

UNIVERSITY OF OREGON INVESTIGATIVE REPORT

RESPONDENT: Nancy Shurtz, Professor
College of Law
University of Oregon

DATE OF INCIDENT: October 31, 2016

DATE OF REPORT: November 30, 2016

INVESTIGATORS: Edwin A. Harnden
Shayda Z. Le
Barran Liebman, LLP

I. BACKGROUND

This matter was referred to Barran Liebman LLP by the University of Oregon’s Office of the General Counsel and the Office of Affirmation Action and Equal Opportunity (“OAAEO”) to conduct an investigation surrounding a Halloween party hosted by, and at the home of, Professor Nancy Shurtz (“Shurtz”), specifically relating to the Halloween costume worn by Shurtz at that event. Both students and other law school faculty were in attendance at the event.

As of the date of this report, none of the students interviewed has indicated that he or she would like to proceed with a formal grievance regarding Shurtz’s costume; all were informed that the OAAEO would have a duty to investigate the circumstances even in the absence of a formal grievance, but that the formal grievance process was available to them.

II. ALLEGATIONS

The University of Oregon (“UO”), through several administrators, was informed that Shurtz held a Halloween party at her home on October 31, 2016, during which she had donned a costume which included the use of black makeup on her face and hands. On November 1, 2016, upon receiving notice that Shurtz had incorporated “blackface” into her costume, Dean Michael Moffitt, Associate Dean Erica Daley, and Associate Dean Adell Amos met with Shurtz, who confirmed that she had used black makeup on her face and hands for her Halloween costume, and that other law school students and faculty had been present at this event. These facts are, therefore, undisputed.

The scope of this investigation was to determine as best as possible what had happened at the event, and whether Shurtz’s choice of costume resulted in a violation of University policy.

III. RELEVANT UNIVERSITY POLICIES

University of Oregon Policy 580.015: Discrimination

Section A. Definition of Discrimination

Terms used in Section B to Section FF will be defined by UO Policy V.11.02 and shall be construed consistent with that policy.

University of Oregon Policy V.11.012: Discrimination Complaint and Response

Section I. Policy Statement

The university is committed to equal access to programs, course offerings, facilities, admission and employment for all of its: (1) employees; (2) students; and (3) campus community members. It is the policy of the university to maintain an environment free of prohibited harassment and discrimination against any person because of: *** race, color, ancestry, national or ethnic origin ***.

Discriminatory harassment, including sexual harassment, regardless of the relative power of the harasser, is disruptive of workplace and campus life, and denies its subject equal opportunity as a student, employee or campus community member. Prohibited Discrimination (as defined in state and federal law), discriminatory harassment, including sexual harassment and retaliation impede the realization of the university's educational mission and shall not be tolerated at the University of Oregon.

Section II. Definitions

A. Prohibited Discrimination is defined as any act that either in form or operation, and whether intended or unintended, unreasonably discriminates among individuals on the basis of age, race, color, ancestry, national or ethnic origin, religion, service in the uniformed services (as defined in state and federal law), veteran status, sex, sexual orientation, marital or family status, pregnancy, pregnancy-related conditions, disability, gender, perceived gender, gender identity, genetic information or the use of leave protected by state or federal law. "Unintentional discrimination" is a concept applicable only to situations where a policy, requirement, or regularized practice, although neutral on its face, can be shown to have disparately impacted members of a protected class. The concept is inapplicable to sexual or other forms of harassment which, by definition, result from volitional actions.

B. Discriminatory Harassment is defined as any conduct that either in form or operation unreasonably discriminates among individuals on the basis of age, race, color, ancestry, national or ethnic origin, religion, service in the uniformed services (as defined in state and federal law), veteran status, sex, sexual orientation, marital or family status, pregnancy, pregnancy-related conditions, physical or mental disability, gender, perceived gender, gender identity, genetic information or the use of leave protected by state or federal law and that is sufficiently severe or pervasive that it interferes with work or participation in any university program or activity,

including academic activities because it creates an intimidating, hostile, or degrading working or university environment for the individual who is the subject of such conduct, and where the conduct would have such an effect on a reasonable person who is similarly situated.

Section VI. University's Response

The university will take prompt and equitable corrective measures to stop Prohibited Discrimination or Harassment, to remedy the effects of Prohibited Discrimination or Harassment, and to prevent future instances of Prohibited Discrimination, Harassment and Retaliation. If the university initiates an investigation, it will be impartial. In responding to incidents of Prohibited Discrimination, the university will follow state and federal law, university policies and any applicable collective bargaining agreements. Employees and Students may also choose to exercise applicable formal grievances rights. A complaining party's options will be explained to that person by AAEO or the Title IX Coordinator, as appropriate.

Section VIII. Interim Measures

Regardless of whether an investigation or university process is initiated, the university will provide interim measures as appropriate, which for Students may include academic accommodations, housing accommodations, workplace or transportation accommodations, reasonable protective measures, health and counseling services, financial aid, visa and immigration assistance, safety planning, legal support options and information regarding other on and off-campus resources and for employees may include change of employment conditions, information and assistance regarding employee resources and other reasonable measures. In deciding which interim measures to implement, the university will attempt to mitigate the impact on affected parties, while also balancing the rights of the alleged wrongdoer.

Section IX. Free Expression and Academic Freedom

In all its actions, the university will respect the rights of freedom of expression and academic expression, as set forth in university policies and applicable bargaining agreements.

University of Oregon Policy 580.015: Discrimination

Section C. Discrimination Prohibited in All Higher Education Programs, Services and Interschol Activities

No person in Oregon shall be subjected to Prohibited Discrimination in any Department program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by monies appropriated by the Legislative Assembly of the State of Oregon. The University shall promptly adopt and publicize, and shall maintain, a procedure for redressing the grievances of persons who are subject to discrimination. Section B to Section FF do not apply to claims of discrimination in employment, promotion, tenure or termination of employment except student employment as provided in Section M(1).

Section G. Educational Programs and Activities

(1) No individual shall, on a prohibited basis, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other educational program or activity operated by the University, or, although not operated by the University, is required of students by the University.

University of Oregon Policy: Freedom of Inquiry and Free Speech

The University of Oregon values and supports free and open inquiry. The commitment to free speech and freedom of inquiry described in this policy extends to all members of the UO community: Faculty, staff, and students. It also extends to all others who visit or participate in activities held on the UO campus.

Free speech is central to the academic mission and is the central tenet of a free and democratic society. The University encourages and supports open, vigorous, and challenging debate across the full spectrum of human issues as they present themselves to this community. Further, as a public institution, the University will sustain a higher and more open standard for freedom of inquiry and free speech than may be expected or preferred in private settings.

Free inquiry and free speech are the cornerstones of an academic institution committed to the creation and transfer of knowledge. Expression of diverse points of view is of the highest importance, not solely for those who present and defend some view but for those who would hear, disagree, and pass judgment on those views. The belief that an opinion is pernicious, false, and in any other way despicable, detestable, offensive or “just plain wrong” cannot be grounds for its suppression.

The University supports free speech with vigor, including the right of presenters to offer opinion, the right of the audience to hear what is presented, and the right of protesters to engage with speakers in order to challenge ideas, so long as the protest does not disrupt or stifle the free exchange of ideas. It is the responsibility of speakers, listeners and all members of our community to respect others and to promote a culture of mutual inquiry throughout the University community.

University of Oregon Policy: Academic Freedom

Policy Statement:

University Policy Statements are interpreted in the context of University of Oregon Board of Trustees Policies, State of Oregon Law, and Federal Law.

The University of Oregon encourages and supports open, vigorous, and challenging debate across the full spectrum of human issues as they present themselves to the university community. The University of Oregon protects free speech through Policy No. 01.00.16. This policy on Academic Freedom builds on these existing commitments by recognizing the special contexts of scholarship, teaching, governance, and public service.

SECTION 1

a. SCHOLARSHIP. The University's research mission requires that members of the UO community have autonomous freedom to conduct research and produce creative work, and to publish and disseminate that work, limited only by the standards and methods of accountability established by their profession and their individual disciplines.

b. TEACHING. The University's responsibility to help students to think critically and independently requires that members of the university community have the right to investigate and discuss matters, including those that are controversial, inside and outside of class, without fear of institutional restraint. Matters brought up in class should be related to the subject of courses or otherwise be educationally relevant, as determined primarily by the faculty member in charge of the class.

d. PUBLIC SERVICE. Public service requires that members of the university community have freedom to participate in public debate, both within and beyond their areas of expertise, and to address both the university community and the larger society with regard to any matter of social, political, economic, cultural, or other interest. In their exercise of this freedom, university community members have the right to identify their association or title, but should not claim to be acting or speaking on behalf of the University unless authorized to do so.

SECTION 2

These freedoms derive immediately from the university's basic commitment to advancing knowledge and understanding. The academic freedoms enumerated in this policy shall be exercised without fear of institutional reprisal. Only serious abuses of this policy – ones that rise to the level of professional misbehavior or professional incompetence – should lead to adverse consequences. Any such determinations shall be made in accordance with established, formal procedures involving judgment by relevant peers.

University of Oregon Policy: Academic Freedom

(1) All teachers in the University of Oregon (University) are entitled to freedom in the classroom in discussing subjects, but they should be careful not to introduce into their teaching controversial matter that has no relation to the subject.

(2) As a matter of policy the University neither attempts to control, sway nor limit the personal opinion or expression of that opinion of any person on the faculty or otherwise on the University's payroll. In the exercise of this freedom of expression, faculty members should manifest appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they do not speak on behalf of the University.

IV. WITNESSES AND DOCUMENTATION

Structure of the Investigation:

Immediately following the Halloween party, a number of students expressed concerns to the Law School Dean of Students. The OAAEO therefore provided names and contact information for each of these students and we contacted them to request an interview. We met, in person, with each of the students who responded to this initial request.

We interviewed administrators who met with Shurtz immediately following the event, and/or who were closely involved in responding to student reactions following the event.

We interviewed Shurtz, as the subject of the investigation. During this interview, Shurtz provided a list of names, unprompted, of all the attendees of the event, to the best of her recollection.

Upon receiving this list, we contacted any students and alumni who were in attendance at the event, who we had previously been unaware of, to request an interview. We interviewed, by phone, each individual who responded to this request.

We also interviewed the three other faculty members who were in attendance at the event.

We did not interview any students who were not in attendance or who did not contact the law school administration immediately after the event. This is because there was no meaningful way to differentiate who to interview amongst the entire law school student body, so we focused on those who had first-hand knowledge of the event and/or who submitted their concern with the administration immediately after the event.

The following individuals were interviewed during this investigation:

Respondent: Professor Nancy Shurtz (in person).

Witness #1: Student [REDACTED] with Shurtz, in attendance at the event, interviewed in person.

Witness #2: Student [REDACTED] with Shurtz, in attendance at the event [REDACTED], interviewed in person.

Witness #3: Student [REDACTED] with Shurtz, in attendance at the event, interviewed in person.

Witness #4: Student [REDACTED], invited [REDACTED] brought it to the attention of the Dean the following morning, interviewed in person.

Witness #5: Student [REDACTED], in attendance at the event as a [REDACTED] interviewed in person.

Witness #6: Student [REDACTED] with Shurtz, in attendance at the event, interviewed by phone.

Witness #7: Student [REDACTED] with Shurtz, in attendance at the event, interviewed by phone.

Witness #8: Student [REDACTED] with Shurtz, in attendance at the event, interviewed by phone.

Witness #9: Alumna Elina Alinezhad, in attendance at the event, interviewed by phone.

Witness #10: Associate Dean for Student Affairs and Law School Dean of Students Jennifer Espinola, closely involved in responding to student reactions following the event, interviewed in person.

Witness #11: Law School Dean Michael Moffitt, present for the meeting with Shurtz immediately following the event and closely involved in responding to student reactions following the event, interviewed in person.

Witness #12: Associate Dean for Academic Affairs Adell Amos, present for the meeting with Shurtz immediately following the event and closely involved in responding to student reactions following the event, interviewed in person.

Witness #13: Professor [REDACTED] in attendance at the event, interviewed in person.

Witness #14: Professor [REDACTED] in attendance at the event, interviewed in person.

Witness #15: Professor [REDACTED], in attendance at the event, interviewed by phone.

The following individuals were contacted but either did not agree to, or did not respond to, our request for interview:

Student [REDACTED]
Student [REDACTED]
Student [REDACTED]
Student [REDACTED]
Student [REDACTED]
Student [REDACTED]
Alumnus Sal Catalano

The following documentation was reviewed and considered:

- Exhibit 1: October 7, 2016 email from Shurtz to alumnus Sal Catalano, inviting him to the event, provided by Shurtz on November 10, 2016.
- Exhibit 2: October 27, 2016 email from Shurtz to Professors [REDACTED], and [REDACTED] (and a 4th invitee, Samara Higdarebed) inviting them to the event, provided by Shurtz on November 10, 2016.
- Exhibit 3: October 27, 2016 email from Shurtz to her Tax Policy class listserv, providing class readings and inviting them to the event, provided by Shurtz on November 10, 2016. She notes the other professors who will be in attendance, that they will be celebrating [REDACTED] birthday (one of her [REDACTED]), and says she will be dressing up, “hint—title of a popular book.”
- Exhibit 4: October 28, 2016 email from Shurtz to her Tax Planning class listserv, providing a class-related attachment and reminding them about the event, provided by Shurtz on November 10, 2016. She notes the other professors who will be in attendance, that she could use help giving out candy bars to the trick-or-treaters, that they will be celebrating [REDACTED] birthday (one of her enrolled students), and says she will be dressing up, “going as a popular book title.”
- Exhibit 5: October 31, 2016 email from student and event attendee [REDACTED] to Shurtz, informing Shurtz about the disappointing and potentially offensive nature of her costume, provided by Shurtz on November 10, 2016.
- Exhibit 6: November 1, 2016 email from Shurtz in response to [REDACTED], also copying both of her class listservs, explaining the intention behind her costume, provided by Shurtz on November 10, 2016.
- Exhibit 7: November 1, 2016 email from Shurtz to student [REDACTED], forwarding the email chain with student [REDACTED], and apologizing for her costume choice and bad judgment, and requesting [REDACTED] email address, provided by Shurtz on November 10, 2016. This chain includes [REDACTED] response, noting the offensive nature of the costume and the fact that “blackface is a worldwide issue that affects people from various backgrounds and cultures.”
- Exhibit 8: November 1, 2016 email from Shurtz to student [REDACTED], forwarding the email chain with student [REDACTED], and apologizing for her costume choice and bad judgment, provided by Shurtz on November 10, 2016.
- Exhibit 9: November 1, 2016 email from President Michael Schill, Provost Scott Coltrane, Vice President for Equity and Inclusion Yvette Assensoh, and Dean Michael Moffitt to students, faculty, and staff informing them of the event.

- Exhibit 10: November 2, 2016 letter from other law school teachers and faculty urging Shurtz to resign and noting that blackface is patently offensive, overtly racist, inappropriate, and reflective of a profound lack of judgment.
- Exhibit 11: November 2, 2016 email from student [REDACTED] to Dean Moffitt and other administrators in support of Shurtz and explaining some of her personal interactions with Shurtz during the event, provided by Shurtz on November 10, 2016.
- Exhibit 12: November 1, 2016 and November 2, 2016 emails of concern from other students, some of whom were not ultimately available to be interviewed, including [REDACTED], [REDACTED], [REDACTED].
- Exhibit 13: November 4, 2016 public apology from Shurtz.
- Exhibit 14: November 7, 2016 email from Yvette Alex-Assensoh, Vice President for Equity and Inclusion, and Lisa Freinkel, Vice Provost and Dean, Undergraduate Studies, following the events of the prior week and tensions on campus regarding race and inclusivity.
- Exhibit 15: November 7, 2016 email from President Michael Schill, noting that Shurtz's decision to wear blackface wounded and divided the community, and exposed fissures that existed under the surface.
- Exhibit 16: List of event attendees provided by Shurtz on November 10, 2016.

V. INVESTIGATION

The information contained in this report is based on witness statements and documentation obtained during the course of this investigation. Information from witnesses is based on notes taken during interviews reflecting information the witnesses provided during those interviews. These notes were recorded with as much detail and accuracy as possible; however, the interviews were not taped or transcribed.

Summary of Events and Points of Consensus

Shurtz hosted a Halloween party at her home on October 31, 2016. She invited all of the students from both her Tax Policy and Tax Planning classes. The invitation was made orally during class, as well as by sending emails through the class listservs, using the students' University email addresses. The invitation was open to guests, in that students were welcome to bring family members, dates, or plus-ones. Several faculty members and alumni were also invited. Shurtz indicated in advance that people could choose to wear costumes if they wished, and that she would be "going as a popular book title," with no further description of her anticipated costume.

Shurtz modeled her costume after a book titled *Black Man in a White Coat*, by Damon Tweedy, MD. Her costume incorporated a white doctor's lab coat, a stethoscope, black makeup on her face and hands, and a black curly wig resembling an afro.

To the best of Shurtz's recollection, there were approximately 13 students in attendance, two alumni with three of their corresponding guests/family members, three faculty members, and four other individuals, for an approximate total of 25 guests. At least two of the students in attendance from the law school community were students of color. Of all the attendees, 24 out of 25 were either directly affiliated with the law school, or were a guest of those affiliates.

The interviews unanimously revealed that nobody told Shurtz during the event that her costume was inappropriate, that it was offensive, or that she should consider removing the black makeup. In addition, all those who were interviewed conveyed that Shurtz appeared to have worn the costume in earnest, and that she did not seem to understand the ramifications of her costume.

Following the event and that same evening, one student sent Shurtz an email conveying disappointment over the costume, and that the costume choice may have caused offense. The following morning, November 1, 2016, Shurtz responded to this student, and copied both of her class listservs, conveying why she had chosen the costume. Another student spoke with Shurtz in person to impress upon her the fact that her costume was likely to result in repercussions. Shurtz also reached out to two students of color who were in attendance at the event to personally apologize for her costume choice.

After Shurtz completed her afternoon class on November 1, 2016, she was called to Michael Moffitt's office to meet with him, Adell Amos, and Erika Daily following reports of the event and costume which had, by mid-morning on November 1st, reached the administration.

That same day, an email was sent to the campus community informing them of the event and the use of blackface as part of a Halloween costume. This email came from President Michael Schill, Provost Scott Coltrane, Vice President for Equity and Inclusion Yvette Assensoh, and Dean Michael Moffitt.

On November 2, 2016, a letter was penned by other law school teachers and faculty urging Shurtz to resign and noting that blackface is patently offensive, overtly racist, inappropriate, and reflective of a profound lack of judgment.

Since the campus-wide communication, the law school administration and faculty have been working towards addressing the needs of the students and providing opportunities for discussion and dialogue. An open forum was held on November 4, 2016. Also on November 4, 2016, Shurtz issued a public apology.

On November 7, 2016, President Schill sent another email to the campus community, noting that Shurtz's decision to wear blackface wounded and divided the community, and exposed fissures that existed under the surface.

Shurtz was placed on administrative leave pending the outcome of this investigation.

Brief Description of Blackface

This report does not intend to serve as an evaluation of the impacts of blackface generally, nor as a comprehensive scholarship of its history. However, it is necessary to offer at least a brief, albeit incredibly cursory, description in order to provide context and explanation for Shurtz's costume choice, the impacts, and this resulting investigation.

Dr. Blair L.M. Kelley of North Carolina State University, the Assistant Dean for Interdisciplinary Studies and International Programs for the College of Humanities and Social Sciences and an Associate Professor of History, summarized the significance of blackface and minstrel shows in a 2013 online article titled "A Brief History of Blackface."¹

"Blackface minstrelsy first became nationally popular in the late 1820s when white male performers portrayed African-American characters using burnt cork to blacken their skin. Wearing tattered clothes, the performances mocked black behavior, playing racial stereotypes for laughs. *** Jim Crow grew to be minstrelsy's most famous character ... depicted as a runaway: 'the wheeling stranger' and 'traveling intruder.' The gag in Jim Crow performances was that Crow would show up and disturb white passengers in otherwise peaceful first class rail cars, hotels, restaurants, and steamships. Jim Crow performances served as an object lesson about the dangers of free black people, so much so that the segregated spaces first created in northern states in the 1850s were popularly called Jim Crow cars. Jim Crow became synonymous with white desires to keep black people out of white, middle-class spaces. *** Black children were depicted as unkempt and ill raised pickaninnies. The running joke about pickaninnies was that they were disposable; they were easily killed because of their stupidity and the lack of parental supervision.

Minstrelsy desensitized Americans to horrors of chattel slavery. These performances were object lessons about the harmlessness of southern slavery. By encouraging audiences to laugh, they showed bondage as an appropriate answer for the lazy, ignorant slave. Why worry about the abolition of slavery when black life looked so fun, silly, and carefree? Even the violence of enslavement just became part of the joke. *** Most often blackface was used as a comic device that played on the stereotypes of black laziness, ignorance, or crass behavior for laughs. *** Until we actively remember the ugliness of this history, people will continue to blacken their faces without recognizing the horror hidden beneath the paint."

Results of Interviews and Points of Divergence

Having interviewed 11 of the estimated 25 people in attendance, the investigation covers a significant portion of the attendees. However, there are diverging accounts of the events, likely for a number of reasons. Different guests arrived at different points in the evening and stayed for

¹ "A Brief History of Blackface," TheGrio.com, October 30, 2013. <http://thegrio.com/2013/10/30/a-brief-history-of-blackface-just-in-time-for-halloween/>

different durations of time. Those guests who arrived earlier in the evening had a greater opportunity to interact with and speak with Shurtz directly, before the event became more crowded. Some guests circulated throughout the house while they were at the event, and others sought more secluded or segmented areas of the house. Different guests also had differing personal perspectives. Therefore, this report will set forth the most commonly-shared sentiments, but for the sake of completeness, will also identify at least some of the areas of divergence.²

Costume Explanation

Shurtz found inspiration for her costume from Damon Tweedy's book, *Black Man in a White Coat*. She provided varying degrees of explanation about her costume to those who were in attendance at the event. We determined that she was inspired by this book and by the author, that she greatly admires Damon Tweedy and wanted to honor him, and that she dressed as the book because she finds it reprehensible that there is a shortage of racial diversity, and particularly of black men, in higher education. Shurtz was further inspired to this costume by virtue of the fact that her daughter attends medical school and her incoming class also had very few people of color; her daughter inquired with school administration about the class demographics and this apparently led to the medical school assigning reading assignments from Damon Tweedy's book. Shurtz's email to her class list the day after the event explained that she had intended "to teach with this costume as well (or at least tell an interesting story)" and Shurtz's public apology following the event conveyed that she had intended to provoke a discussion on racism in society, educational institutions and professions.

One student reported receiving at the event a fairly detailed explanation from Shurtz about the book, her desire to honor Damon Tweedy, her daughter's medical school experience, discrimination in higher education, and some discussion of discrimination generally. This student also recalled that Shurtz carried the book around with her at some point during the evening, but was unsure about the duration of time. This student understood the purpose behind the costume choice to be to start a conversation about discrimination.

Two students heard directly from Shurtz during the event that she had dressed as "a book," and that part of her inspiration for dressing as this character related to her daughter's attendance at medical school and the lack of students of color in her daughter's class.

One student received an explanation from Shurtz during the event that she had dressed as "a book" and that the purpose was due to her admiration for the character of the book, who was a black doctor and a great person.

One student was told by Shurtz at the event that she was "a book," that the book was a bestseller, and that the book was on the coffee table.

Two students did not receive an explanation of the costume from Shurtz during the event, but did overhear pieces of an explanation that Shurtz provided to someone else during the event. They saw the book on the coffee table and understood that the book was related to the costume. They

² For purposes of this section, "student" is meant to refer to both students and alumni.

did not see Shurtz carrying the book around during the event, and both were there for close to an hour and fifteen minutes.

One student did not hear an explanation of the costume during the event at all, but saw the book sitting on the coffee table and put two and two together. This student was at the event for approximately an hour and a half.

Of the other professors in attendance, one was at the event for close to the entire duration and during the event received a full explanation of the costume, the book, the relation to Shurtz's daughter's medical school, as well as an explanation of Shurtz's motive to highlight this disparity and to speak out about racism. One professor was told by Shurtz during the event that she was a book, with most of the emphasis placed on her daughter's medical school, the lack of students of color, and that her daughter's inquiries had led to assignment of part of this book for reading. Shurtz conveyed that she was a black man in a white coat. This professor did not hear or recall Shurtz explain anything during the event about a greater purpose or goal in choosing this costume. The third professor had a very brief exchange with Shurtz during the event, in which she conveyed that she was personifying Damon Tweedy. The explanation was very brief, but this professor's understanding was that Shurtz seemed to be earnestly trying to portray a figure she admired.

Conclusion

While it is clear that different guests received varying levels of explanation about the costume and its purpose during the event, most either received or indirectly heard at least some explanation about the costume, and all of them understood that it was related to the book which was on the coffee table. A smaller number of witnesses were told or perceived during the event that Shurtz was intending to start a conversation or make a reference to discrimination in higher education and society at large.

Reason for Attendance

The email invitations sent by Shurtz to her two class listservs were generally brief. We asked the student witnesses whether they perceived or personally felt any pressure to attend the event.

Two students explained that there was no classroom requirement to attend and that they did not feel directly pressured, but noted that they felt indirectly obligated to make an appearance because of a general sense of the student-teacher relationship, including the knowledge that Shurtz had papers of theirs on her desk that she would soon be grading. One of the two students explained that attending the event felt like participation in class, stating "I wouldn't have gone if it didn't feel like participation in class. You want her to know you and recognize you. It helps. Participation is huge in a small class. If she's invited you to her house, you need to make the face time." This student would not have attended the event if such attendance did not feel to the student like class participation that could influence his or her grade. The other of the two students went on to explain that this sense of indirect obligation to attend extended to a similar feeling to remain at the event, despite feeling extremely uncomfortable about being around Shurtz in this costume.

Two other students confirmed that their accompaniment or friend felt indirectly obligated to attend, and to remain at the event despite feeling significant discomfort relating to Shurtz's costume.

One student did not feel pressured to attend, but did note, having attended a prior year's Halloween party at Shurtz's home, that Shurtz promoted this year's party to a greater degree because it was close in proximity to one of the students' birthday.

Two other students said they did not feel pressured to attend and felt it would be fine if they had not made an appearance.

Conclusion

Half of the students personally felt, or understood that other students felt, that attendance at Shurtz's party, and remaining for a longer duration of time even despite feeling uncomfortable, was important in relation to the teacher-student relationship. Half of the students felt at ease to attend or not attend at their own discretion.

Guest Reactions During the Event

Most witnesses felt that the guests at the event appeared visibly upset or uncomfortable, although all of them acknowledged that Shurtz did not appear to have noticed this. Five of the students and one professor confirmed that they observed discomfort amongst the guests. Two students and one professor felt that the guests appeared comfortable and happy, though one of those students acknowledged some limitation in understanding due to a language barrier, and one of those students noted not knowing the other students very well.

Beyond the general recognition of whether and to what degree the guests were uncomfortable, the specific responses from the witnesses as to their own reactions during the event vary:

The student witnesses reported feeling and observing shock, anger, surprise, anxiety, disappointment, and discomfort with remaining at the event. The discomfort was not limited to students of color. One student reported that the experience was "totally surreal." One student said that the costume was so ludicrous and offensive that it was apparent that many of the guests were avoiding interaction with Shurtz. Students and one of the faculty members in attendance felt that the attendees were shifting around, looking at each other, looking down at the ground, unsure what to do.

Almost every student interviewed reported that they knew the costume was "not okay." One student-guest reported acknowledging to another student that they would remain because "I know she's your professor, but this is not okay." One of the professors in attendance reported that there is no doubt or ambiguity that blackface is offensive. One student conveyed thinking that everyone knew that you can "never, ever, as a blanket rule, dress up in black face; that's not something that's acceptable." This same student said that the costume appeared somewhat cartoonish, with a huge and ridiculous looking afro wig, which made it even more offensive. Another student also conveyed confusion over the use of the wig, noting that Damon Tweedy is

bald, and therefore even if Shurtz was trying to dress up like him, it did not appear that she was. Another student expressed that Shurtz was not representing a racial issue at the medical school, where the problem supposedly existed, but in her own home with her own students. Several students reported avoiding the rooms where Shurtz was, declining participation in a group photo, and generally feeling like they could not say anything because they were in Shurtz's home. Several students stated that they would have either not entered the home once seeing Shurtz's costume, or would have left immediately, but for the fact that Shurtz was their professor.

Noteworthy Observations

Amongst the various descriptions the witnesses provided about their individual experiences, there were a few particular statements that bear specific note:

Two students stated that when they arrived at the event, Shurtz happened to be standing at the entrance to the home with the door open (likely handing out candy to trick-or-treaters) and therefore they saw each other before actually entering the residence. These two students stopped in their tracks upon seeing Shurtz's costume. Shurtz reportedly asked "aren't you coming in?" One student responded "I don't know if we should." Shurtz then responded with, "I hope my costume doesn't offend you; I'm a book."

A different student reported hearing Shurtz ask one of the other guests whether a given professor (whose name the student did not recall during our interview) would be offended by her costume.

A different student reported an exchange with Shurtz in which Shurtz asked "do you know who I am?" The student said something like "I have no idea what this is." Shurtz responded, "I do shocking things." The student then stated that Shurtz had done lots of things to shock but this one "took the cake." Shurtz responded with a statement along the lines of "you guys are okay with it." The student reported that there were upwards of eight other students standing close by at the time of this exchange and none of them said anything in response to Shurtz's statement that would indicate that the students were okay with her shocking behavior.

One professor reported that prior to the event, Shurtz had indicated that her costume would be "scary."

After the event, two of the students who were in attendance reached out to Shurtz to inform her that her costume choice may have really offended some people and might result in further ramifications for her. Both students reported that Shurtz appeared genuinely surprised that her costume might have had this effect.

When Dean Moffitt met with Shurtz before placing her on administrative leave, Shurtz conveyed to him that she had not thought people were offended, but she understood she had obviously been called in for something. She stated that she made a stupid mistake with the best of intentions.

Impacts and Outcomes

In evaluating the event in light of the University's policies against discrimination, it is important to outline the outcomes and impacts following the event, upon both the attendees as well as the student body. As stated previously, different guests had differing personal perspectives, so the range of responses varied accordingly. One point that was clear, at least before the event, was that most of the attendees knew Shurtz (setting aside the family members and plus-ones), had an appreciation for or understanding of her personality and her general intentions, and held her in esteem.

- All the students interviewed made it very clear that the impacts of the event and the costume extend far beyond those students and individuals who were in attendance, and that the resulting environment at the school has been very negative and contentious.
- In addition to the specific impacts to the individual students while they were at the event, one student noted that there is added pressure on the students who were in attendance because of all of the attention generated after the event.
- Several students stated that many people have used social media to weigh in on the costume choice and the commentary online has been hostile. There has been hostility on the law school's Facebook pages: a first year law student commented about how he did not think this costume situation was a big deal, pointing to First Amendment rights. This student reportedly received a significant amount of push back as a result and his faculty advisor had to reach out to him.
- One student noted having to take the Multistate Professional Responsibility Examination (MPRE) in the midst of stress and anxiety caused by the costume, the student's personal reaction to attendance at the event, as well as all the broader uproar about Shurtz's costume.
- One student said that the aftermath of the costume has been really hard on the students and some have been missing classes because they do not want to keep talking about it. Some professors have been devoting upwards of half an hour from each class session to allow students to discuss. One example was provided in which a professor ended the class early over the level of student discussion and contention and told the students he would just email out notes after the class. Some students left the class afterwards and talked about how the minority students were all wrong and overreacting.
- One student stated that a common sentiment amongst the students is that they cannot sleep as well and feel an impact on their levels of concentration.
- Several students stated that their way of dealing with the situation following the Halloween event has been to pull themselves out of the environment and avoid the law school, such as by doing their studying elsewhere and turning off or avoiding email and social media.
- Two students said they have heard classmates who are concerned and stressed that this incident could have an impact on the school's future ranking and on their future ability to obtain jobs.
- Two administrators stated that from a student affairs perspective, the event and the costume were very injurious, with students expressing that they do not feel safe in the law school environment and are considering or are seeking transfers to another school.

- Several students stated that when Shurtz sent an email to her two class listservs following the event, rather than denouncing what she did she appeared to be rationalizing it, and that further upset some students.
- Two students stated that many of the other law students who were not at the event reacted as if the minority students were being too sensitive to the costume. Therefore, in addition to the personal impacts that flowed directly from attending the event and seeing the costume, these students have the added impact of dealing with insensitive and disappointing comments from fellow students.
- Two students and an administrator shared that there are additional incidents taking place at the law school stemming from conversations about the costume. For example, while addressing the underlying events and Shurtz's costume, one student used the "N word" during class, stating the full word, and the professor did not say anything to discourage this language. One student noted that when professors hear negative statements by other students and simply move on without addressing them, it gives the impression that they either do not understand, or do not want to understand, and that impression devalues the feelings of the listener affected by those negative statements.
- One student noted that with such a predominantly Caucasian environment at the law school, commentary about the costume from teachers and students impact the minority students even more so than they would otherwise. Another student raised this same issue and also said that students and faculty are looking to the minority students to help them understand the situation, which is a further burdensome position to be in. Several students also noted the general lack of diversity on the campus.
- Several students and administrators noted that one professor sent a communication to the law school at large and weighed in that Shurtz was well-meaning and did not have malicious intent, and that the school community should not be so quick to judge her. Two students and two administrators specifically stated that this public communication served to further disenfranchise students of color and to cause additional rifts. One of the students [REDACTED] noted also having a class with this professor, and having a difficult time in this professor's class following that public message. An administrator followed this email with a response to everyone, pointing to intent versus impact. This administrator noted receiving some very grateful responses from students, but also receiving a handful of messages saying the response had been ridiculous. Two students felt that this follow-up message from the administrator looked like a position from the law school, and therefore those students who might have defended Shurtz felt alienated. They said the follow-up message felt disrespectful and retaliatory, angered some of the student population, and worked to silence those students who would have pled for civility.
- Two students felt that the ensuing environment at the law school has led to a culture of feeling a little threatened to have an opposing view.
- Two students stated that following this event, other professors have opened up the floor for discussion in their classrooms, and this is very awkward when there is only person of color in the class.
- One student and one administrator noted that at least a couple of the professors who signed onto the letter urging Shurtz's resignation addressed their classes about it and discussed why they had signed on. This also caused an ongoing impact, and some students read a lot into who had signed onto the letter and who had not.

- Two students and two administrators felt specifically that this event and costume have divided the student body. Some of the students are focused very adamantly on potential First Amendment protections, and the fact that many students love Shurtz as a teacher, as compared to the effect the costume has had; so the division within the student body has caused further stress and anxiety. One student noted that because many people believe that Shurtz's intention and history of behavior are irrelevant in this situation, and the response from the law school administration has been mostly responsive to that particular viewpoint, the law school's response has therefore further polarized the situation.
- One student felt that the open forum which was held at the school to help students address and deal with this situation was also difficult. The students who presented a non-majority opinion felt they were attacked and shot down. At least one administrator spoke and presented a very strong opinion on the matter, which set the tone and resulted in students voicing opinions about racial inequities, the need for diversity, and other racial issues not directly related to Shurtz. In addition, the forum allowed students to conjecture about things that were not true, but because it was a forum and nobody responded and negated those conjectures, in some ways it served to anger the students further.
- One student noted that the school has tried hard to provide forums or opportunities for discussion, and talking is good, but that also puts a burden on the minority students to educate the others.
- Several students felt that this instance with Shurtz's costume could be shining a light on the underlying problems at the school, including an oblivious nature to racial issues.
- Two administrators described the need for holding an open meeting with faculty that was held after Shurtz's event, to discuss how to talk to students about this, noting that many faculty have been in tears and are nervous about how to respond to their students. There has been tension between the faculty members as well.
- One administrator said that both the student and faculty environment have been significantly impaired, where the administrators have not been able to get a single other thing done besides deal with the aftermath of the Halloween event and Shurtz's costume; that student affairs, admissions, and alumni association employees have harder jobs now, because they are dealing with how to support the students.
- Two students felt that there has been a lot of discussion about how Shurtz could possibly be unaware of what blackface was and meant; however, they had seen other students in class in the rows sitting in front of them googling what is blackface. They felt that if at least some students were unaware, especially given their exposure to media, it was understandable that Shurtz might not be aware.
- Two administrators felt that this event has caused additional ripple effects in the school, or "re-injuries," beyond an uncovering of underlying issues.
- One administrator reported that minority law student leaders have communicated to the administration that they would not take future classes with Shurtz as a result of this costume.
- One student felt that the worst part of the overall situation was the period following the event when people at the law school started sharing their opinions. For example, a student who was not present at the event had emailed the administration to notify them about the costume. When others found out that complaints about the costume were presented to the administration, various people weighed in on this student having shared

that information; one student stated that others were just being too sensitive and called people “pussies.”

- One student, who is involved with a minority law student association, felt that some of the first year law students were not doing well adjusting to their first semester of law school and simultaneously encountering this situation.
- One professor felt that it was unclear as to what effect Shurtz’s costume had on the student body before the administration emailed the school about the event, and noted that the administration’s communication characterized Shurtz’s actions in a way that itself caused commotion on campus.
- One professor felt that the administration’s communication, which stated, “[t]he use of blackface, even in jest at a Halloween party, is patently offensive,” led to some of the students’ negative reactions. One student had noted to this professor that he or she could not believe that Shurtz would think blackface is funny. This professor felt that the student’s reaction was not based on what Shurtz actually did, given that her costume had been worn in earnest, but rather was based on the administration’s message and wording.
- One student stated that the administration’s response was a very inciting email, because they characterized the costume as “blackface,” which is a specific and racially-charged thing, instead of stating that black face paint was used. When that message went out to all the students, the students started calling Shurtz a racist and using profanity about her, which this student felt was unacceptable and unprofessional behavior from law students, but which the student also attributed more directly to the administration’s responses and how they had angered the student body.
- One student shared being called a “racist” and a “bitch” for speaking up in class in defense of Shurtz. This student felt that the other student responses were a direct reaction to the administration, and reflective of their leadership.
- Several students felt that the response on campus had been appropriate, because the costume was unacceptable and constituted behavior that the school would not want to be associated with. However, one such student also felt that the administration had not been fair, because the response was a blatant mischaracterization of Shurtz attempting to do a minstrelsy characterization. This response made Shurtz easy to vilify, it seemed unfair, and it added to the toxic environment.
- One professor who was present for the event stated their personal belief that a good portion of the consternation among the students related to the number of meetings, and the cancelling of study or review sessions to accommodate those meetings.
- One student felt the environment at the school had been toxic because the law school is a “bit of a fishbowl.”

Shurtz Interview

As the respondent and the subject of the investigation, Shurtz’s interview and explanations are summarized separately. Shurtz was informed that the investigators had not been charged with reaching a conclusion about her employment or any potential discipline, and that such decisions, if any, would be made by University administration. Shurtz was also encouraged to provide as much information and detail as she could, and that the information she provided would be used to assist the investigators in thoroughly evaluating the circumstances.

Shurtz confirmed that she had mentioned the Halloween party orally during class, and that she had sent an open invitation to all of the students in both her Tax Policy and Tax Planning classes. She also invited some of the faculty and a few alumni. All guests were invited to bring family members or plus-ones. Shurtz also noted inviting her neighbors, but she did not believe that any neighbors were ultimately in attendance.

Shurtz provided a list of those guests she could remember. As noted previously, to the best of her recollection, there were 13 students in attendance, two alumni along with three of their corresponding guests/family members, three faculty members, and four other individuals, for an approximate total of 25 guests.

Shurtz explained that she hosts a Halloween party at her home most, but not all, years, that she thinks it is a nice gesture when faculty invite their students, that she enjoys hosting events and sharing her home with others, that she does not enjoy handing out candy bars to the trick-or-treaters and therefore appreciates guests contributing to that effort while they are there, and that the invitation is made openly and without any requirement or expectation of attendance. She did not feel that students might feel like they ought to, or were pressured to, attend.

Shurtz explained her costume choice in some detail. She said that she had read the book, *Black Man in a White Coat*, which she had really enjoyed. When she read the book she felt like she related to the author, found Damon Tweedy to be an amazing man, and enjoyed his writing. Shurtz had also recently attended her daughter's white coat ceremony as part of her daughter's first year at medical school. Amongst her daughter's incoming class, Shurtz had noticed a shortage of students of color, and specifically an almost complete absence of black men. She feels strongly that black men are underrepresented in higher education, and she felt that on Halloween she could be a black man in a white coat in order to represent this topic. She clarified that she did not dress as Damon Tweedy or try to look like him specifically, but that she dressed as the book, or as a black man in a white coat. She stated that she had been thinking about this book and this costume for some time.

When asked if she had thought her costume was going to be controversial, Shurtz replied in the negative. She said she had thought to herself that she could represent this black man and she could talk about a black man being a professional, which are issues that are important to her. She said her intention had been to honor Damon Tweedy.

Shurtz described her costume as incorporating a white doctor's coat, a stethoscope, glasses, black makeup on her face and hands, and a black wig.

Shurtz confirmed, consistent with all of the other interviews, that nobody at the party told her or mentioned that her costume or the black makeup were inappropriate.

Shurtz recalled some of the specific conversations she had had with some of the students, but not all of them. She also noted that as the evening wore on and the event became more crowded, she had less opportunity to describe and explain her costume as well as she had hoped. She felt that she had an adequate opportunity to describe the costume to those guests who arrived earlier in the evening. When asked if she recalled saying anything specific to the two students who arrived

and saw her costume while still outside of the house, Shurtz said she recalled only asking them to come in. She also stated that towards the middle to end of the evening, she spent a significant portion of time in one room of the house, conversing mainly with one student and one alum who were there with their families. She reiterated that she did not have as much of a chance as she had wanted to talk to her students about the costume.

When asked about the guests' reactions, Shurtz stated that she did not gauge from their reactions that anyone was uncomfortable with the costume. She did not recall any negative reaction. She stated numerous times that nobody said anything to her about her costume, that she was not aware or had not heard of any negative connotation associated with putting black makeup on one's face, that she had absolutely no intention to offend or mock anyone, and that she wished emphatically that someone had said something to her, particularly given that she was in her home and would have easily been able to wash the makeup off or remove her costume. She stated that she did not know the term "blackface."

Shurtz further explained that minority issues are very important to her and that she has openly criticized the law school for what she considers to be a long history of discrimination against minorities.

Shurtz explained that following the event, she received an email from one student and had a conversation with another student, both of whom had attended the event, and they conveyed to her that her costume choice was inappropriate and might have caused offense. She decided to respond to the student's email by copying both of her classes because she felt that since she had invited all of them, she needed to apologize to all of them. She then individually responded to the students of color who had been in attendance.

Following these communications, Shurtz explained that she met with Dean Moffitt, Erica Daley, and Adell Admos, and tried to explain what had happened. She stated that she was very upset because nobody had told her about the costume, that she had been unaware, and that she felt that people were jumping to racism and an action that had wrongful intent. Shurtz felt that during this meeting, the administrators did not understand her purpose and they did not think her daughter's medical school experience was important to the issue with her costume. Shurtz also spoke with a few faculty members before she left on administrative leave. She felt that the faculty members who were irate probably did not know about all the great work she had done and her commitment to social justice issues.

VI. ANALYSIS AND DISCUSSION

University Policies

Discrimination Policy

We find that Nancy Shurtz's costume, including what constitutes "blackface" through use of black makeup, constitutes a violation of the University's policies against discrimination. We further find that the actions constitute Discriminatory Harassment.

Discriminatory Harassment

Discriminatory Harassment is defined by University policy as conduct that either in form or operation, unreasonably discriminates among individuals on the basis of race or color; which is sufficiently severe or pervasive that it interferes with work or participation in any University program or activity; which creates an intimidating, hostile, or degrading working or university environment for the individual who is the subject of such conduct; and where the conduct would have such an effect on a reasonable person who is similarly situated.

Shurtz's conduct, in donning a costume at a Halloween party which hosted both students and faculty, operated to distinguish against a group of people on the basis of race or color. The black makeup she incorporated, whether specifically termed as "blackface" or not, has a very negative racial history and connotations. The use of a costume component with such negative connotations operated to unreasonably differentiate between students of color and other students.

From the student interviews, it appears clear that for the majority of the students their presence at the event subjected them to an occurrence sufficiently severe to interfere with their participation in University programs or activities.

Almost every student reported feeling shocked, offended, angered, disappointed, surprised, anxious or uncomfortable being at the event. The discomfort was not limited to the students of color. Although the event was off-campus, there was considerable nexus to the law school: Shurtz had invited all students from two of her classes, using the class listserv, using their university email addresses, and including the invitation within an email that also included coursework assignments; several students reported feeling obligated to attend, and several said that once they arrived and were uncomfortable, they felt obligated to remain, and unable to say anything to Shurtz about the costume, given the dynamics of the teacher-student relationship as well as their own discomfort; and ultimately, over half of the attendees were students and over 70% of the attendees were from the law school itself.

Discriminatory Harassment under the University's policies is directly comparable to racial or sexual harassment under Title VI or Title VII. "[T]he existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI." Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994). The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct. *Id.*

In addition, from the witness interviews, it appears clear that the event and its broader impacts on the University environment have led to interference with participation in University activity for many others as well, including those students who were in attendance at the event.

The law school environment has become hostile, with discussions and strong conflicts of opinion taking place within the classrooms and on the law school social media pages. The reactions to the event and the students' conflicts have required other teachers to take time from lessons to address the Halloween incident. The open discussions in class have also resulted in racial

hostility between the students. The lack of understanding by some students, coupled with an existing lack of diversity in the law school student body, has led to minority students feeling further disenfranchised from their classmates and the school. Some students have been missing class, avoiding the law school, and changing their study habits in an attempt to avoid the resulting negative environment. Based on both the reaction and lack of reaction from other faculty and professors, students have also felt a sense of anxiety and mistrust towards professors and faculty beyond just Shurtz, with some students considering and seeking out transfers to other schools. A full list of the range and severity of impacts has been referenced above.

We find that this environment was and is intimidating and hostile and has impacted a wide range of students from different backgrounds. It is also apparent, given the unanimous response from the witnesses, that a reasonable person who is similarly situated would have experienced such an effect. Almost every student interviewed reported that they knew the costume was “not okay.”

Prohibited Discrimination

Prohibited Discrimination is defined by University policy as any act that either in form or operation, and whether intended or unintended, unreasonably discriminates among individuals on the basis of race or color. “Unintentional discrimination” is a concept applicable only to situations where a policy, requirement, or regularized practice which is neutral on its face can be shown to have disparately impacted members of a protected class. The concept is inapplicable to sexual or other forms of harassment which, by definition, result from volitional actions.

Shurtz’s costume was directed at all of the guests at her party and did not result in a different application of privileges to some students over others. However, it is likely and even probable that her costume had a greater negative impact on students of color, because of the historical connotations of, and uses for, “blackface.”

Conclusion

The policy against discrimination also provides that no individual shall be denied the benefits of, or subjected to discrimination under, any academic, extracurricular, or other educational program or activity operated by the University, or although not operated by the University, is required of students by the University. At least half of the students interviewed felt or understood that attendance at Shurtz’s event, though extracurricular, was impactful towards, or important to, the teacher-student relationship and the understanding of class participation, an element that influences a student’s grade.

The finding of discriminatory harassment constitutes a violation of the policy against discrimination. Consistent with the University’s policy statement, “Discriminatory harassment, including sexual harassment, regardless of the relative power of the harasser, is disruptive of workplace and campus life, and denies its subject equal opportunity as a student, employee or campus community member. Prohibited Discrimination (as defined in state and federal law), discriminatory harassment, including sexual harassment and retaliation impede the realization of the university’s educational mission and shall not be tolerated at the University of Oregon.”

We also note that the policy against discrimination holds that the University will respect the rights of freedom of expression and academic expression. A more detailed analysis on these points follows below.

Academic Freedom Policy

The University has two policies relating to academic freedom, the first is a former Oregon Administrative Rule made UO policy when UO became independent and the second, a Policy Statement approved by UO's President in 2014. The Policy Statement holds that the policy is interpreted in the context of University of Oregon Board of Trustees Policies, State of Oregon Law, and Federal Law. The Academic Freedom policy states that it builds on the free speech policy and recognizes certain special contexts for scholarship, teaching, governance, and public service.

“Governance” is not a category that applies to this scenario. Similarly, “Scholarship” is defined to mean conduct of research and production of academic works and is not applicable here.

Academic freedom in “Teaching” relates to the right to investigate and discuss matters, including those that are controversial, inside and outside of class – though matters brought up in class should be related to the subject of the courses or otherwise be educationally relevant. If Shurtz's choice of costume were to be construed as helping students to think critically and independently, then it is possible that this portion of the Academic Freedom policy would apply. The policy and its application to Shurtz's action would be interpreted in the context of State and Federal law, which requires an analysis of statutes and cases relating to academic freedom.

Academic freedom in “Public Service” provides freedom to participate in public debate and to address matters of social, political, economic, cultural, or other interest. Shurtz's costume could be construed as addressing a matter of social or cultural interest. Again, the policy and its application to Shurtz's action would be interpreted in the context of State and Federal law relating to academic freedom.

The policy further states that “serious abuses of the policy,”³ or ones that rise to the level of professional misbehavior or professional incompetence, should lead to adverse consequences. Therefore, from the plain language of the policy, it is clear that the right to academic freedom is not absolute. It is also noted that in several recent matters, the University concluded that violations of its nondiscrimination policy were sufficient bases to impose discipline for cause, which amounts to failure to perform the responsibilities of an academic staff member, or professional incompetence and misbehavior. In addition, the attempt to start a conversation about racial diversity, while not knowing or determining how patently offensive the costume choice was, perhaps points to a level of professional incompetence.

The former OAR version of University policy on Academic Freedom holds that teachers are entitled to freedom in the classroom in discussing subjects (with some limitations). This portion of the policy is not at issue, given that Shurtz's costume was not worn or presented within the

³ The policy is rather circular on this point. One presumes that the policy protects activities that might violate other policies, while recognizing that “serious abuses” of those other policies are not protected.

confines of the classroom. The policy also states that the University does not attempt to control or limit the personal expression of opinion of its faculty. The University does not take issue with the subject matter of Shurtz's expression, or her viewpoints, but the freedoms under this policy end where prohibited discrimination and/or discriminatory harassment begin. Therefore, this policy and its application to Shurtz's conduct will also be interpreted in the context of state and federal law, in relation to academic freedom.

Freedom of Speech Policy

The University's policy on Freedom of Inquiry and Free Speech states that the University encourages and supports open, vigorous, and challenging debate across the full spectrum of human issues, and that the belief that an opinion is pernicious, false, and in any other way despicable, detestable, offensive or just plain wrong cannot be grounds for its suppression. The policy also notes that as a public institution, the University will sustain a higher and more open standard for freedom of inquiry and free speech than may be expected in private settings. Speakers, listeners, and all members of the University community have a responsibility to respect others and to promote a culture of mutual inquiry throughout the University community.

The policy's direct reference to the public nature of the institution and the higher and more open standards for free speech than those expected in a private setting finds its origin and explanation in case law relating to freedom of speech under the First Amendment to the United States Constitution. An employee of a public institution has greater rights to free speech than employees of private companies or organizations, because the employer is also a state actor. An evaluation of the employee's rights and limitations on free speech involves a balancing of certain interests. This policy directs us to that balancing inquiry.

Constitutional First Amendment Protections for Public Employees

Employees of public institutions enjoy greater free speech protections in relation to their employers than do employees working for private entities. However, courts extend substantial deference to the government in its regulation of speech when the government "acts as employer rather than as sovereign." *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) (citing *Waters v. Churchill*, 511 U.S. 661 (1994)).

Statements Pursuant to Official Duties

The first component of this evaluation is whether, as a public employee, Shurtz was making statements pursuant to her official duties, or whether she was speaking as a citizen for purposes of the First Amendment. In general, speech that owes its existence to a public employee's professional responsibilities can be restricted without infringing on free speech liberties the employee might have enjoyed as a private citizen, because "it simply reflects the exercise of employer control over what the employer has itself commissioned or created." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

It appears clear that Shurtz's costume and the message she wished to convey were not made pursuant to her official duties as a faculty member of the University. The costume was not

related to the subjects that she taught, and she did not incorporate information she was privy to by virtue of her teaching post at the University. In addition, the *Garcetti* analysis does not extend to academic scholarship or classroom instruction. *Id.* at 425. Nor does it “apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.” *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). We do not find that Shurtz’s statements were made pursuant to her official duties.

Addressing a Matter of Public Concern

The second component of this evaluation is whether the speech at issue addressed a matter of public concern. Whether or not an employee’s speech addresses a matter of public concern is ordinarily determined by the content, form, and context of the statements at issue. *Connick v. Myers*, 461 US 138, 147 (1983). However, issues of racial discrimination are considered inherently a matter of public concern. *Connick* at 146 (internal citations omitted); *Bonnell v. Lorenzo*, 241 F.3d 800, 812 (6th Cir. 2001). In addition, a public employee’s right to protest racial discrimination is not forfeited by the employee’s choice of private forum. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979).

Shurtz’s conversations with the attendees at the event, her email communication to her classes the following day, her public apology, and her interview with the investigators all make clear that her speech or expression was about racism in our society. We received diverging accounts from the witnesses interviewed as to how much time Shurtz spent in conversation about her costume, and how many people heard an explanation directly from her. However the costume without any speech at all would likely be sufficient to constitute protected expression. In addition, although the accounts were conflicting, and Shurtz herself admitted that she did not think she ended up conversing about her costume to the extent she had originally planned, all of the witnesses interviewed did uniformly express that they thought she had worn the costume in earnest. Her expression related to racial discrimination and is inherently considered a matter of public concern.

Pickering Balancing Test

If a public employee has spoken as a citizen for purposes of the First Amendment and the speech was not made pursuant to the employee’s official duties, and if the speech at issue addressed a matter of public concern, then the final component of the First Amendment analysis requires a weighing of the interest of the State, as an employer, in maintaining the efficiency of its operations and avoiding potential or actual disruption against the employee’s interest in commenting on the matter of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

In conducting this balancing test, courts will consider how substantially the speech involved matters of public concern, whether the speech was made in a private setting, as well as the context of academic freedom. However, the employer is not required to establish actual injury or disruption; weight is given to the employer’s reasonable prediction of disruption and harm, and the examples discussed often involve speculation rather than tangible, present interference with operations. *Waters* at 673.

The *Pickering* Court considered such factors as the necessity of close working relationships in the workplace in order to fulfill public responsibilities, whether the statement or expression was directed at a specific person, public damage to reputation, whether the teacher's position presumes she has greater access to real facts, and impediments to the teacher's performance in the classroom.

Shurtz's expression was not directed at a specific person, and the amount of contact between faculty members while doing their jobs is probably negligible given that the law professors discharge their educational duties in large part without interaction with their colleagues. However, we can draw some analogy to the relationship and respect required to be able to teach students effectively. Impediment to Shurtz's performance in the classroom is likely to be significant, particularly given that students have gone so far as to express to the administration that they are unwilling to take classes with Shurtz in the future. Public damage to reputation is also clearly very significant in this case. Within the law school, students have expressed reactions ranging from disappointment to an unwillingness to take future classes with Shurtz to a desire to transfer to a different law school. Students have also expressed lack of trust and confidence in other teachers, as well as the administration, as a result of Shurtz's costume and the impacts stemming from that action.

Shurtz's position as a law professor likely does not give rise to a presumption she has greater access to real facts than a regular citizen. Although her costume was partly inspired by her thoughts on the lack of diversity in higher education, and she is of course a professor at such an institution, demographic data about the school is available to both students and the general public. Shurtz's position as a professor likely does not provide her with any greater access to those demographics.

As stated above, in evaluating and balancing the disruption and harm to the employer's operation and its provision of public services, courts do not require actual harm, and weight is given to the employer's reasonable prediction of disruption. In the present case, while the anticipation of disruption and harm was considered by the administration, the tangible harm followed quickly after the event, and the disruption and interference with operations has been significant and ongoing.

This investigation focuses on one instance of racially-based conduct. In addition, this conduct occurred off-campus. However, Shurtz invited all of her students from two classes, the invitation was sent by email through the class listservs, using the students' University email addresses, and most of the attendees were students or alumni. Half of the students interviewed personally felt, or understood that other students felt, that attendance at Shurtz's party was important in relation to the teacher-student relationship. One student clearly stated that attending the event felt like class participation and that this was significant because Shurtz's class sizes are small and therefore participation and face time with the professor are important.

The fact that the event was off-campus at Shurtz's home distinguishes it from the standard classroom environment in which the students can be considered a "captive audience," unable to just "avert their eyes" from something that offends them. However, several students said they felt like they could not leave when they wanted to, despite being offended and uncomfortable,

for the same reason they felt obligated to attend, and some said this was because Shurtz had papers of theirs still waiting to be graded.

Actual impacts that we heard from those interviewed included shock, anger, surprise, anxiety, disappointment, and discomfort with remaining at the event. Given the number of students who were present for the event, the publicity surrounding the incident, the severity of the costume choice and the level of offense, and the significant and ongoing impacts upon both the attendees as well as the student body, it is clear that Shurtz's costume was substantially disruptive to the educational environment. Outcomes and impacts upon the broader student body have been described at length above, but a summary of such impacts includes outright hostility and division between the students, the environment being described by some as "toxic," class time being spent on discussing the event and the students' reactions, the open forum, minority students feeling that they have become burdened with educating other students about racial issues and racial sensitivity, students using other offensive racially-based terminology during class times in the context of discussing this event and broader racial issues, feelings of anxiety and mistrust towards other professors beyond just Shurtz, students now avoiding spending time on campus as a result, and some students who are attempting to transfer to a different law school.

In evaluating the intersection between a University's policies against discrimination and its interests in control over the employment environment versus the employee's rights to free speech and academic freedom, the *Bonnell* Court clearly established that the employee's rights are not absolute. "Speech that rises to the level of harassment – whether based on sex, race, ethnicity, or other invidious premise – and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing." *Bonnell* at 824. The Court further found that "the College's interest in preserving a learning environment free of sexual harassment, among others, outweighs Plaintiff's claimed free speech and academic freedom interests." *Id.*

Our evaluation, consistent with our finding of discriminatory harassment, is that the effects of Shurtz's costume constitute disruption to the University significant enough to outweigh Shurtz's interests in academic freedom and freedom of speech in the type of speech at issue. In addition, the resulting hostile learning environment and impact upon the academic process renders this particular speech to be speech that the University has a strong interest in preventing.

It is important to note that the witness interviews described two additional factors which have contributed to the resulting outcome. One factor is the preexisting lack of diversity in the law school, which could be either the cause or result of other "fissures" that existed under the surface. The second factor consists of the reactions of the various relevant groups: the students, faculty, and administration. Some of the witnesses reported that the students' reactions to the event were racially insensitive or divisive, that the communications sent out by administration may have served to anger or confuse some students about the context of the event, and some of the faculty's responses or lack of responses to the resulting discussions in the classroom environment also contributed to the hostility and divisiveness in the law school.

It is unlikely that any investigation would be able to meaningfully evaluate how much of the resulting impact was caused directly by Shurtz and how much of the impact is connected to these

other factors. We acknowledge the presence of these other factors and the conclusion we reach is that Shurtz's costume and actions set a course of events in motion, even though she did not intend those outcomes, which have been very negative towards, and impactful to, the school and the learning environment.

VII. CONCLUSION

Based on the interviews conducted and our review and analysis of the information obtained during this investigation, we conclude:

1. That Nancy Shurtz's wearing of the costume at the stated event constitutes a violation of the University's policies against discrimination. We further find that the actions constitute Discriminatory Harassment under those policies.
2. That the actual disruption and harm to the University resulting from Nancy Shurtz's wearing of the costume at the stated event are significant enough to outweigh Nancy Shurtz's interests in academic freedom and free speech.

Respectfully Submitted,
Edwin A. Harnden
Shayda Z. Le
Barran Liebman LLP