

**LEGAL
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THE CURIOUS CASE AGAINST OBERLIN COLLEGE

– and why it matters to activists

OBERLIN COLLEGE and its famous music conservatory will always be an incredibly significant place for me. I graduated from Oberlin in 1982, and my experience there paved the way for my decision to practice union-side labor law. Studying at both the college and the conservatory stoked my deep love for music and gave me the impetus to find a way to merge music with my interest in law and social justice. (Oberlin is renowned because it combines a nationally-ranked liberal arts college with a world-class music conservatory). I am proud to say that I now represent three major AFM locals and hope to expand further. Oberlin helped me get here.

Therefore, it would be a gross understatement to say I was utterly shocked when I learned several months ago that a \$44 million jury verdict had been rendered against Oberlin, which included \$11 million in compensatory damage and \$33 million in punitive. The verdict received national attention, and – if left to stand – will have wide-ranging impact upon liberal institutions of higher education.

What led to this result is what I perceive to be an act of pure stupidity by several first-year students in the fall of 2016. One of them, who was 19 at the time, attempted to use a fake ID to purchase alcohol from Gibson's Bakery, a popular local spot known for its incredibly sumptuous whole wheat donuts. When the cashier realized

that the ID was forged, he grabbed it. Apparently, an altercation ensued that poured out into the street. The students were arrested on robbery charges. The student who had presented the ID was charged with a second-degree felony. After a voluntary plea deal was rejected in Oberlin municipal court, a court case proceeded.

Oberlin students did not take this well. Protests were organized against Gibson's. Allegedly, the college administration assisted in distributing flyers and encouraging protests. Oberlin also ceased doing business with Gibson's.

The activist flyers included language like this: "This [Gibson's] is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." (The students who had attempted to buy alcohol at Gibson's on the night of the incident were black.)

Gibson's initiated a civil suit for "defamation, slander and tortious interference with contract and business relations." This suit went to trial and the \$44 million verdict was the result.

This lawsuit has been the subject of much debate that mirrors the polemics of our current national politics. On one hand, some conservatives viewed the Gibson's verdict as a fair and just result because Oberlin has "long been known as an out-of-control activist college," to quote one point of view I came across. William Jacobson, a columnist for the Wall Street Journal, wrote, "The jury held accountable an unhinged progressive activist college that lost concern for the lives of working people in its community."

On the other hand, liberal voices denounced the verdict as potentially stifling First Amendment freedom of expression of college students.

Colleges and similar institutions act in what we call in legal terms *parens patriae* to its students – legal guardianship. In Oberlin's view, the college was protecting the students by making sure they protested in a safe and controlled environment. On the other hand, neither the college nor the students had a right to intentionally damage a community business because they disagreed with its actions.

But is calling Gibson's Bakery "racist" actually illegal? Accusing a business of being racist can be construed as mere opinion, which is permissible under the First Amendment.

As noted by the Ohio Court of Appeals in *Condit v. Clermont County Review*, 110 Ohio App. 3d 755 (1996), "Numerous courts have concluded that allegations of fascism, anti-Semitism, or other accusations of ethnic bigotry are not actionable as defamation."

Another example is *Buckley v. Littell* (C. A. 2, 1976), 539 F. 2d 882, 891-895. Here the court wrote that the word "fascist" is loose and ambiguous and cannot be regarded as a statement of fact because of the "tremendous imprecision of meaning and usage of the term).

In *Stevens v. Tillman* (C. A. 7, 1988), 855 F. 2d 394, 402, the court wrote that the term "racist" is "hurled about so indiscriminately that it is no more than a verbal slap in the face."

In *Raible v. Newsweek* (W. D. Pa. 1972), 341 F. Supp. 804, 807, the court wrote that "to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel."

In *Rambo v. Cohen* (Ind. App. 1992), 587 N. E. 2d 140, 148-149, the court wrote that the phrase "anti-Semitic" is not defamatory per se.

In other words, calling Gibson's Bakery "racist" is not by itself libel, according to abundant case law. In addition, Oberlin College apparently had evidence that Gibson's in fact does engage in discriminatory conduct, but the college was not allowed to present this evidence. Furthermore, Oberlin did not itself create the flyer. The college seems to have been accused of "aiding and abetting libel," a theory that does not actually exist in law. Finally, the punitive damages award exceeded the maximum allowed by law; the court has already decreased it. Clearly, issues with this verdict exist.

This entire controversy could have been avoided had cooler heads prevailed. Both the college and the students believed that Gibson's was wrong to press charges against this kind of petty crime. This matter could have been referred to the internal disciplinary processes within the college rather than the criminal justice system.

When I was at Oberlin, there were riots on campus related to recruitment efforts by the CIA. I remember other altercations that included the use of chemical mace. All of these were resolved internally. That process was no joke, as I am aware of one student who was expelled as a result of it. Another student was given severe penalties.

For union activists, this case shows us the times we're in. We should be allowed to use free speech in our flyers and call out racism when we believe we see it. But courts don't always decide in our favor – at least not always on the first round.

In any event, I will be following this case carefully. And when I return to Oberlin for my 40th reunion in 2022, I will make sure to reminisce about all the amazing times I had there – and the donuts.