12 available at <http://uhr.rutgers.edu/sites/default/files/userfiles/policyprohibitingdiscrimin.pdf>.

Harassment can include, among other things, racial slurs or offensive or derogatory remarks about a person's race or color. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal and a violation of University Policy when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision.

There is no bright-line test to determine whether behavior is sufficiently hostile or abusive to violate federal and state anti-discrimination laws or University Policy. However, courts have set forth numerous factors to aid in analyzing whether conduct rises to the level of harassment. No one factor is required and there is no precise formula to use when considering these factors. The analysis is fact-specific.

The initial investigation examined Professor Livingston's behavior utilizing several considerations, but this renewed evaluation will provide more in-depth analysis, guided by harassment jurisprudence. We also now have the benefit of considering the actual impact of Professor Livingston's comments on the University community, as several months have passed since he has made his statements and OEE concluded its investigation.

i. The nature of the alleged harasser's remarks and gestures

The first prong of the harassment analysis is whether the nature of the remarks pertained to a protected class. Here, it is clear that Professor Livingston's online posts were racial in nature, which directly implicates a characteristic protected by law. Indeed, he used the terms "race" and "Caucasian" repeatedly throughout his statements.

As noted in the July 31, 2018 report, Professor Livingston argued that his initial Facebook post was 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. The University makes no such distinction, but prohibits discrimination based on any race, in a blanket manner. As such, from a legal and Policy perspective, "reverse racism," to the extent it is defined as offensive or intimidating conduct directed at another because he or she is white, is indeed possible and prohibited.

ii. The frequency of the offensive encounters

Here Professor Livingston made two offensive online posts in the span of twenty-four hours. He made his second posting after he received several online complaints from people who read his initial statement and after Facebook removed his first comment for violating its "hate speech" parameters.

Given that Professor Livingston made only two isolated comments, I find that his behavior was not so pervasive as to create a hostile environment. However, while frequency is a factor to be considered, it is to be considered in context, including the severity of the incidents.

- iii. *Whether the alleged harasser's action or comments were threatening, humiliating, intimidating, or otherwise went beyond rudeness or casual joking*

While Professor Livingston alleged that he was attempting to make a humorous commentary on gentrification, his language was offensive and racially-charged. I maintain that his comments went beyond the bounds of rudeness or casual joking.

- iv. *Whether the harassment was directed at more than one individual*

Professor Livingston's statements were arguably directed at "white people" generally. However, he did not reference any individual specifically or comment on University students or employees. Indeed, his comments were directed at small children and their parents, who fall outside the scope of his professional interactions as a University professor. As such, under this prong, the blanket nature of Professor Livingston's comments cuts against a finding of harassment.

- v. *Whether the encounter had an effect on the target's psychological well-being and whether the target of the comments was reasonably made to feel uncomfortable, fearful or inadequate*

Again, the key issue under this factor is identifying the "target" of Professor Livingston's statements. He made a generalized statement about children and their parents at a neighborhood restaurant and did not verbally attack a member of the University community.

- vi. *Whether the alleged harasser was a peer or one who had control over the target of the comments*

Here, Professor Livingston is a tenured faculty member, and therefore has direct responsibility for supervising students. This greatly magnifies the gravity of his conduct, as faculty members have a unique role in shaping the classroom environment, a role which brings with it a heightened obligation to prevent and avoid harassment.

- vii. *Whether others joined in perpetrating harassment*

Professor Livingston admitted that his posts prompted online vitriol, though it appears most of this was in opposition to his language rather than in support of it. There is no evidence that other University employees "jumped on the bandwagon" and began railing against Caucasians.

- viii. *Whether the offensive encounters interfered with the target's performance*

This consideration is perhaps most relevant in determining if Professor Livingston's comments can be defined as harassment. No student or university employee has come forward to assert that Professor Livingston has in some way penalized them for their race. This is the case even after Professor Livingston has been teaching for several months after making his Facebook posts. There is no evidence that he administered grades and conducted himself in class in a manner that reveals any racial bias on his part.

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Weighing all the factors set forth above, I find that Professor Livingston did not violate the University's Policy Prohibiting Discrimination and Harassment.

Given the absence of a Policy violation, the issue of Professor Livingston's First Amendment protections to make such statements need not be addressed.