WHAT'S IN A NAME, ANYWAY? MAKING SENSE OF TITLE IX, HOSTILE ACTS, AND MICROAGGRESSIONS

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An incident at the University of Tennessee brought Title IX to the forefront of discussion when freshman Keaton Walhbon was accused of sexual harassment after writing a pornographic model's name to refer to his lab instructor on a quiz. A question on the quiz (see Exhibit 1) in his Earth Science course asked students to write the name of their lab instructor or to *"make something good up"* if they could not remember it.

According to him, Keaton Wahlbon simply could not remember the name of his female lab instructor, so he wrote *"Sarah Jackson."* Professor Deane, the instructor, gave Wahlbon a grade of zero on the quiz and wrote *"inappropriate"* next to Wahlbon's response, believing that Wahlbon had deliberately used the name of a famous porn actress. Wahlbon emailed the professor (see Exhibit 2) to ask why he was given a grade of zero and to request that the grade be changed.

The authors developed the case for class discussion rather than to illustrate either effective or ineffective handling of the situation. The case and its accompanying instructor's manual were anonymously peer reviewed and accepted by the ***Journal of Case Research and Inquiry, Vol. 6, 2020***, a publication of the Western Casewriters Association. Contact: Inae Yang, San José State University, 1 Washington Sq., San Jose, CA 95192, inae.yang@sjsu.edu.

Exhibit 1. The Quiz

Source: https://archive.totalfratmove.com/keaton-wahlbon-sarah-jackson-tennessee/

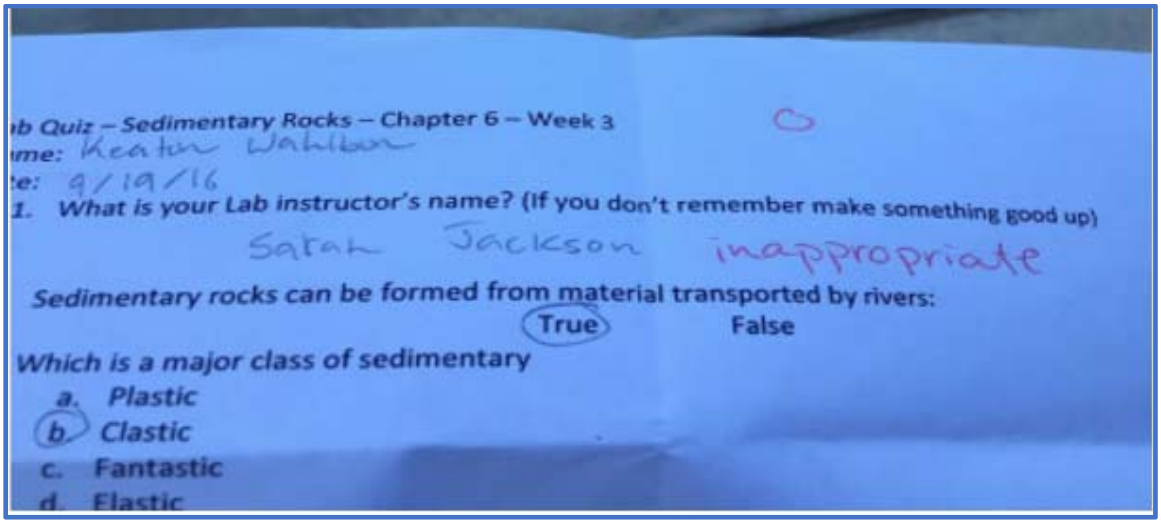

Exhibit 2. The Email

Source: https://archive.totalfratmove.com/keaton-wahlbon-sarah-jackson-tennessee/

Professor Deane responded (see Exhibit 3) that he had *"no way of determining* [Wahlbon's] *intent"* and believed that giving Wahlbon a grade of zero was the appropriate action in the context of the Title IX definition of sexual harassment.

Exhibit 3. The Professor's Reply

Source: https://archive.totalfratmove.com/keaton-wahlbon-sarah-jackson-tennessee/

Wahlbon, Keaton

W I wanted to talk about a grade I received on a lab quiz. I got a 0 on my geology lab quiz because wa

D **Deane, William**
to me, McKay,, Richter,
1 hour ago Details

Keaton,

I have no way of determining your intention. I can only consider the result. The result is that you gave the name of Sarah Jackson, who is a lingerie and nude model. That result meets the Title IX definition of sexual harassment.

The grade of zero stands and will not be changed.

Bill Deane

Wahlbon claimed that it was an honest mistake and that *"Sarah Jackson"* was a generic name that had just popped into his mind. He also insisted that he had never heard of the porn actress. Wahlbon wrote:

> *I literally put down a very common girl name and a common last name, so I put down Sarah Jackson. Turns out Sarah Jackson is a porn star so I got a 0 for the whole quiz…I had no idea that was the case and* [I had] *zero intention of trying to be funny or rude* (Lee 2016).

Neither Professor Deane nor the lab instructor filed a complaint. Nonetheless, university officials investigated the case to determine if there was a Title IX violation after an anonymous faculty member, who had read about the incident online, raised the issue. Was this incident a Title IX violation? Why should it matter in an academic setting? Should students be concerned that something they said or did in the classroom could be interpreted as sexual harassment?

Definition of Sexual Harassment under Title IX

Passed in 1972, Title IX of the Education Amendments Act ("Title IX") prohibited discrimination on the basis of sex in federally funded education programs and activities. Title IX defined sexual harassment as *"unwelcome conduct of a sexual nature"* which can encompass *"sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."* Title IX also includes a prohibition of *quid pro quo* sexual-harassment behavior - a situation in which a superior offered advancements or benefits to someone in exchange for sexual favors. In 1980, the Equal Employment Opportunity Commission expanded the definition of sexual harassment to include the idea of a *hostile working environment* (EEOC 2016), which encompassed sexual stereotyping or derogatory speech based on sex. For an academic environment to be considered a hostile environment under Title IX, the perpetrator's actions needed to be so *"severe, pervasive and objectionably offensive such that it undermines the victim's educational experience and denies equal access to an institution's resources and opportunities"* (*Davis v. Monroe County Board of Education* 1999).

That definition can become more complex in academia where such policies may conflict with free speech rights under the First Amendment. Public universities are obligated to abide by constitutional guarantees, such as free speech, but they must also consider that sexual harassment in an academic context can severely affect a student's ability to participate in or benefit from school. In the court case *Saxe v. State College Area School District* (2001), the Third Circuit Court stated that the Free Speech Clause protected a wide variety of speech that listeners may consider deeply offensive, such as such as derogatory remarks on an individual's

ethnicity or cultural background. The court further noted that anti-discrimination laws could not regulate oral or written expression on topics that may offend others due to the First Amendment rights, *"however detestable the views expressed may be"* (*Saxe v. State College Area School District* 2001).

The Department of Education's Office for Civil Rights (OCR) was tasked with interpreting and enforcing Title IX; it issued *Questions and Answers on Title IX and Sexual Violence* (Lhamon 2016). In that document, the OCR addressed potential conflicts with the principles of free speech; OCR noted that some students' opinions that a statement was offensive was insufficient evidence to constitute a hostile environment under Title IX. Only unlawful physical harassment required reporting to the school Title IX coordinator or other appropriate school officials. In practice, OCR's guidelines made it more difficult for educational institutions to identify and address claims of sexual harassment.

Trends of Sexual Harassment in Higher Education

According to the *AAU Campus Climate Survey on Sexual Assault and Misconduct* (2017: p. xiv), of the 150,000 students who completed the survey, 47.7 percent of students indicated that they had been victims of sexual harassment. Nonetheless, the actual numbers of cases reported were significantly lower. Specifically, at the 28,000-student University of Tennessee, there were only three sexual harassment cases reported to the school (Title IX Annual Plan, University of Tennessee 2016). The faculty member who brought the Wahlbon incident to the forefront might have been drawn to do so due to a previous high-profile case in which the University of Tennessee paid a $2.48 million dollar settlement to 8 women in response to their complaints against male student athletes. The federal lawsuit stated that the University had committed Title IX violations and fostered a *"hostile sexual environment"* beginning in 1995 (Andrusewicz 2016). The ***Policy on Sexual Misconduct, Relationship Violence, Stalking, and Retaliation*** for the University of Tennessee can be found at https://titleix.utk.edu/university-policy-procedures/.

Title IX Cases at the Supreme Court

More than 25 years after Title IX was passed, the U.S. Supreme court issued a standard that would be applied to sexual harassment claims made against educational institutions under Title IX. There were three Supreme Court cases on Title IX that addressed students' claims of sexual harassment (Heckman 2006; MacKinnon 2016).

Franklin v. Gwinnett County Public Schools (1992) was the first case in which the Supreme Court upheld an award of monetary damages under Title IX. This case went to the Supreme Court when a high school student brought a Title IX claim against the school board, seeking monetary reparations after the board took no effective action against a report of sexual harassment. The court analyzed the case to determine if there was a legislative intent concerning any limitations on the available remedies allowed by Title IX. In the *Franklin* case, the Supreme Court upheld the recovery of damages, finding it reasonable to conclude that the legislative intent was concordant with the implication of monetary damages as a reasonable remedy. The decision expanded the scope of available remedies for sex discrimination in federally funded education. At the same time, it increased the incentive for schools to be vigilant and proactive against sexual harassment.

Six years later, the Supreme Court was once again called upon, this time to delimit the circumstances in which damages were to be recovered in *Gebser v. Lago Vista Independent School District* (1998). The court examined whether the school district should be held liable for damages under Title IX after a male teacher's sexual harassment of a female student even when the school district had not been officially notified of the situation. The court ruled that *"damages may not be recovered in those circumstances unless an official of the school district who, at a minimum, has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct"* (*Gebser v. Lago Vista Independent School District* 1998). By addressing the internal complaint procedure in Title IX in the Gebser case, the court indicated that "[f]*ailure to comply with the regulations,*

however, does not establish the requisite actual notice and deliberate indifference" (*Gebser v. Lago Vista Independent School District* 1998). For young victims of sexual abuse by educators, however, the consequences of this decision have been significant. In some cases, it has created an insurmountable hurdle for a victim trying to prove the school liable.

One year later, the Supreme Court in *Davis v. Monroe County Board of Education* examined if the school district should be held liable for sexual harassment among peers under Title IX. The court ruled that *"[f]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"* (*Davis v. Monroe County Board of Education* 1999). The court additionally noted that certain behaviors would not satisfy this standard, even though it may be offensive, stating that *"damages are not available for simple acts of teasing and name–calling among school children, however, even where these comments target differences in gender"* (*Davis v. Monroe County Board of Education* 1999). Therefore, behaviors must meet certain standards to be considered sexual harassment.

These court decisions provided the groundwork for defining what was considered sexual harassment under Title IX and what circumstances called for reparations. Considering these Supreme Court guidelines, should Wahlhon's actions be considered sexual harassment?

Freedom of Speech and Education

The First Amendment of the United States Constitution was adopted in 1791 as one of the ten amendments that constitute the Bill of Rights. The First Amendment states: "*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."* It protects several basic liberties: freedom of religion, speech, press, petition, and assembly. The First Amendment

prevents the government from restricting a person or organization's expression of ideas, messages, or content. This means that it allows individuals or private organizations to determine their own rules for the liberties mentioned above.

One of the most fundamental rights guaranteed is the freedom of speech, as many other constitutional freedoms would be meaningless without it. The free speech clause protects speech only - not conduct - but does not define what speech entails. The Supreme Court has interpreted the clause to protect against government regulation of certain core areas of protected speech, while in other scenarios the court treated certain types of speech as having limits. In some cases, courts have had to find a delicate balance to determine if the right of free speech outweighs the governmental interest claimed.

The right to speak freely one's mind is generally protected by the First Amendment, such as by expressing dissatisfaction with the government. In other words, the government cannot prohibit or regulate the content of fully protected speech. However, some speech falls outside of constitutional protections and may be entirely forbidden by the government. The U.S. Supreme Court has identified select categories of unprotected speech, which include obscenity, defamation, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography. Other types of speech, such as commercial speech or political speech, are entitled to First Amendment protection, but this protection is considered limited. This means that the government may impose restrictions on the time, place, or manner of speech when this restriction is reasonably related to the protection of public interest.

Free speech ideas often conflict with the rights and values embodied in Titles VII and IX, which address the non-discrimination and equal opportunity policy (Roederer 2018). There has been considerable tension between the right to free speech and the right to equality. In particular, educational institutions have a duty to enforce Title IX regulations by protecting students from gender-based violence and harassment, as well as by providing equitable facilities. As in the educational institutions, they are instrumental in achieving other important educational values;

however, these policies may limit free speech. The courts have often struggled to find a balance in this scenario (Kirshenbaum 2002). They are tasked with both protecting a person's right to free speech while at the same time considering how speech might negatively affect other people or groups of people, especially when it comes to their educational and professional opportunities (Roederer 2018). Educational institutions must find the balance between free speech and the mission provide equal opportunity and an environment conducive to institutional goals.

However, Title VII differed from Title IX in that it applied to employers of 15 employees or more, not only recipients of Federal financial assistance like colleges and universities. Title VII deals with employment discrimination by requiring employers to adhere to statutory requirements (McGuire 2016). One of those requirements is that employees should be free from sexual harassment or any other hostile environment. The Equal Employment Opportunity Commission (EEOC) enforces Title VII, which prohibits unlawful employment discrimination and workplace harassment. The EEOC definition of harassment was based on employment discrimination with the important difference that petty slights and isolated incidents were not illegal (EEOC 2016). Under Title VII, unlawful conduct was defined as what a reasonable person would regard as intimidating, hostile, or offensive, which was unwelcome conduct directed at protected groups (*i.e.*, race, color, religion, sex, those 40 or over, and those with disabilities). For example, harassment was considered illegal when offenses, such as physical or verbal abuse, affect an individual's ability to perform at work (EEOC 2016). Employers were motivated by Title VII to eliminate conduct and speech that could lead to harassment in the workplace. If the complaints were unfounded or involve innocuous remarks, a company could ignore the concern. However, companies had the authority to decide, even in the name of efficiency, to reprimand or fire employees who might be contributing to a hostile environment.

Microaggression or Hostile Act:

The Difficulties of Defining Actions under Title IX

There was wide support for the intolerance of sexual harassment and discrimination. However, when rude remarks were not considered severe enough to cause substantial emotional distress, they were often called *"slights."* Slights could be labeled as micro-aggressions or narcissistic injuries when they bruised one's ego or made one feel belittled (Taylor 2012). Certainly, speech that preyed on others' vulnerabilities, which was often true of sexual harassment, merited immediate denouncement. Yet some inappropriate comments could have innocent explanations: they could have been said on impulse, were not intended to be threatening, provided a different perspective, or were born of immaturity or ignorance. In these cases, initiating a conversation or confronting the speaker about why the comment was hurtful, might help avoid an escalation to the Title IX office.

In education, microaggressions can create an environment in which the victim experiences stress, lower self-esteem, and career consequences (Ellemers 2018). Microaggressions are defined as *"subtle, stunning, often automatic, and nonverbal exchanges which are 'put downs' of people from minority and marginalized statuses"* (Pierce, Carew, Pierce-Gonzalez & Wills 1977, p. 65). Microaggressions are also found to be resultant of gender bias (Heilman 2012).

While microaggressions are subtler, the action could also be considered a hostile act. Rotundo and her colleagues categorize these behaviors into "personal derogatory attitudes" in which the "behaviors reflect derogatory attitudes toward women" and can be "aimed specifically at the target person" (Rotundo, Nguyen & Sackett 2001, p.916). With this definition in mind, was Wahlbon's action intentionally directed at his lab instructor, and therefore a hostile act? Alternatively, should Wahlbon's action be considered a microaggression rather than a hostile act?

Conclusion

Students, staff, and faculty in a university setting can experience a tension between the right to free speech and Title IX regulations. In this case, how does the First Amendment come into play in this incident? Was Wahlbon's speech protected under the First Amendment? How did Title IX influence the actions of those involved in this case? Why was this a Title IX and not a Title VII violation? How is Title VII similar to and different from Title IX? Finally, would punishing these types of incidents prevent future incidents? More specifically, was Professor Deane right to fail Wahlbon's assignment? Was there instead a middle ground between failing Wahlbon and ignoring the situation? How else could this situation have been handled?

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References

American Association of Universities. (2017). AAU Campus Climate Survey on Sexual Assault and Misconduct. Retrieved from: https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf

Andreusewicz, M. (2016, July 6). University of Tennessee settles sexual assault lawsuit. The Two-Way. Retrieved from https://www.npr.org/sections/thetwo-way/2016/07/06/484891430/university-of-tennessee-settles-sexual-assault-lawsuit

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

EEOC. (2016). Harassment. Equal Employment Opportunity Commission.

Ellemers, N. (2018). Gender stereotypes, *Annual Review of Psychology, 69*, 275-298.

FIRE. (2013, July 13). Department of Justice and Department of Education's Office for Civil Rights Joint Findings Letter to the University of Montana. FIRE.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Gebser v. Lago Independent School District, 524 U.S. 274 (1998).

Heckman, D. (2006). Deconstructing Title IX Sexual Harassment Matters Involving Students and Student-Athletes in the Post-Davis Era, *Education Law Reporter, 206*, 469-500.

Heilman, M. E. (2012). Gender stereotypes and workplace bias. *Research in Organizational Behavior, 32*, 113-135.

https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf

Kirshenbaum, A. M. (2002). Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist, *Texas Journal of Women and the Law, 12*, 67-95.

Lee, H. (2016, October 3). Tennessee student accidentally puts porn star's name on quiz, professor gives him 0 for sexual harassment. Retrieved from https://archive.totalfratmove.com/keaton-wahlbon-sarah-jackson-tennessee/

Lhamon, C.E. (2016, February 17). Letter to Honorable James Lankford from Catherine E. Lhamon, Assistant Secretary for Civil Rights, United States Department of Education]. United States Department of Education.

MacKinnon, C. A. (2016). In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education, *Yale Law Journal, 125*, 2038-2105.

McGuire, Stephen. (2016). Note on Gender Discrimination and Sexual Harassment, J*ournal of Case Research and Inquiry, 2*. 139-165.

Pierce, C. M., Carew, J. V., Pierce-Gonzalez, D., & Wills, D. (1977). An experiment in racism: TV commercials, *Education and Urban Society, 10*, 61– 87.

Roederer, C. J. (2018). Free speech on the law school campus: Is it the hammer or the wrecking ball that speaks? *University of St. Thomas Law Journal, 15*(1), 26.

Rotundo, M., Nguyen, D. H., & Sackett, P. R. (2001). A meta-analytic review of gender differences in perceptions of sexual harassment, *Journal of Applied Psychology, 86*(5), 914-922.

Saxe v. State College Area School District, 240 F. 3d 200 206 (3rd Cir. 2001).

Taylor, S. (2012, January 22). Slighting-the dangers of being disrespected. Retrieved from https://www.psychologytoday.com/us/blog/out-the-darkness/201201/slighting-the-dangers-being-disrespected

University of Tennessee. (2016). Sexual misconduct, relationship violence, stalking, and retaliation annual report (January – December, 2016). Retrieved from https://titleix.utk.edu/wp-content/uploads/sites/75/2017/05/2016_annual-report.pdf

Journal of Case Research and Inquiry

Peer-Reviewed Cases, Notes and Articles

A publication of the Western Casewriters Association

Vol. 6
December 2020

ISSN 2377-7389