



Sexual Harassment and the First Amendment

Will Your Policies Hold Up In Court?

BY SAUNDRA K. SCHUSTER

Public colleges and universities strive to create and sustain learning environments that promote diversity, maintain civility, and establish atmospheres of mutual respect. At the same time, these institutions of higher education proudly acknowledge they represent the “marketplace of ideas” and academic freedom in settings where scholarly and divergent opinions are welcome.

These important and noble goals can create conflict when the expression of an individual’s opinion is articulated in such a way that it offends, embarrasses, or degrades another. This challenge is a complex one for public institutions that must uphold the First Amendment rights of students, faculty, and staff while maintaining the values of personal dignity and civility to which higher education institutions aspire. It also challenges private institutions that voluntarily uphold Constitutional rights, and private colleges in California, where Leonard’s Law imposes First Amendment requirements through state statute. Thus, higher education institutions must find the means to reconcile the often-competing values of personal expression and civility. Unfortunately, many institutions choose to maintain their commitment to a civil, respectful community by implementing sexual harassment policies that go far beyond the legal framework created by the legislature and the courts.

The Conflict

The conflict of harassment policies with First Amendment freedoms generally stems from two factors. First, institutions frequently apply workplace language related to sexual harassment to their student sexual harassment policies. Restrictions on expression in the workplace are far more expansive and legal than the restrictions on student expression. Second, many institutions do not create clear distinctions about expression versus conduct. Over-reaching sexual harassment policies may be used to limit verbal or written interaction among and toward students.

Title VII of the Civil Rights Act of 1964 set the standard prohibiting gender discrimination in the workplace. In a 1986 U.S. Supreme Court case, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 5, the Court stated that sexual harassment is a form of gender discrimination, subject to Title VII regulations. Subsequent cases established the framework for holding an employer liable for sexual harassment in the workplace.

The Equal Employment Opportunity Commission (EEOC) is the government agency charged with overseeing workplace discrimination issues, including sexual harassment. The EEOC publishes language to describe sexual harassment in the workplace that is adopted by institutions. However, many public institutions have adopted the sexual harassment language prescribed by the EEOC as the standard for

prohibited conduct by students. Sexual harassment behavior related to students is governed by Title IX of the Educational Amendments of 1972, a federal law that prohibits gender discrimination in the education context. Like Title VII, Title IX was interpreted by the U. S. Supreme Court to apply gender discrimination to sexual harassment in *Franklin v. Gwinnet Cty. Public Schools*, 503 U.S.60 (1992). The court further established the contextual parameters of hostile environment sexual harassment under Title IX in *Davis vs. Monroe County Board of Education*, 526 U.S. 629 (1999). The decision states that the conduct or expression must 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.”

Although Title VII and Title IX are similar, in that they both prohibit discrimination based on gender, they are not identical laws, and the scope and context to which they are applied are distinctly different. Unfortunately, many public institutions begin with publication of their student sexual harassment policy using the broader language of sexual harassment from the employment context. Then they embellish the context to incorporate prohibition of expression that reinforces the institutional mission related to civility and respect.

Freedom of Expression Issues

Civility, respect, and support for diversity are important institutional values, and most institutions strive to reinforce these aspirations. However, using institutional policies that incorporate campus conduct and discipline to enforce these values make institutions vulnerable to challenge by prohibiting forms of expression that are protected under the First Amendment.

The U.S. Supreme Court, in *Tinker v. DesMoines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), stated, “a school may not prohibit speech unless the speech will materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” In a further decision, *Healy v. James*, 408 U.S. 169 (1972), the court stated that, “the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.” These cases underscore the court’s adherence to the principles of free expression in the educational context.

In order to avoid First Amendment challenges, institutions should also ensure that their student sexual harassment poli-

cies contain language that clearly articulates what behavior or expression is prohibited and the context within which this prohibited behavior will rise to the level of sexual harassment. Incorporating words such as "offends," "denigrates," or "belittles an individual" in a sexual harassment policy makes the institution vulnerable to challenges of having a policy that is vague (the student must guess at how this would translate to their actions) and overbroad (the language encompasses a substantial amount of protected speech along with prohibited speech). A successful challenge to the language of a sexual harassment policy could result in a court injunction against application of the policy or even an outright declaration that the language of the policy is unconstitutional. In extreme cases, it might lead to personal liability for administrators who implement unconstitutional policies.

Colleges and universities must carefully review sexual harassment policies to ensure that language specifying prohibited expression is clearly articulated, consistent with the standard established in Davis. In addition, institutions must analyze the language of sexual harassment policies to ensure the prohibited language is not unconstitutionally vague, ambiguous, or overbroad.

As the court in Saxe emphasized, school administrators must avoid careless expansion of institutional harassment policies to include protected expression. ■

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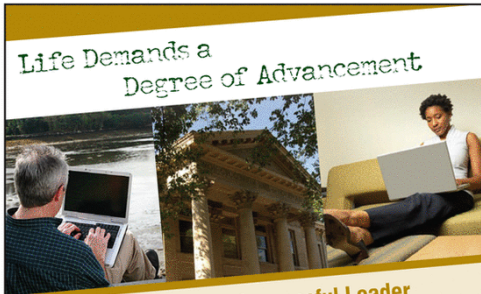
RECENT CASES OF NOTE

► **Saxe v. State College Area School District**, 240 F. 3d 200 206 (3rd Cir. 2001) struck down the school's sexual harassment policy stating that "[t]he free speech clause of the First Amendment protects a wide variety of speech that listeners may consider deeply offensive."

► **DeJohn v. Temple University**, 537 F. 3d 301 (3d Cir. 2008) held that Temple's use of broad terms such as "hostile" and "offensive" without qualifying language rendered its sexual harassment policy sufficiently overbroad and subjective that it could conceivably be applied to cover any speech of a gender-motivated nature.

► **Lopez, et al. v. Candaale, et al.**, U.S. Dist. Ct. Central Dist. of Calif. (2009) found that the school's policy was too broad and vague and prohibited a substantial amount of protected speech and held that a school may not prohibit speech unless the speech will "materially and substantially" interfere with the requirements of appropriate discipline in the operation of the school.

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