

August 10, 2018

James Livingston
Professor of History
School of Arts and Sciences, New Brunswick

Via Email

Re: Appeal of the July 31, 2018, Letter of Determination – Complaint Pursuant to the University Policy Prohibiting Discrimination and Harassment – Case Number 2018-44

Dear Professor Livingston,

I am writing in response to your appeal of the determination from Lisa Grosskreutz, Director of the Office of Employment Equity (OEE), that there was a violation of the University's Policy Prohibiting Discrimination and Harassment in the matter referenced above.

Pursuant to the Rutgers' Discrimination, Harassment, Workplace Violence, Sexual Misconduct and Retaliation Complaint Process, the bases for an appeal of the determination of the Director of OEE are as follows:

1. **Unsupported Conclusion:** The decision is not supported by the facts of the case;
2. **Procedural Error:** The investigation was conducted unfairly and not in conformity with prescribed procedures and said error must be determined to have substantially impacted the fairness of the investigative process;
3. **New Information:** There is new information available that was not available when the investigation was pending that is sufficient to alter the original decision.

In your appeal, you write that the determination should be overturned on grounds that there were procedural errors and that there were substantive errors.

In support of your appeal, you argue the following:

1. The report emanating from the investigation "introduced" new information that you were not given an opportunity to respond to;
2. Statements you made in "the context of the Skype interview [were] falsely repurposed as a response to information [you] were never given access to";
3. "Guesswork and speculation [were] substituted for facts";
4. "Public and media commentary on [your] remarks, regardless of the source, motives, or intellectual caliber, [were] uncritically regarded as dispositive";

5. During your interview with the investigator you asked about the source of the complaints regarding your Facebook posts and were advised that the complaints were external and anonymous which, therefore, "would preclude a claim of harassment according to Rutgers policy";
6. The representation by the investigator "misled" you because the investigator "surmised" in her report that the complaints could have been internal because no confirmation could be made that the complaints were not from members of the Rutgers community;
7. The conclusion reached by the investigator constituted speculation and speculation is not fact;
8. Had you been provided with the opportunity to respond to the statement of the investigator, you would have "pointed out" that the investigator was engaging in conjecture and that her conclusion that some of the complaints filed through the Rutgers Compliance Hotline were arguably made by individuals with a connection to the university was a specious conclusion;
9. You never asserted that "no university students or faculty (that we are aware of) have yet complained to OEE or university administration- so the response to [your] posts is nothing more than internet trolls attacking a liberal academic";
10. The investigator was wrong to assume that an anonymous complainant who threatened to "withhold his offspring's application to Rutgers, meaning that [you] were responsible for 'disrupting' Rutgers mission" was a "real parent with real children";
11. Despite the investigator finding it "highly improbable that every complaint came from a neo-Nazi troll", 230 of the communications that came to you via your Rutgers faculty page were from "members of the alt-right" who stated racial epithets and profane monikers towards you and sometimes threatened you with bodily harm. None of the "so called complainant[s] claimed to be part of the Rutgers community;
12. The evidence you presented that the complaints were from white supremacists was ignored;
13. The investigator bought into the sensationalism of the media by "taking at face value the NBC report that four students were troubled by [your] remarks and the investigator wrongfully took critical media coverage of your Facebook posts as evidence of a substantive occurrence;
14. You were not given the chance to respond to the media coverage the investigator relied upon;

15. You were not given the opportunity to provide evidence to the contrary of what the four students who were quoted in the media stories stated as their reaction to your Facebook posting;
16. The interpretation of your remarks is “predicated on a highly literal reading of the words [you] have written whereas [your] remarks were clearly intended to be hyperbolic and satirical”;
17. The remarks were made on social media, “a venue known for hyperbole, satire, and rants”;
18. Once it is acknowledged that irony, satire and hyperbole exist, the case against you “falls apart” because “literal readings are demonstrably false readings [of Facebook posts] and anyone choosing to take them as statements of actual fact or opinion would thereby prove his or her failure to understand how people live and speak in real life”;
19. Anyone who says that your satirical remarks suggest that “Rutgers implicitly sanction[s] racial bias against Caucasians” has an agenda and “is willfully misreading your remarks to suit that agenda”;
20. The United States Supreme Court has provided broad protection for opinions expressed in caustic or satiric language;
21. There is also a social context and social conversation of the moment in which your remarks were made which make the standard applied by OEE to your conduct to have the effect of causing current television shows, opinion articles and phrases to be found to have created a hostile environment;
22. “For whites to say that they are victims of reverse racism is, then, to obliterate 500 years of history”;
23. There exists a “considerable body of respected scholarship on the issue of ‘whiteness’”;
24. If “[your] freedom of speech is to be weighed against the university’s mission, then [you] assert that the university’s mission of diversity must include making a home for diverse viewpoints and modes of expression”;

In her investigative report the investigator conducted an analysis to determine whether your Facebook posts constituted speech protected by the First Amendment of the Constitution and the posts are therefore outside the purview of university policy and, if they did not, whether said posts rose to the level of discrimination or harassment in violation of the university’s policy prohibiting the same.

The investigator conducted the appropriate three prong analysis of the Facebook posts to determine whether the posts, or speech, pertained to a matter of public concern, whether

the speech occurred outside of your job duties as university professor and whether your interest in free speech outweighed the university's interest in "efficient and effective provision of services".

The investigator found that while the first two prongs of the test were satisfied, the university's interest in providing effective and efficient services outweighed your interest in free expression. The investigator determined that the university's core function of educating a diverse student body may be disrupted by your Facebook posts. She further found that such a disruption had moved beyond prediction to actuality, as evidenced by complaints about your posts and student concerns over taking your classes. In addition she found that reputational damage to the university and your department occurred, as demonstrated by the media attention which resulted.

Further, the investigator found that the university's Policy Prohibiting Discrimination and Harassment was violated. The investigator held that because university policy blanketly prohibits discrimination based on race, without a preclusion of any specific race from protection under said policy, your negative and profane posts about Caucasians could be interpreted as impermissibly racist and therefore a violation of said policy.

Additionally, the investigator discounted your assertion that until such time that a member of the university community brought forth a complaint about your Facebook posts and demonstrated material harm as a result of said posts, there could be no finding of violation of policy. The investigator held that the university was obligated to take proactive and reasonable care to prevent and correct harassment when it knew that such conduct had occurred, and this is what occurred in the instant matter.

In your appeal, you argue that you were not provided with the opportunity to respond to, or provide evidence to the contrary of, what the investigator relied upon in her findings. The investigative report makes mention of a written statement that you provided and a Skype interview. You do not indicate how in these two opportunities you were not able to provide exculpatory evidence sufficient to overturn the investigator's findings. You indicate that you were "misled" about the university "hotline" complaints which were made because you were told that they were external and anonymous and then later in her report the investigator held that it is not inconceivable that some of the complaints came from members of the university community. Even if one assumes *arguendo* that you were misled, you do not demonstrate what evidence you would have produced to refute the investigator's determinations. Additionally, you do not provide evidence, other than to offer argument, of how the investigator erred, or how the investigator's conclusions could be entirely wrong. Further, the proper time for argument about conclusions that are drawn by an investigator is during the appellate stage of the process, not during the investigative stage. Despite your argument to the contrary, the conclusions of the investigator are properly drawn.

Further, you argue that the investigator erred by failing to find that every complaint about your Facebook posts was posited by a neo-Nazi, internet troll, white supremacist or from the alt-right. Despite this assertion, you provide no evidence in support of your position other than to draw the conclusion that because of the profane and racist terminology used in some of the communications sent to you after your Facebook posts, all persons who complained about your posts must be neo-Nazi's, internet trolls, white supremacists or members of the alt-right. Without empirical evidence to prove your assertion you are engaging in conjecture. This is the same conduct that you have accused the investigator of engaging in albeit without any evidence such as what she relied upon in reaching her conclusions.

Additionally, you argue that the investigator erred by giving weight to any of the reporting made by the media and further by not providing you with an opportunity to respond to said coverage. The investigator found significant that the media reported on the posts that you made and that students interviewed by the media expressed concern over said posts. These are incontrovertible facts. The investigator did not rely upon "findings" by the media in drawing her conclusions. In your appeal, you have not disputed the findings of the investigator that you made the Facebook posts, that said posts contained your authored comments or that students interviewed by the media expressed their concerns over taking your classes as a result of said comments. You further provide no evidence to dispute what the media reported or what evidence you would have provided while the investigation was ongoing to refute the facts presented by the media. Without such proof or evidence to the contrary, the findings of the investigator were proper.

Further, your argument that the investigator erred by determining that your posts were not meant to be literally construed is misguided. Despite your assertions that social media posts are generally satirical, hyperbolic and ranting and that your friends to whom you were writing knew that your remarks were intended to be so, it is the words contained in your posts which are evaluated and whether these words in and of themselves are a violation of policy. Your alleged intent, or alleged attempt, at satire, hyperbole or irony is not dispositive of the issue of whether a policy violation occurred as a result of the words you used in your Facebook posts.

The investigator found that the terminology you used in your posts as well as the invective content of the posts constituted a violation of the university Policy Prohibiting Discrimination and Harassment. The investigator noted that even if you meant your initial post to be satirical, hyperbolic or ironic, the second post you made, which came after Facebook notified you that it had removed your initial post for violating its standards on hate speech, and after you had received comments from Facebook users taking issue with your initial post, contains no explanatory verbiage indicating that you meant your first post to be satirical or ironic but instead once again contained insulting comments towards Caucasians.

The second post not only fails to support your argument concerning your intent in making the first post but in actuality refutes it.

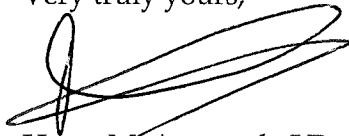
Additionally, your argument that because your comments were made on social media, which in your own terms is a venue known for "hyperbole, satire and rants", they should be considered as such and not intentionally racist weakens, if not renders inutile, your argument that all the comments and complaints that have been made to you following your posts were made by neo-Nazis and the alt-right. If social media is indeed a place where the comments that are made are satirical, hyperbolic or understood as ranting, how can you conclude that some, if not all, of the complaints you have received are not simply hyperbole or satire?

Lastly, it is imperative to recognize that federal and state anti-discrimination statutes, decisional law concerning discrimination and the policies of the university prohibiting discrimination are "color blind" in their content and in their application. Protection from discrimination on the basis of race exists for all individuals, regardless of their race. There is no partial application of the law or the policy and there is no exclusion from protection under the law or the policy for individuals of any particular race. Your objections and claims to the contrary, protection from discrimination applies to Caucasians equally as it applies to other races.

You have provided no cognizable evidence or basis by which to disturb the findings of the investigator that the Facebook posts you made violated the University's Policy Prohibiting Discrimination and Harassment.

For the reasons set forth above, the instant appeal is denied.

Very truly yours,



Harry M. Agnostak, J.D.
Associate Vice President for Labor Relations
Director Office of Labor Relations

Cc: P. March
L. Grosskreutz