

a. The Posts

On May 31, 2018, Professor Livingston

university.

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 at the core of what we do

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 , which the U.S.

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.

The second prong of the analysis requires that speech must fall *outside* 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.

*Must Outweigh the
Efficient and Effective Provision of Services*

Though Professor _____ 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 _____ in other words, his speech must be weighed against its _____. Notably, a Government employer may take action against an employee for speaking on a matter of public concern if the _____ mere *prediction* of disruption to its operations is reasonable.

uncomfortable taking a class with him. Such a response to that he

speech indicates

I further note that widespread media attention

has generated

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

ments 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 . . . He chose to reiterate his thoughts, including his inflammatory 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. . . . ents, a

reasonable student may have concerns that he or she would be stinuiz(e)4()--299(heW6(s)-10(he)4()-19(would