

20 MINUTES TO...TRAINED STUDY GUIDE:

# SEXUAL HARASSMENT

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Materials are adapted  
from The ATIXA Playbook



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## **20 Minutes to Trained: Sexual Harassment Learning Outcomes**

- Participants will understand the difference between an objective and subjective standard in assessing welcomeness and offensiveness.
- Participants will be able to articulate the three different types of sexual harassment and their respective elements.
- Participants will be familiar with the interplay – and conflicts that may arise – between hostile environment, the First Amendment, and academic freedom.



## 20 Minutes to Trained: Sexual Harassment Discussion Questions

- How does the reporting standard differ from the disciplinary standard? How do they inter-relate?
- When assessing welcomeness, do we look to a subjective standard, an objective standard, or both? What happens when there is a disparity between the two?
- How do we know how a reasonable person would perceive certain behaviors? What is a reasonable person?
- Members of our community seem to want us to police minor harassment or inter-personal conflict. Should we?
- When speech is protected by academic freedom, can it also be found to create a hostile environment on the basis of sex?



## 20 Minutes to Trained: Sexual Harassment Case Studies

### **Maria**

Maria Torres is a second-year student at your institution. She transferred to your school this year from a two-year college near her hometown in Texas. She selected your school because of the institution's values and mission.

Maria is a first-generation college student and she is under a lot of pressure to make her family proud of her. She is working as a research assistant for a couple of professors to earn money for school and trying to become involved at the institution while keeping her grades up.

Following class last month her professor asked her if she was fluent in Spanish. Maria responded, "Si," laughingly. Her professor said he wanted to hire a student to accompany a study abroad group from the institution to provide interpretation services for the participants and he thinks she would be perfect. He told her she would have all her travel expenses paid and earn a stipend as well. Maria was thrilled.

Jason, another student in the class, overheard the conversation between Maria and her professor. He was angry because, as a Spanish major, he had hoped to be selected as the group interpreter.

Jason stopped Maria outside the classroom. He said the only reason the professor offered her the job was because she was “hot.” He said, “I’m going to start calling you the ‘Hot Tamale.’”

Jason’s nickname for Maria caught on across campus and she would frequently hear people call out “Hey Hot Tamale.” Maria was very embarrassed but was determined to ignore the taunts.

Then last week at the volleyball game (Maria is on the women’s team), a group of male students sat on the sidelines wearing large sombreros and holding signs. The various signs said:

- *I like it hot*
- *Hot tamales are the best tamales*
- *Aren’t you on the wrong side of the Rio Grande?*
- *Don’t come here and take our jobs*

Maria was devastated and left the floor in the middle of the game. She came to the Equity Compliance Office to make a complaint.

## **Annie and Bobby**

### Statement of Annie, a 2<sup>nd</sup> year student

I met Bobby the first week I was here. We had a couple of classes together and he helped coordinate a study group with several other people. The first summer study group got together, it was me, Charlie, David, Edward, and Fran; we all exchanged information and talked about times we could all get together to study and go over material. Bobby really took over and coordinated the whole thing.

We tend to get together in the evenings, and one of us would host at either an apartment or dorm room. The first study session I made a

comment that I was really feeling tense and stressed out about school, life, just everything. We took a break, I went outside and Bobby followed me. He and I talked a little bit about the stresses of school, work, and everything. He put his hand on my shoulder and mentioned how tense I felt. He asked if I wanted him to rub my shoulders a little bit and I said yes.

We exchange texts and talk to each other several times over the next month. I felt like we had a really good friendship and I felt pretty close to him. He sits behind me in class, and a couple of times he would come in the class, lean forward, and rub my shoulders. Before he would do that, he would say something like "you seem really tense."

Last month, at a party, he came up behind me, rubbed my back with his hand, and moved it down to my butt. He gave a little pat, made eye contact with me, and said "I'm going to get a drink, do you want anything?" I told him no but didn't say anything else about him touching my butt. Later that same party, he came up behind me and wrapped his arms around me. There were other people around, and I didn't say anything, but I felt really uncomfortable. As he did it, I'm not sure if he realized that his hands and arms were touching my breasts, but I think he knew it. I kind of literally shrugged it off and made some comment like, "stop it, people will think we're together."

Shortly after that in class, when I went to sit down he slid his hand into my chair so that I ended up sitting on his hand. I jumped back up and turned around and looked at him and said, "What are you doing!" He said, "Sorry, I was just messing around." I said, "Please don't do that again."

The next time we were together at study group, we took a break and he and I agreed to go get some beer together for the group to drink after we were done studying. On the ride to the store, he shared with me

that he felt really comfortable with me and I told him I felt really comfortable with him too. We got the beer went back to Charlie's apartment. We were done studying, all of us decided to have a couple drinks. I don't really like beer and Charlie had some wine, so I drank that. I had a couple of glasses, and went outside on Charlie's balcony. Bobby followed me, and he and I were outside alone. We are talking about school and life and he leaned in and kissed me. I pulled back and looked at him and said, "I'm not sure we should be doing this, I think this might make things confusing." He said, "I'm sorry I thought we liked each other." I told him that I did like him, but I just thought things would be confusing if we moved our relationship in a different direction.

About a week after this at a party, he came up behind me again, hugged me from behind again, his hands again touching my breasts, but this time he also kissed my neck. I shrugged it off again literally and then after the party we were walking out together, and I turned to him to tell him that I was uncomfortable but when I did he put his arms around my waist and pulled me to him he kissed me. It was an open mouth kiss and I tried to pull away but he was holding me very closely and tightly. He's much bigger than I am so with his arms around my waist and back I know his hands could feel my breasts. I pulled away as soon as I could and told him that I needed to go.

At this point I feel like I've done everything I can do to let him know that this is inappropriate. But his repeated touching, hugging, kissing, etc. and his in-class back rubs and other behaviors are making it difficult for me to be in study group and in class. I want to file a complaint and I want him removed from class immediately. At the very least want him removed from my study group. We only have two classes together, but we're in the same major so I know we will have other classes together in the future.

I also told Prof. Smith about these behaviors (the back rubs in class) and Prof. Smith told me that he would talk to Bobby about this. I don't know if he has or not. (Note: This complaint came in November or December. The behaviors occurred during September and October.)

### Statement of Bobby, 2<sup>nd</sup> year student

I met Annie earlier in the semester when we realized that we had multiple classes together. I offered to coordinate a study group for all of us, and got Charlie, David, Edward, and Fran to agree to be in a study group together. We all agreed to take turns hosting it, initially making some jokes about getting beer or drinks after we would study. This actually turned out to be true, and we would get some drinks or beer either at a bar or somebody would bring them over.

We also went to some of the parties that some of the students would host to let steam off. The first time we met as a study group, Annie and I hit it off. We're both stressed out about trying to balance our lives, work, and school. In fact, the very first study group we had, she asked if I would give her a back rub because she was feeling so tense. I rubbed her upper shoulders out of the balcony at Ed's house, she thanked me afterward.

We talked and texted quite a bit and not just about school. I never really asked her out, because we always ended up in the same places anyway. I have a lot of our texts if you would like to see them. We always ended up at the same parties, too.

At one of the parties, she and I stood together, and she was leaning on me occasionally and she would put her hand on my shoulder and on my back occasionally. I went to get a drink once and asked if she wanted anything. She said yes, and when I brought back a drink, I came up from behind her, reached around her, and gave her drink while kind of giving

her a half hug. She took the drink, and never said anything to me about the hug. I think I actually took her home that night as well. By that I mean, I gave her a ride. At another party, I gave her a ride to the party, and while we were there we were pretty much inseparable. It almost felt like a date. At one point, I put my arms around her from behind kind of over her shoulders, like a hug. She did shrug it off, and later on we talked about it. She told me she was worried that if we started dating it might mess up our study relationship. I told her I didn't think that would happen, but we could talk about it more.

At one of our study periods, I think it was at Charlie's, we took a break to go buy some beer and wine. On the way to the store we talked about how we were getting along, and she did mention that she was kinda concerned that people might think we were together and that that might confuse our study group relationship. I told her not to worry about it, and that nobody had said anything to me about it. Later, after we were done studying, we went out onto the balcony, and we were talking. She was sharing that she felt like that the study group is really helping her adjust to school. We were standing really close to each other and our faces were really close to each other, and I leaned in and kissed her. We kissed for a minute, and then when we pulled back, she said she wasn't sure we should be doing this. I told her that I didn't think the people in the study group could see us. But then I went ahead and did not do anything else.

At the next party, after that study group time, she still would stand next to me and kind of lean on me, but she wasn't as "handsy" with me as she had been in the past. I asked her what was wrong when we were alone later, and she said "nothing." As we were leaving, we ended up walking out together, and I asked her she needed a ride. She said no, that she had driven. I asked if she wanted me to walk her to her car, and she said "sure." We walked to her car, as we got to the car, she turned to me and we are facing each other just like we were in Charlie's

balcony. I leaned in, put my hand around her waist and we kissed each other. When the kiss ended, she said "I need to go." She got in her car and left.

We texted a few times since then, mostly about school and life. She has not made it to study group the last two times. She said she had conflicts with work. I texted her once and asked her if we were cool, and she said yes.

Then I got this letter from your office, and I'm not really sure what is going on. I think you should talk to the other people in our study group and anybody who was at those parties and they can tell you that there was nothing weird going on.

### **Karen and Dr. Yorke**

#### *Faculty Harassment*

Karen, Reporting Party, graduate student at Vexler University

Dr. Yorke, Responding Party, tenured geology professor at Vexler University

The Title IX Coordinator at Vexler University recently received a call from Dr. Conway, the associate dean of the College of Arts & Sciences. Dr. Conway explained that one of his college's academic advisors had contacted him after meeting with Karen, a graduate student in the geology department who is expected to graduate with her master's degree at the end of the upcoming fall semester. According to Dr. Conway, the advisor said that Karen had stopped by her office unexpectedly and asked about her academic schedule for the upcoming fall semester, specifically whether she could take GEOL 6315, a course in which she was enrolled for fall semester and needed in order to graduate, with someone other than Professor Yorke, the instructor of

record. When the advisor told Karen that Professor Yorke was the only professor teaching the course that semester, Karen seemed visibly concerned. When the advisor asked Karen why she didn't want to take Professor Yorke's class, Karen said that she "just didn't feel comfortable" being in his class and would not provide any further explanation. In looking at Karen's academic transcript, the advisor noted that Karen appeared to have just finished a course taught by Professor Yorke in the second summer semester, which concluded a week prior to their meeting. Concerned by how adamantly Karen seemed to want to avoid being in a class with Professor Yorke, the advisor referred the concern up to Dr. Conway, who scheduled a meeting with Karen to see if he could help.

Dr. Conway told the Coordinator that when he met with Karen, he told her that there was likely no alternative class, but that he really wanted to understand her concerns related to Professor Yorke and would try to help as best he could. Though initially reluctant, Karen eventually said, "Well, Dr. Yorke was our professor for this summer's field camp, the seminar class, where we camp out in the hill country for a couple weeks and do all types of hiking, mapping, and measuring. I mean, he's a good professor, he really is, I actually had him for another class my first year in grad school and it was fine, but, I don't know, some stuff happened during field camp and I'd just feel more comfortable taking a section taught by someone else, if that's at all possible." Dr. Conway said he asked Karen if she would feel comfortable telling him more about what happened during field camp, but she was resistant. Dr. Conway said he told Karen, "It doesn't sound like your concerns with Professor Yorke are 'academic' in nature," to which he said Karen responded with a subtle shake of her head. Dr. Conway contacted the Title IX Coordinator shortly after Karen left his office.

When the Title IX Coordinator asked Dr. Conway whether he was aware of any other concerns regarding Professor Yorke, Dr. Conway said, "No,

not at all. He's been with the department for over 20 years, he's a highly respected researcher in his field, and the students really seem to love him."

The Title IX Coordinator met with Karen soon after. Karen eventually told the Coordinator about her interactions with Professor Yorke during field camp. Karen described field camp as an extensive, multi-week outdoor graduate course where she and 12 other graduate students in the geology department, a teaching assistant (TA), and Professor Yorke all drove out to the nearby hill country and camped for several weeks. Karen said days were spent hiking the area, mapping the terrain, and studying various rock and geologic formations, while nights were typically spent finishing assignments and then eating, talking, and singing around the campfire. Karen said it was fairly common for Professor Yorke to break out his acoustic guitar.

Karen said that, on multiple occasions during the daily hikes, Professor Yorke would make comments or ask her questions that made her feel uncomfortable, often when the other students were scattered about taking measurements and few were within earshot. On one occasion, she said Professor Yorke told her, referencing the spaghetti-strap tank top she was wearing, "You might want to pull those straps down onto your arms so you don't get tan lines." On another occasion, as she and one of her female classmates were climbing up some rocks and Professor Yorke was climbing up behind them, Karen said that Professor Yorke remarked, "I'm not sure how you ladies do this in such tight shorts. Looks very constricting." Karen said they just tried to laugh it off, but were decidedly aware of the fact that he was staring at their butts.

Karen said that on the last night of field camp, as everyone sat around the fire, Professor Yorke squeezed into a small space next to her with his guitar, despite there being other places to sit with more room. She

said he began to play his guitar and kept urging her to sing with him, saying that “everyone talks about how beautiful your voice is.” Karen said that at first it seemed playful, but he persisted even after she refused several times, and it embarrassed her. Later, as other students started leaving for their respective tents, Karen said Professor Yorke turned to her and asked offhandedly if she was dating anyone. When she said no, he asked her if there was anyone in the geology department she would consider dating. Karen said she just laughed and said, “probably not.”

Karen said a few minutes later, Professor Yorke leaned in, started talking more quietly, and began telling her about his wife and how she doesn’t understand the type of work he does, and how much he enjoys talking to women who understand geology and can have engaging conversations with him about the subject matter. Karen said she just listened and didn’t say much, looking for an opportunity to head to her tent. Karen said, “Finally, Elise came to save me—she was my tent mate. I think she could tell I was uncomfortable and she kind of interrupted Professor Yorke to tell me to come to the tent. I think she made up something about it being cold and needing my body heat.”

Karen said that the following day all the students packed everything up and started the drive back to campus. Karen said as she sat in the back of the van with a few of her classmates, she received a text message from Professor Yorke. She explained to the Coordinator that everyone had exchanged phone numbers at the start of field camp and that a group text had been the primary means of communication between Professor Yorke and the students. This text, however, was sent only to her and read, “I can’t get the thought of your face glowing in the firelight out of my mind. I really wish we could have sung together; I would have loved to hear your beautiful voice.” Karen said she did not know how respond but felt like she should say something, so she

replied, “Haha, thanks Professor! Camp was a lot of fun and I definitely learned a lot.” Karen said she still has the text messages on her phone.

When they arrived back on campus, Karen quickly grabbed her belongings, and went to her car and left campus without saying much to anyone. Karen said she has not spoken to Professor Yorke since leaving campus that day. Karen said she thought seriously about reporting her concerns, but feared that it would jeopardize her grade in the class. Karen also mentioned that Professor Yorke has a reputation in the geology department, particularly among the graduate students, as being somewhat flirtatious toward female students. Karen indicated that she would be willing to participate in an investigation, so long as she could be assured that nothing adverse would happen to her, academically or otherwise.



## 20 Minutes to Trained: Sexual Harassment Case Studies Q&A

**Maria**

### For Discussion

- What are the policies potentially implicated?
  - **Sexual Harassment**
- How would you process this through the hostile environment analysis?
  - **First determine whether the conduct is sexual harassment. According to the ATIXA model policy, sexual harassment is:**
    - Unwelcome
    - Sexual and/or Sex/gender based
    - Verbal and/or written and/or online and/or physical conduct
  - **Once you determine that the behavior constitutes sexual harassment, then proceed to determine if the conduct creates a hostile environment.**
  - **Using the ATIXA model policy definition, hostile environment sexual harassment is:**
    - **Severe or**
    - **Persistent or pervasive AND**
    - **Objectively offensive such that it**
      - **unreasonably interferes with, denies, or limits**

someone's ability to participate in or benefit from the institution's education or employment programs.

- Would this conduct reach the bar of hostile environment? Why or why not?
  - The conduct likely doesn't reach the relatively high bar of hostile environment sexual harassment. The behavior certainly isn't severe and it doesn't seem to be persistent or pervasive either.

## **Annie and Bobby**

### For Discussion

- If what Annie says is true, is this a policy violation? Explain why or why not
  - While it seems that this behavior certainly constitutes sexual harassment, as it is unwelcome, sexual/sex-based physical conduct, in order for the conduct to be a policy violation and actionable, it must either be quid pro quo, retaliatory, or hostile environment harassment. Does the conduct qualify as one of the three types of sexual harassment? It might. It certainly is not severe conduct, so the analysis revolves around determining if the behavior is persistent and/or pervasive.
- What if Bobby and Annie are medical students and Bobby is a resident and Annie is an intern?
  - Given the potential power differential, this variation of the facts raises the question of whether there is a potential quid pro quo situation here. Further analysis is necessary to determine whether submission to Bobby's conduct was an explicit or implicit term or condition of rating, performance evaluation and/or some type of educational/employment

benefit bestowed on Annie.

- What steps would you take here to ascertain which account is more accurate?
  - Speak to Charlie, David, Edward, and Fran from the study group to better understand the dynamics between the parties.
  - Review any text messages/social media/other communications between the parties.
  - Go back to the parties with information gathered and ask further questions.

## **Karen and Dr. Yorke**

### For Discussion

Assuming the behavior [more likely than not] occurred as alleged (e.g., suppose that Professor Yorke qualifies the various instances rather than denying their occurrence, and that witness statements and other available evidence corroborates—or at least does not conflict with—Karen’s account), what policy analyses would you perform and how would you go about obtaining more information?

- First determine if the behavior meets the definition of sexual harassment – unwelcome, sexual or sex-based conduct.
- If so, then you need to assess whether the conduct qualifies as hostile environment, quid pro quo, and/or retaliatory harassment.
- For a hostile environment analysis, the conduct must be severe, persistent, or pervasive, and both subjectively *and* objectively offensive AND there must exist a limitation or deprivation of an educational participation or benefits.
- A quid pro quo analysis is also necessary given the power differential between the parties. Just because there are no

explicit conditions or expectations articulated by Professor Yorke does not rule out the possibility that this conduct is quid pro quo sexual harassment. To determine whether the behavior constitutes quid pro quo harassment, you need to determine whether there were unwelcome sexual advances/conduct of a sexual nature, where submission to those advances was an implicit term or condition of Karen's educational performance.

- Gather more information about Professor Yorke's conduct, both in regard to Karen as well as in general. You want to obtain copies of the text messages reported by Karen, and see if there is any other communications between her and Professor Yorke.
- Talk to other students on the trip – including, but not limited to, Elise, Karen's tent mate.
- Try and better understand how/why Karen believed that her grade in the class would suffer. What made her think that?
- Ask Karen if she has told anyone else about Professor Yorke's behavior and speak to those individuals.
- Consider other ways to assess the climate in the geology department.

## Sexual Harassment

Sexual harassment is a form of sex discrimination<sup>24</sup> covered by Title IX and takes three forms: *Quid Pro Quo* Harassment, Hostile Environment Harassment, and Retaliatory Harassment.<sup>25</sup>

### *Quid Pro Quo* Harassment

This form of sex- or gender-based harassment relies heavily on a power or authority imbalance between those involved, such as an intimate relationship between a supervisor and a supervisee or a faculty member and a student. *Quid pro quo* literally means “something for something” or “this for that” in Latin, implying a trade. Under the law, the trade is suspect when a power imbalance is in play. Let’s look at the definition.

### Model Policy<sup>26</sup>

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature
- by a person having power or authority over another
- when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual’s educational or employment development or performance.

### Model of Proof

- Sexual advances  
AND/OR
- Requests for sexual favors  
AND/OR
- Other verbal or physical conduct of a sexual nature  
AND
- Unwelcome  
AND
- By a person having power or authority over another  
AND
- Submission to such sexual conduct is an explicit term or condition of
  - rating  
AND/OR
  - evaluating  
AND/OR
  - providing a benefit to an individual’s educational or employment development or performance.

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<sup>24</sup> See e.g.: *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283 (1998).

<sup>25</sup> These are not all covered by VAWA §304, a key distinction between VAWA and Title IX.

<sup>26</sup> The ATIXA model policy here roughly tracks the Equal Employment Opportunity Commission (EEOC) language defining *quid pro quo* offenses, as that language has become a legal term of art, but modifies it for the college setting.

OR

- Submission to such sexual conduct is an implicit term or condition of
  - rating  
AND/OR
  - evaluating  
AND/OR
  - providing a benefit to an individual's educational or employment development or performance.

It is important to note that not all relationships between such individuals qualify as sexual harassment, because many of those relationships or situations are not unwelcome. Further, many relationships where one person has power or authority over another do not have explicitly or implicitly placed conditions, potential benefits, expectations, or detriments on one of the individuals, which prevent it from becoming *quid pro quo* harassment. Stated differently, there is a difference between conduct that violates only institutional consensual relationship policies (e.g.: a consensual relationship between a faculty member and student) and harassing-level *quid pro quo* misconduct.

The power or authority imbalance can be formal or informal. In some instances, the authority or power over another is formalized in terms of structure or hierarchy, such as supervisor-supervisee or faculty-student, where the student is in the faculty member's class. At other times the power or authority can be informal, such as a faculty member who offers to write a letter of recommendation for a student in exchange for sexual favors. Indeed, use of leverage or threats can both negate the validity of a person's consent to sexual activity, as well as create a *quid pro quo* harassment situation.

### Rubric

Employing the above definition, a finding of *quid pro quo* harassment must answer each of the following four questions accordingly:

1. Are there sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature present? If not, there is no policy violation. If so,
2. Is such conduct welcome? If so, there is no policy violation.<sup>27</sup> If not,
3. Is there a formal or informal power or authority imbalance between the parties? If not, there is no policy violation. If so,
4. Did the person with power or authority explicitly or implicitly condition the rating, evaluation, or receipt of a benefit to an individual's educational or employment development or performance on submission to the unwelcome sexual conduct? If not, there is no policy violation. If so, policy has been violated.

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<sup>27</sup> A consensual relationships policy violation may exist, but this would not constitute sexual harassment.

### Retaliatory Harassment

Retaliation is defined as a stand-alone sex/gender discrimination offense below. All that is needed in this section, therefore, is to remind you that if the adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment, and an institution should analyze such conduct using both the retaliation rubric below, as well as the standard hostile environment analysis below. For example: a student alleges sexual violence by another student and the institution begins an investigation. The responding party is angry at the reporting party and while the investigation into the sexual violence is ongoing, the responding party distributes nude videos and photos of the reporting party on social media. This action likely constitutes hostile environment harassment as a retaliatory mechanism and it should be addressed using both the retaliation and hostile environment lenses.

### Hostile Environment

For Title IX to apply, conduct or speech must reach the level of creating a hostile environment. Understanding at what point harassing conduct rises to the level of hostile environment is therefore a critical element in addressing issues of sex- and gender-based harassment.

In 1999, the U.S. Supreme Court defined hostile environment in a Title IX context, noting that the unwelcome conduct of a sexual nature must be “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.”<sup>28</sup> The court added that institutions must determine whether a hostile environment exists by looking at the “constellation of surrounding circumstances, expectations, and relationships.”<sup>29</sup> Subsequently, OCR and the Department of Justice have confusingly answered the question of how to define a hostile environment from the perspective of an administrative agency, but they have not taken an identical approach to the courts.

### *Model Policy*

Applying and interpreting these various standards, ATIXA developed the following model definition of hostile environment sexual harassment, in part by separating the two concepts of sexual harassment and hostile environment, and elaborating the difference between the reporting/remedial standard (sexual harassment) and the disciplinary/free speech standard (hostile environment):

*Sexual harassment is:*

- *Unwelcome,*
- *Sexual, sex-based and/or gender-based,*
- *Verbal, written, online and/or physical conduct.*

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<sup>28</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>29</sup> *Id.* at 651 (citing *Oncale v. Sundowner*, 523 U.S. 75 (1998))

All sexual harassment should be reported to college officials who will provide informal and remedial responses. Sexual harassment may also be subject to discipline when it rises to the level of creating a hostile environment.<sup>30</sup>

### *Model of Proof*

- Unwelcome
  - Sexual  
AND/OR
  - Sex-based  
AND/OR
  - Gender-based  
AND
  - Verbal  
AND/OR
  - Written  
AND/OR
  - Online  
AND/OR
  - Physical conduct

### *Model Policy*

- A hostile environment is created when sexual harassment is:
- Severe, or
- Persistent or pervasive,<sup>31</sup> and
- Objectively offensive, such that it:
  - *unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.*

### *Models of Proof*

There are several ways to reduce this to a model of proof, depending on how you decide to divide the elements. Here are a few examples, the first being the most academically rigorous parsing of the policy elements into a checklist:

- Severe  
OR
- Persistent  
OR
- Pervasive  
AND

<sup>30</sup> Sexual harassment may be subject to discipline at a public university IF AND ONLY IF it rises to the level of creating a hostile environment.

<sup>31</sup> Private institutions may prefer the OCR standard: sufficiently severe or pervasive.

- Objectively offensive  
AND
- A limitation or deprivation  
AND
- Of educational or employment program  
AND
- Participation,  
OR
- Benefits

If that format is a little too cumbersome, this is another version that is a more compact decision-tree:

- Severe  
OR
- Persistent or Pervasive  
AND
- Objectively offensive  
AND
- A limitation or deprivation of educational or employment  
AND
- Participation or benefits

Or, an even more simplified third variation:

- Severe or Persistent or Pervasive  
AND
- Objectively offensive  
AND
- A limitation or deprivation of educational or employment participation or benefits

### *Rubric*

1. Does evidence show unwelcome conduct? If so,
2. Was the conduct sex- or gender-based or of a sexual\* nature (\*or was there conduct targeted toward any member of a protected class)? If so,
3. Was the expression severe or persistent or pervasive? If so,
4. Was the conduct or expression also objectively offensive; and if so,
5. Did the individual(s) impacted experience a limitation or deprivation of their educational or employment participation or benefits?

If the answer is yes to each question above, there is a policy violation. If the answer to *any* question is no, there is no policy violation. Similarly, with the checklist model of proof, are all of the AND boxes checked? If so, there is a policy violation. If not, there is no violation. If you'd like a clever shortcut (and this is one we always use ourselves), flip the rubric, asking the 5<sup>th</sup> question first:

1. Did the individual(s) impacted experience a limitation or deprivation of their educational or employment participation or benefits. If not, there is no policy violation. If so,
2. Does evidence show unwelcome conduct? If not, there is no policy violation. If so,
3. Was the conduct of a sexual\* nature (\*or was there conduct targeted toward any member of a protected class)? If not, there is no policy violation. If so,
4. Was the expression severe or persistent or pervasive? If not, there is no policy violation. If so,
5. Was the conduct or expression also objectively offensive? If no, there is no policy violation. If yes, policy has been violated.

By flipping the rubric, you'll gain some efficiency if there was no education or employment impact, because without that first element, none of the other elements matters. It's a way to "early fail" the rubric as you analyze, something we use quite often as a tool during preliminary inquiries into hostile environment allegations.

The policy construction distinguishing between the basic definition of sexual harassment and conduct that is subject to discipline ensures protection of the principles of free speech and academic freedom. It is also helpful to foster reporting of low-level behaviors that may not rise to the level of discipline, but should be addressed and reported before the situation rises to the level of creating a hostile environment.

Determining if conduct or speech rises to the level of a hostile environment requires an understanding of the meaning of the terms severe, persistent/pervasive, objectively offensive, and an understanding of what constitutes an unreasonable interference with educational or employment access. Some conduct may meet the criterion for each of these elements, but meeting each element is not necessary to find a hostile environment. Conduct need not be severe, **and** persistent or pervasive, and objectively offensive. Rather, conduct can be sufficiently severe and objectively offensive that it creates a hostile environment. Similarly, persistent or pervasive conduct that does not qualify as severe, can, in tandem with objective offense, create a hostile environment. Before expanding on the analysis, it is critical to have an understanding as to what the terms severe, pervasive, persistent and objectively offensive mean.

### Severe

The severity of an incident depends largely on the nature and scope of the alleged conduct, although you can also look at its impact. Some physical conduct does not require repetition to qualify as severe. Any single act of penetration, anal, oral or vaginal, will automatically be seen by most courts as sufficiently severe. Additionally, if the behavior is humiliating, threatening, or violent, that heightens the severity of the incident. Comments, jokes, classroom comments, online postings, photographs, etc. are typically not, on their own, sufficiently severe to create a hostile environment. In this way, offensiveness and severity are linked. That which is merely offensive, rather than objectively offensive, is unlike to meet the test for severity. This is a critical element that cannot be overstressed, as many members of college communities expect harsh and rapid responses to conduct that, while perhaps mean, hateful, rude, or insulting, does not rise to the level of being severe, and does not warrant discipline, though it may need to be remedied.

### Persistent

An analysis of persistence typically centers on the conduct's frequency; whether and how often the unwelcome conduct is repeated. Additionally, the relative intensity and duration of the conduct, coupled with whether it is welcome, informs a finding of persistence. The more actions approach severity, the less persistence is required to meet the definition. The less severe the conduct, the more persistence will be necessary to cause a discriminatory effect. The longer an action or incident lasts, or the more often conduct is repeated, the more likely it will be deemed persistent in a hostile environment determination.

### Pervasive

Pervasiveness hinges on how widespread, openly-practiced, prevalent, and/or distributed the conduct is. Unwelcome sex- or gender-based conduct that is well-known among students or employees can qualify as pervasive. Conduct that occurs in public spaces is more pervasive than conduct in private. Relatedly, online, electronic, or social media postings and conduct, which often spread rapidly and widely, heighten the pervasiveness by which offensive and unwelcome content can be disseminated.

### Objectively Offensive

Whether the conduct is objectively offensive is a critical element that must be present for conduct to qualify as creating a hostile environment. This standard requires application of the reasonable person standard, and context matters. Would a reasonable person *in the context in which the conduct occurred* deem the conduct to be objectively offensive? Both subjective and objective elements are necessary in finding a hostile environment. The subjective element is often satisfied by determining whether the recipient (either the intended target, or an offended third party) found the conduct unwelcome. Unwelcome isn't the same thing as offensive, but many behaviors that are unwelcome are so because they are offensive. Elements to examine include, but are not limited to: the age and relationships of those involved; the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening, humiliating, ridiculing, intimidating, or abusive; and the number of persons involved. Critical to remember is that just because conduct offends, is mean, or is hateful, does not mean it creates a hostile environment. It must also meet the other criterion described throughout this section.

*“As we evaluate sexual harassment allegations, many of us are challenged to properly contextualize those allegations within the frameworks of the First Amendment and/or academic freedom.”*

### *Hostile Environment, the First Amendment, and Academic Freedom*

As we evaluate sexual harassment allegations, many of us are challenged to properly contextualize those allegations within the frameworks of the First Amendment and/or academic free-

dom. While the First Amendment ostensibly impacts only public institutions and all institutions in California (unless religiously-affiliated), many private colleges respect the First Amendment's protections, even if they are technically free from constitutional mandates. Regardless of public or private status, academic freedom provides a set of protections for speech at all institutions. Thus, any assessment of hostile environment sexual harassment must also assess whether the harassing speech deserves the protections of the First Amendment and/or academic freedom. This is a litmus test, and it functions like an on/off switch. If speech is protected by either the First Amendment or academic freedom, it cannot create a hostile environment, by definition. Speech that creates a hostile environment, by definition, cannot be speech that is protected by either the First Amendment or academic freedom.<sup>32</sup>

The increased scrutiny of reports of hostile environment harassment, combined with the emerging awareness of the impact of "trigger words," has brought the issue of sexual harassment involving faculty and students into the classroom as never before, setting up the potential for conflict with firmly held beliefs of academic freedom.

### Faculty, Employees, and the First Amendment

Although many faculty members declare that academic freedom is assured through the First Amendment, it was actually first defined by the American Association of University Professors (AAUP) in its "Declaration of Principles" in 1915.<sup>33</sup> That declaration stated, "academic freedom has traditionally had two applications- to the freedom of the teacher and to that of the student. Academic freedom of the teacher comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." In 1940, the AAUP refined this earlier definition in their "*Statement of Principles on Academic Freedom and Tenure*" to include:

- "Teachers are entitled to full freedom of research and in the publication of the results, subject to the adequate performance of other academic duties; but research for pecuniary return should be based on an understanding with the authorities of the institution.
- Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter, which has no other relation to their subject.
- When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, show respect for the opinion of others and should make every effort they are not speaking for the institution."<sup>34</sup>

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<sup>32</sup> [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/fall2011/the\\_intersection\\_of\\_free\\_speech\\_and\\_harassment\\_rules.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules.html)

<sup>33</sup> <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>

<sup>34</sup> AAUP, 2001 pp. 3-4.

While the AAUP holds fast to its declaration of academic freedom, the U.S. Supreme Court has never fully accepted that term as the AAUP has defined it as a legal right. In *Sweezy v. New Hampshire*<sup>35</sup> the Court recognized First Amendment rights of “institutional academic freedom.” The Court identified institutional academic freedom as: who may teach; what may be taught; how shall it be taught; who may be admitted to study. This institutionally-owned set of rights is a far cry from the perceptions of faculty about their wide latitude for expression in the classroom, and thus sets a stage for continuing conflict when faculty comments or opinions in the classroom target a protected class of individuals or are overtly sexual in nature.

Some examples include:

- A University of Kansas faculty member who was terminated after commenting in class, “As a white woman, I just never have seen the racism.... [referring to the riots in Missouri]. It’s not like I see [n-word redacted] spray painted on walls.” Students protested following this comment and sought her termination. She argued that she was comparing the University of Kansas to the University of Missouri and that she never directed the word at anyone and used it as an example of a slur, not to hurt anyone.<sup>36</sup>
- Professor Laura Kipnis was charged with creating a sexually hostile environment at Northwestern University following her publication of a scholarly article, “Sexual Paranoia Strikes Academe,” in which she challenged Title IX’s expanding reach and stated that “sexual panic rules.”<sup>37</sup> She was subjected to a 72-day investigation that resulted in a “not responsible” finding, yet left her traumatized by the experience and fearful for her job.<sup>38</sup>
- Theresa Buchanan was a tenured Associate Professor at Louisiana State University who had taught there for 20 years in the Pre-K-3rd grade teacher preparation program. She was charged with violating the university’s sexual harassment policy because of complaints from students that she used profanity and sexual language in the classroom. She responded that her use of profanity was in keeping with her particular pedagogical style and that she occasionally used sexual language and humor in lessons and role-playing as a way to keep students engaged. Although the faculty committee voted unanimously not to terminate her, the President did terminate her, stating that she created a hostile learning environment that amounted to sexual harassment and that her behavior put the university at risk of sexual harassment lawsuits. Indeed it did; she has filed a lawsuit for damages and is seeking reinstatement to her position.<sup>39</sup>

These examples help illustrate that politics, social media, special interest groups, and college and community pressures can and do influence our decision-making in cases of academic free-

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<sup>35</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

<sup>36</sup> <https://www.insidehighered.com/news/2016/05/18/professor-says-she-was-fired-over-well-intentioned-ill-received-class-discussion>

<sup>37</sup> <http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf>

<sup>38</sup> <http://www.chronicle.com/article/My-Title-IX-Inquisition/230489/>

<sup>39</sup> Summary of case: <https://www.insidehighered.com/news/2015/09/02/aaup-report-alleges-violations-academic-free-dom-due-process-new-report-professors> Lawsuit: <https://www.thefire.org/complaint-and-exhibits-a-c-in-buchanan-v-alexander-et-al-2/>

dom. These examples also show that analyzing academic freedom often requires a concurrent analysis of the principles of freedom of expression and the First Amendment.

While there should be a balancing test applied in any set of circumstances in which the First Amendment rights of a faculty member are weighed against the rights of an institution to maintain a non-disruptive learning environment, how far can a faculty member go in expressing personal opinions or posing challenging questions? Just as not all speech or expression is protected under the First Amendment, not all comments, opinions, or expressions are protected within the classroom, or even in circumstances outside the classroom where the faculty member's speech is associated with their position at the institution.

Generally, a faculty member will retain freedom of expression when the subject matter of the challenged speech, opinion, or expression is germane to the subject matter being taught and has an identified nexus to the pedagogy of the course. However, when the challenged opinion, expression, or speech does not have a sufficient nexus and is used merely for effect or shock-value, then the faculty member's protections under academic freedom or freedom of expression are likely to be vulnerable to challenge.

The criteria below offer you a checklist to assess the questions of welcomeness, severity, and objective offense that are elements above. If there is a hostile environment allegation, or the institution seeks to have control over the actions of faculty related to their behavior in the classroom, the institution must assess:

1. Does the challenged expression have sufficient pedagogical nexus to the subject matter being taught? Does the expression by the faculty member undermine the legitimate goal or mission of the institution?
2. Does the classroom expression conflict with college policies and standards for professional conduct?
3. Does the in- or out-of-classroom expression interfere with the faculty member's performance of their duties?
4. Is the challenged expression being addressed in a completely content-neutral way because of its disruptive effect, or is it being addressed because of the content of the speech?
5. And, as a mitigating factor, did the faculty member alert the class, either verbally or in the syllabus, that there would be discussion of a provocative, possibly triggering nature?

The situation for faculty and staff at public institutions is different from those at their private school counterparts. At a public institution, the First Amendment offers a layer of protection for out-of classroom expression, in addition to language in Faculty or Staff Handbooks or employment contracts.

Faculty and staff members at private institutions, however, lack First Amendment protections and are entirely governed by the Staff or Faculty Handbook or employment contracts. Accord-

ingly, they run the risk of challenge and discipline by their institution for out-of-the classroom expression, especially when the speech of an employee uttered outside of the classroom setting or the academic context is found to be “offensive” or “demeaning” based on sex or gender.

As discussed, the way in which the institution responds to offensive expression will rely heavily on the status of the individual, with faculty protected by academic freedom, subject to the limitations previously discussed, and staff members maintaining far less latitude in free expression in the context of their jobs.

The way an institution responds is also governed by the location of the expression. Institutional offices are considered non-public forum environments. This means that the institution has far broader latitude in proscribing expression in that setting. The applicable standard in these circumstances is merely one of “reasonable limitations” on expression, consistent with the particular office or institutional environment.<sup>40</sup> The U.S. Supreme Court applied the balancing of employer and employee interest in *Garcetti v. Ceballos*<sup>41</sup> and held that in the context of public employment generally, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” The Supreme Court reasoned that restricting speech that “owes its existence” to a public employee’s job responsibilities does not infringe any liberties the employee enjoys as a private citizen. Interestingly enough, however, that same court, in a majority opinion stated an “academic freedom” caveat: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” The *Garcetti* decision left unanswered the argument, however, that sexually harassing speech by public employees, in the course of their professional roles, that is unrelated to scholarship and teaching, may well be outside the protections of academic freedom and the First Amendment.

Expression outside the boundaries of the physical institution or institutional context of both faculty and staff employees at public institutions is afforded far less protection. In 1968, the U.S. Supreme Court in *Pickering v. Board of Education*<sup>42</sup> held that a faculty member can only succeed on a First Amendment claim if, on balance, his or her interest “in commenting upon matters of public concern” outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” However, a public employee’s speech on a matter of public concern may still be disciplined “if the expression contains knowing or reckless falsehoods or the statements were the sort to cause a substantial interference with the ability of the employee to do his job.”<sup>43</sup> By contrast, faculty and staff at private institutions have almost no protection outside of the institution.

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<sup>40</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>41</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>42</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968), was a case in which the Supreme Court of the United States held that in the absence of proof of the teacher knowingly or recklessly making false statements, the teacher had a right to speak on issues of public importance without being dismissed from his or her position. The case was later distinguished by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), where the Court held that statements by public employees made pursuant to their employment have no First Amendment protection.

<sup>43</sup> *Id.*

## Students and the First Amendment

And that brings us to students and the First Amendment. What are the obligations and limitations of colleges when a student has allegedly engaged in sexually harassing expression? Earlier in this section, we provided a comprehensive description of how to address sexually harassing expression that causes a hostile environment within the context and boundaries of the institution, but what about the circumstances in which a student's expression occurs in cyberspace, such as on social media sites? How should a college respond when a student's expression offends, maligns, embarrasses, demeans, or degrades another member of the college community? Unfortunately, far too many institutions react and respond with a heavy hand (especially when those expressions are directed toward a faculty or staff member) by imposing discipline.

Two cases decided by the 3<sup>rd</sup> Circuit U. S. Court of Appeals, *Layshock v. Hermitage School District*<sup>44</sup> and *J.S. v. Blue Mountain School District*,<sup>45</sup> have provided guidance in determining appropriate responses to reports of sexually harassing expression in cyberspace. While a Circuit court decision is not decisive or controlling the way a Supreme Court decision would be, other circuits have since followed the 3<sup>rd</sup> Circuit. In both of those cases, students using their own computers off-campus from the school, engaged in shocking, embarrassing, demeaning, and degrading postings that directly implicated a teacher and an administrator. In both cases the students were suspended from school. Both students initiated First Amendment lawsuits. The 3<sup>rd</sup> Circuit heard the appeal and found in favor of the students in both cases.

These outcomes remind us that the *Tinker v. Des Moines Independent Community School District*<sup>46</sup> standard – that neither students nor employees “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”<sup>47</sup> – is alive and well, and while a student's expression may occur outside the schoolhouse gate, we may not engage in disciplinary action (for purely outside or external cyber speech) that separates a student from their education unless there is a sufficient nexus between the speech and a substantial disruption of the school environment that results. This is a reminder for public institutions to be wary of punishing speech for merely the anticipation of a disruption, or because another student or employee was offended. We are required to apply the same standard of severe, persistent or pervasive, and objectively offensive to the cyber speech that we would if the same expression occurred on campus, along with a requirement for substantial disruption to the school community or mission. The court was also clear that, had the students utilized the school's computing resources to engage in these activities, the school may have had a stronger case for restricting the speech. The court also noted that had the speech been of a threatening nature – and the threat deemed credible – the institution's actions would have been viewed in a much different light.

Recently the courts have allowed students to be disciplined in a fashion for off-campus/online speech. In *Oyama v. University of Hawaii*<sup>48</sup> and *Keefe v. Adams*,<sup>49</sup> students were not permitted to proceed in their programs as a result of their posts on social media. However, it is important

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<sup>44</sup> 593 F.3d 249 (3d Cir. 2010), *aff'd en banc*, *Layshock ex rel. v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

<sup>45</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, 650 F.3d 915 (3d Cir. 2011)

<sup>46</sup> 393 U.S. 503 (1969).

<sup>47</sup> *Id.* at 506.

<sup>48</sup> *Oyama v. Univ. of Haw.*, 813 F.3d 850 (9th Cir. 2015).

<sup>49</sup> *Keefe v. Adams*, 2016 WL 6246869 (8th Cir. Oct. 26, 2016).

to note that the rationale was that their conduct was so “unprofessional” as to violate the standards of their professions, and the restrictions were reasonably applied. This is consistent with the *Tatro v. Univ. of Minnesota* findings from a few years prior, and shows a continuing erosion of First Amendment protections as it relates to off-campus and online social media posts.<sup>50</sup> That said, schools should be very wary to see this as an open door to expand their definitions of “professional conduct” in order to discipline off-campus or online speech they just don’t like. Instead, schools should continue to use the above analyses to determine if the speech is harassing, disruptive, or a true threat.

Students at private institutions do not have First Amendment protections,<sup>51</sup> though we encourage all institutions to promote the free and open exchange of ideas.

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<sup>50</sup> 816 NW 2d 509 (2012).

<sup>51</sup> Except in California under the Leonard Law, which applies the free speech protections under the California Constitution, as well as the First Amendment of the U.S. Constitution, to all public and private colleges and universities. California Education Code § 94367.