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November 8, 2000

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Catherine Mizell, Esquire
Vice President and General Counsel
University of Tennessee-Knoxville
719 Andy Holt Tower
Knoxville, TN 37996-001

Dear Ms. Mizell:

Re: Complaint Number 04-00-2137
Closure Letter

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above referenced complaint filed against the University of Tennessee at Knoxville (University). [b)(7)(c)] (complainant) alleged that the University discriminated against him on the grounds of sex while he was enrolled in the University's graduate nursing program. Specifically, it was alleged that Professor [b)(7)(c)] made derogatory statements about men that created a sexually hostile environment and that he received a low grade from Professor [b)(7)(c)] after he turned down her invitation to dinner. Additionally, complainant alleged that Professor [b)(7)(c)] retaliated against him for reporting Professor [b)(7)(c)] sexually hostile remarks to the associate dean by failing him in her clinical course. He also claimed that the second time he took Professor [b)(7)(c)] course she treated him differently than a similarly situated female student.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. Sections 1681 et seq. and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex by recipients of Federal financial assistance. The University receives Federal financial assistance from the Department. Therefore, it is subject to the requirements of Title IX.

Section 106.8(a) and (b) of the regulation implementing Title IX requires recipients to designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities, including the investigation of any complaint alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX. It also requires the recipient to notify all of its students and employees of the name, office address, and telephone number of the appointed employee and to adopt and publish

Tab D (5)

grievance procedures for the prompt and equitable resolution of complaints alleging prohibited actions. Section 106.9(a) requires recipients to disseminate information about its nondiscrimination policy on the basis of sex and protections against such discrimination that are assured by Title IX.

34 C.F.R. Section 106.31(a) and (b) of the regulation implementing Title IX generally prohibits recipients from excluding persons from participation in, denying persons the benefits of, or discriminating against any person on the basis of sex under any program operated by the recipient. These subsections prohibit recipients from taking any of the following actions on the basis of sex: treating persons differently in the provision of any aid, service, or benefit; subjecting persons to separate or different rules of behavior, sanctions, or other treatment; discriminating against persons in the application of rules of appearance; or otherwise limiting any individual in the enjoyment of any right, privilege, advantage, or opportunity. Allegations of discrimination based on a sexually hostile environment are evaluated under these provisions.

A sexually hostile environment exists when unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by another student, a school employee, or a third party are sufficiently severe, persistent, and objectively offensive as to limit a student's ability to participate in or benefit from an educational program or activity or to create a hostile or abusive educational environment. If OCR finds: (1) a sexually hostile environment, (2) of which a recipient has notice, and (3) where the recipient has reacted with deliberate indifference and has not taken action reasonably calculated to redress this hostile environment, OCR will determine that the institution is in violation of Title IX.

OCR's investigation of the allegations included an analysis of records and documents pertinent to the issues of the complaint, interviews, and statements by complainant and University officials. Our findings regarding the allegations are as follows:

Allegations against Professor Grubbs

Complainant enrolled in the nursing course N540 during the Spring semester of 1998. Professor Susan Grubbs (Grubbs) was the complainant's section instructor and Professor Mary Kollar (Kollar) was the coordinator for all sections of the course. Complainant's transcript reveals that he received a grade of C for this class.

Complainant maintains that Grubbs made derogatory statements about men that created a sexually hostile environment. Specifically, complainant states that Grubbs joked in class that words describing women's health problems started with the word "men", i.e., menopause, menstruation, and menstrual cramps. Complainant also informed the University that Grubbs made a comment on castrating her daughter's male toys so that they would become female in appearance.

The University has a discrimination complaint process and a notice that states that sex discrimination is impermissible. The University's policy regarding sexual harassment is

found in the student's handbook. The notice informs people that a person who feels that he or she is subject to unlawful sex discrimination may file a complaint with the University's Diversity Resources and Educational Services Office (DRES). If a complaint is filed, DRES then conducts an investigation into the allegations and takes corrective actions if necessary. If a person is unhappy with the findings of the DRES, he or she may appeal the decision.

In May of 1999, DRES received an email from complainant in which he complained about sexually biased jokes and discriminatory grading practices. In an email dated June 1, 1999, complainant informed DRES that the jokes and comments "were not directed specifically towards [him], just his gender." In an email dated August 12, 1999, DRES reported to complainant the results of its investigation into the allegations. DRES concluded that there was no evidence of improper grading practices.

In order for a sexually hostile environment to exist, a reasonable person must perceive the situation as one that is hostile and abusive. Additionally, the conduct must consist of severe and pervasive language or activity that is of a sexual or gender-related nature. The sporadic use of gender-related jokes and occasional teasing usually does not create a sexually hostile environment.

In this case, the two comments described above were made over the course of a semester in a class that was composed of graduate students. Two comments of this nature that were made over an extended period of time and in front of graduate students are not sufficient to constitute severe and pervasive conduct when viewed from the perspective of a reasonable person. Accordingly, OCR concludes that there is insufficient evidence that complainant was subjected to a sexually hostile environment.

Complainant also maintains that he received a low grade, i.e., a 52 percent, from (b)(7)(C) because he refused an invitation to dinner. The University, through its counsel, maintains that (b)(7)(C) has a policy against socializing with students and denies that she invited complainant to dinner." The University contends that "complainant received a low grade because of the poor quality of his paper and because he plagiarized certain sections of the paper." A review of the paper in question indicates that the person who graded the paper stated that a portion of the paper constituted plagiarism because complainant did not indicate that he was directly quoting from a source when explicating a concept. Hence, the University has presented evidence that the grade was not the product of unlawful sexual discrimination.

Moreover, complainant stated in a grade appeal letter to the University's President, Dr. Gilley, that on subsequent assignments in the class he "averaged a B on all of my remaining class requirements so that even with a 52 on one paper, I managed to pass the class with a C." Accordingly, as the University correctly analyzes this sequence of events, "it strains all reason to suggest [that (b)(7)(C) would give him one low grade and then later give him two higher grades if she [i.e., (b)(7)(C)] were retaliating for the rejection of a dinner invitation." Hence, OCR finds insufficient evidence that

complainant received a low grade from (b)(7)(C) after he turned down an alleged dinner invitation from her.

Allegation of retaliation and disparate treatment by (b)(7)(C)

Complainant next alleged that (b)(7)(C) retaliated against him for reporting (b)(7)(C) sexually hostile remarks to the associate dean. The retaliation took the form of failing complainant in her (b)(7)(C) clinical course. Under the applicable C.F.R. regulations, one can make a prima facie case of retaliation by showing the following elements:

1. the student engaged in a protected activity;
2. the institution was aware of the student's activity;
3. the institution took adverse action against the student; and
4. there was an apparent causal connection between the adverse action and participation in the protected activity. There are several types of evidence relevant to proof of a causal connection, including: (1) closeness in time between knowledge of the protected activity and adverse action; (2) change in treatment of the individual after the recipient had knowledge of the protected activity; and (3) treatment of the individual compared to other similarly situated persons.

If these elements are established, OCR inquires into whether the institution has a legitimate, nondiscriminatory reason for taking adverse action against the student. The evidence is then analyzed to determine whether the proffered reason is merely a pretext for retaliation.

Applying these elements to the facts of this case, complainant states that he complained to the associate dean of the nursing school about Grubbs's allegedly improper conduct. OCR does not have written evidence of this complaint to the associate dean, but OCR will assume that such a complaint was made during the time in which complainant was enrolled in (b)(7)(C) course. This means that complainant engaged in a protected activity and that the University was aware of this activity because complainant informed an administrator of the University of the allegations.

However, complainant did not fail any course. Instead, complainant withdrew from N541. A review of complainant's transcript reveals that complainant withdrew from Class N541 in the Fall semester of 1998. The University maintains that complainant would have failed N541 "if he had not been allowed to withdraw." The University asserts that the reasons why complainant was not in a position to pass the course was because he "failed to show up for his assigned cases, was defensive with patients, failed to adequately take patient histories, and he failed to adequately evaluate the patients, including prescribing penicillin to a patient with a penicillin allergy."

Pursuant to the University's policy, a student who fails a clinical course is removed from the nursing program. The University contends that complainant was given several options because of his poor performance in N541. One of these options was taking

another clinical course, i.e., N572. In the Spring semester of 1999, complainant enrolled in N572, and he received a C for that class.

It is arguable that complainant is asserting that the University forced him to withdraw from the course by threatening to fail him. Accordingly, OCR will assume that this is the allegation and that there is therefore information that could support the contention that the University took adverse action against complainant when it allegedly forced him to withdraw from N541 or face a failing grade.

OCR now examines whether there was an apparent causal connection between the adverse action and participation in the protected activity. Complainant was enrolled in Grubbs's class during the Spring semester of 1998, and he complained to the associate dean during this period of time. Complainant withdrew from N541 during the Fall semester of 1998, i.e., the semester after he was enrolled in Grubbs's course. This means that there is close temporal proximity between the protected activity and adverse action.

However, there is no evidence that the University changed its treatment of complainant once the University had knowledge of complainant's protected activity. A review of complainant's transcript does not reveal any serious academic difficulties until complainant was enrolled in N541. Hence, it was not until complainant was in danger of failing a course, i.e., N541, that the University conferred with complainant regarding his academic situation and given options to prevent a situation that could result in his removal from the program. Accordingly, there is insufficient evidence that the University changed its treatment of complainant after it received knowledge of complainant's protected activity.

Moreover, there is insufficient evidence that the University treated complainant in a different manner than similarly situated individuals. A female student also experienced academic difficulties in a clinical class. This female student was given the option to take another clinical class. Hence, both the female student and complainant were treated similarly when faced with a failing grade in a clinical class.

Additionally, the University possesses a legitimate, nondiscriminatory reason for taking adverse action against complainant. The University has provided OCR the notes of the associate dean that were made during the meeting on December 2, 1998, in which complainant's performance in the upcoming Spring semester of 1999, N572 class (i.e., the course complainant took after his withdrawal from N541) was discussed. During this meeting, the clinical requirements for N572 were expressly articulated. In addition, the criteria for determining whether a site visit was unsatisfactory were clearly delineated. It also was stated that the paper in the course would deal with the issue of professionalism. Finally, the notes articulate the skill areas that complainant needed to master in order to pass the course.

The University has therefore presented information that supports its position that complainant's withdrawal from N541 was based upon the neutral, nondiscriminatory reasons of poor performance in the class. There is no evidence that the University's

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proffered reason is a pretext for unlawful discrimination. Accordingly, OCR finds insufficient evidence of retaliatory conduct by the University.

Complainant's final allegation is that he was treated in a different manner than a female student when he took ^{(b)(7)(C)} course, i.e., Class N572 in the Spring semester of 1999. Specifically, it is alleged that a returning female student was not subject to the same number of site visit requirements that he (complainant) was subjected to and that he was required to submit a different type of paper for the course. However, as discussed above, prior to the beginning of Class N572 the University delineated in clear terms complainant's requirements for the class N572. The number of site visits and the content of the course paper are described in the notes of December 2, 1998, and these requirements were developed in order to address complainant's deficiencies in the clinical aspect of his graduate education.

The University avers that the female student's deficiencies were not the same as complainant's. This is the reason why the female student did not have the same requirements for the course that complainant was required to complete. Dr. Gilley has informed complainant of the denial of his grade appeal because there was "no reason to grant the relief" requested. The evidence shows that complainant was required to abide by the N572 course criteria set out in the meeting held on December 2, 1998. Consequently, OCR finds insufficient evidence that complainant was treated in a dissimilar manner to that of similarly situated female student on the basis of sex.

Based upon the foregoing reasons and analysis, OCR finds insufficient evidence that complainant was subjected to a sexually hostile environment or that he was discriminated against based upon his sex. Furthermore, there is insufficient evidence that the University took retaliatory action against complainant. Accordingly, OCR is closing the investigation of this complaint as of the date of this letter.

We appreciate the cooperation extended by you and your staff during the investigation of this complaint. If you have any questions regarding this matter, please contact Mr. Thomas Falkinburg, General Attorney, at (404) 562-6353, or me at (404) 562-6365. Thank you for your cooperation in this matter.

Sincerely,


Vickie A. Barrows, Esquire
Team Leader, Team E