



LIBERTY
AND JUSTICE
FOR ALL

THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA

1616 BEVERLY BOULEVARD LOS ANGELES CA 90026-5752 T: 213 977 9500 F: 213 250 3919 WWW.ACLU-SC.ORG

May 7, 2004

Via Facsimile to 323-341-4921

Ms. Sandra A. Cooper, General Counsel
Occidental College
1600 Campus Road
Los Angeles, CA 90041-3314

Re: Jason Antebi

Dear Ms. Cooper:

I am extremely concerned about Occidental's decision to punish Jason Antebi for sexual harassment and your attempt to rely on the ACLU's position on unprotected harassment to justify that decision. I have reviewed the harassment complaints filed by Occidental students against Mr. Antebi for statements he made, as well as numerous statements you point to in your April 2, 2004 letter to Greg Lukianoff of FIRE, and it is clear to me that however crude or offensive some people might find them, they constitute protected speech.

As I am sure you know, Occidental is covered by the Leonard Law, Cal. Educ Code § 94367, which states in pertinent part:

No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution of Section 2 or Article 1 of the California Constitution.

As a result, Occidental may not punish students for a wide variety of speech that many people, including Occidental students and professors, might find sophomoric, crude, or deeply offensive. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971) (jacket stating "Fuck the Draft" protected by the First Amendment); *Hustler v. Falwell*, 485 U.S. 46 (1988) (holding that imposing liability for intentional infliction of emotional distress for parody ad that states that Jerry Falwell had his first sexual experience with his mother in an outhouse violates the First Amendment). Thus, for example, while you point to Mr. Antebi's describing Occidental as "such a socialism peddling cunt" as apparent support for the school's punishing him, the law actually forbids Occidental from punishing him for speech like that. Similarly, Mr. Antebi's statement that "anyone [who] buys into the nonsense that only whites can be racist should be murdered in their sleep by a santa suit wearing fat man," obviously does not constitute a threat that is unprotected by the Constitution's First Amendment. *See, e.g., Watts v. United States*, 394 U.S. 705, 707-08 (1969) (reversing conviction for violation of statute prohibiting threat to harm

the President of man who stated “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”); *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)(“The purpose of the *Watts* constitutionally limited definition of the term ‘threat’ is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished.”).

You are correct that the ACLU has drafted a sample harassment policy to help guide colleges and universities on how to satisfy their statutory and constitutional obligations to protect speech, while also explaining where speech is so harassing as to be unprotected. A copy of the harassment policy is attached. That policy provides in pertinent part:

The intentional harassment of a person by another person or persons is not constitutionally protected. Actionable harassment must (1) target a specific person or persons; (2) be addressed directly to the person or person whom it harasses; (3) be intended in some measure to frighten, coerce, or intimidate its target; and (4) be sufficiently severe or pervasive to substantially impair a reasonable person’s participation in University activities or the use of University facilities.

However, you are incorrect to assert that the ACLU’s policy justifies punishing Mr. Antebi for his speech. It should be obvious from a cursory reading of the policy that speech such as Mr. Antebi’s calling his mother a “bitch” and a “whore” does not satisfy the definition of actionable harassment. Similarly, sophomoric insults, such as twisting a student’s name into the nickname “Van Der Douche” or calling another student a “bearded feminist” is not actionable harassment because the insults were spoken during a radio program, rather than “addressed directly” to the complaining students and because the speech is not frightening or intimidating, even if it is insulting.

I am also concerned that your letter appears to rely on a number of incidents, such as tires being slashed in the Women’s Center parking lot, as justification for punishing Mr. Antebi, especially since your letter states the College is “still investigating the incidents.” The ACLU acknowledges in example 2 of the attached policy that destruction of property does not constitute protected speech. However, if the College is still investigating these incidents, I can only assume that you have not found Mr. Antebi to have committed them. If your purpose in mentioning these incidents is to suggest that punishing Mr. Antebi is justified because his speech is responsible for inciting others to commit these acts, you are incorrect. Speech may only be punished on the grounds that it incited, or threatened to incite, illegal activity in the narrow circumstances set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

I certainly understand how speech such as Mr. Antebi’s can upset some students and faculty. Nevertheless, punishing a student for that speech is inconsistent with the law as well as



ACLU's policies. Indeed, the very ACLU briefing paper that you found on the internet and mention in your letter to Mr. Lukianoff states "The best way to combat hate speech on campus is through an educational approach that includes counter-speech, workshops on bigotry and its role in American and world history, and real – not superficial – institutional change."¹

I strongly urge you to rescind any finding of liability for harassment and any punishment that you have imposed on Mr. Antebi. Please feel free to contact me at 213-977-9500 ext 228 if you have any questions or concerns.

Sincerely,

Peter Eliasberg
Managing Attorney

cc: Mr. Ted Mitchell, President (via mail)
Mr. Frank Ayala, Jr., Dean of Students (via mail)
Mr. Rameen Talesh, Associate Dean and Director of Residential Life (via mail)
Mr. Jason Antebi (via e-mail)
Mr. Greg Lukianoff (via e-mail)

¹ Although there is no legal definition of hate speech, it is not clear that Mr. Antebi's speech would fall within most people's definition of that term. However, even if it did, that does not justify Occidental's punishing him for it, as I have explained above.

