

20 MINUTES TO...TRAINED STUDY GUIDE:

STALKING

Presented by:

Daniel C. Swinton, J.D.,
Ed.D. and Anna
Oppenheim, J.D.

Materials are adapted
from The ATIXA Playbook



20 Minutes to Trained: Stalking Table of Contents

- I. Learning Outcomes
- II. Discussion Questions
- III. Case Studies
 - a. Rebecca Tate & Reese Smith
 - b. Jorge & Hai-Jin
- IV. Case Study Questions & Answers
 - c. Rebecca Tate & Reese Smith
 - d. Jorge & Hai-Jin
- V. Excerpt from *The ATIXA Playbook: Best Practices for the Post-Regulatory Era*



20 Minutes to Trained: Stalking Learning Outcomes

- Participants will be able to articulate the difference between stalking and lurking.
- Participants will be able to isolate the conduct at issue in a report of stalking to determine if the behavior is repetitive.
- Participants will understand general dynamics related to stalking, including but not limited to, the fact that:
 - Most stalkers use more than one tactic to follow, track, and/or pursue their victims.
 - Females are much more likely to be stalked by men.
 - Individuals between 18-24 experience the highest rates of stalking.



20 Minutes to Trained: Stalking Discussion Questions

- Why is menacing conduct a critical element in assessing whether stalking has taken place?
- Is stalking on the basis of sex also a form of sexual harassment?
- How do lurking and stalking behaviors differ from each other?
- Lurking behaviors should or should not be subject to discipline? Why or why not?
- What is the difference between stalking someone and repeatedly annoying them?



20 Minutes to Trained: Stalking Case Studies

Rebecca Tate & Reese Smith

Rebecca Tate's Statement

A former student of mine, Reese Smith, is harassing me and I am fearful for my safety. I have told him repeatedly to stop contacting me, but he keeps parking in front of my apartment and just watching it. He also waits for me after my classes and tries to talk to me.

Reese and I met when I took a group of students to England on a study abroad trip last year for my Shakespeare class. On these trips, the group is small (around 10 people) and we all get very close to each other after spending days and evenings together.

Reese and I became very close on the trip. It began as flirting on the flight to England and continued in my room one night. One evening Reese came to my hotel room to talk about a writing project for our course. I was winding down after a long day of touring and was enjoying a glass of wine. I offered him one and he accepted. We worked through his outline for his paper and maybe had a few more glasses of wine.

One thing led to another and we ended up having sex that night. We continued to see each other over the past year when we could, even at my apartment when my housemates were out. There was a very strong attraction between us. He even took my Renaissance Literature class last spring so that we could see each other more often.

You need to know I have a boyfriend from home and I told Reese about it. I said we needed to keep our relationship casual. Over the summer I was approached by the head of the English Department about applying for a tenure track teaching position. I was fearful the Department would find out about Reese and it would jeopardize my chance for the position. I decided to break it off with Reese last month and told him we could not meet up any more. I thought I had made it clear this was just fun and games, but he went ballistic and threatened to tell my boyfriend.

He wants an explanation, but I don't want to tell him about the job because I'm afraid he will use that to hold over my head. For the past month, he has sent me endless numbers of texts, and e-mails, drives past my apartment, sits in front of my apartment in his car, stands outside my class, and then yesterday I looked out and he was in the English Department office while I was talking with the Dean! I was so upset I couldn't concentrate. You should also know that two tires on my car were slashed.

I don't know what to do. Can I keep my name out of this and just have someone talk to him? I don't want anyone else to know about it, but I want him to stop harassing me.

Reese Smith's Statement

I met Becca last year as a participant on a study abroad trip she took to England. She struck me as different from other professors because she

was really flirty and hung out with us.

During the trip, she seemed to just be one of the group. One evening I went to her room to talk about a paper I was struggling with. She was super helpful and even offered me a glass of wine. Actually, she and I finished off a couple of bottles. She started rubbing my arm and looking in my eyes and then she kissed me. I didn't know what to think. I was really nervous and didn't know what to say and I knew I should leave, but how could I do that? I was really fuzzy and dizzy.

I'm not an academically strong student but Becca assured me she would make sure I did well in college. She even suggested I take one of the classes she was teaching so she could help me. I got an "A" in it.

We hung out together this past year as much as we could. She said she had a boyfriend at home, but she said it was rocky. We even talked about a future together. Then last month, out of the blue she said she wanted to break it off. I couldn't believe it! She won't even tell me what's going on. I keep trying to get her to talk to me, but she just avoids me. I am so frustrated and have tried every way possible to get her to tell me what's going on. I know she cares about me. I'm so confused.

Jorge and Hai-Jin

Jorge worked as a student worker in the student-run A/V/Tech lab for his high school. Hai-Jin needed some help installing software on her new laptop, and she went to the A/V/Tech lab for help. Jorge helped to install the software Hai-Jin wanted. As he was working, he asked Hai-Jin out. She turned him down, somewhat abruptly, saying that she doesn't date outside her race.

Shortly after, Hai-Jin began to receive unwelcome email and text communications to her laptop and phone from undisclosed addresses and numbers. The messages were sexual and vaguely threatening. She told her parents about the messages, and her father took the computer to a friend who was tech-savvy. The friend blocked the messages, but could not find out who sent them.

Then, Hai-Jin started to see social media messages in her apps that came from her account, but that she did not write. Several people contacted her about the fact that she was sending them inappropriate messages. Two students contacted the Title IX Coordinator to report that they were receiving harassing messages from Hai-Jin.

When you interviewed Hai-Jin, she denied sending the messages and claimed that someone was accessing her accounts to do so and provided the above information. She also told you that someone left a note on the windshield of her car, “You shouldn’t have blocked me. Now I’ll destroy you.”

Jorge came forward to complain of race discrimination by Hai-Jin.



20 Minutes to Trained: Stalking Q&A

Rebecca Tate & Reese Smith

For Discussion

- What potential violations of your policy might be implicated by this situation
 - Sexual Harassment
 - Stalking
- What are relevant details that may aid in your analysis here?
 - Rebecca notes that she is fearful for her safety. How would you go about assessing whether the conduct is menacing?
 - Look at the texts that Rebecca referenced. What is the content of the communication?
 - Consider the behavior that Reese has engaged in from Reese's vantage point in addition to Rebecca's perspective. To do this thoroughly, obtain as much detail as possible about the relationship between the parties, both currently and in the past. Did Rebecca and/or Reese discuss their relationship with anyone else? Did anyone else observe/hear their interactions? This will enable you to better understand the conduct at issue. Is the behavior *meant* to frighten? According

to Reese's interview, it certainly doesn't seem like it. Do you believe him? Like in many investigations, the credibility analysis here is intrinsically tied to the overall determination of whether a policy has been violated.

- Reese mentioned that he and Rebecca discussed a future together. Rebecca failed to mention that they had this discussion. If true, it may shed light on the circumstances of their relationship and, subsequently, on Reese's conduct.
- Are there other issues that catch your attention?
 - Rebecca's conduct with Reese certainly hints at a quid pro quo relationship, yet there is nothing from the above information Reese provided that indicates Rebecca's conduct was unwelcome. Does your institution have a consensual relationship policy that addresses student and staff? If so, that might be implicated by the above.

Jorge and Hai-Jin

For Discussion:

- Hai-Jin wasn't the initial reporting party. How would you handle this?
 - Hai-Jin may not have known that she could report the conduct and may need to discuss her options with the Title IX Coordinator. Just because she wasn't the first to come forward doesn't mean you shouldn't proceed with investigating the conduct.
- How would you handle Jorge's report?
 - Jorge's report does not involve Title IX. Depending on your institution's processes, the report could be forwarded to the appropriate office. Alternatively, you could work with Jorge

to explain how a refusal to date another individual – even on the basis of race – does not constitute race discrimination.

- How would you proceed with a stalking analysis?
 - ATIXA model policy states that stalking is repetitive and menacing pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
 - The first step is to determine if Jorge is the individual responsible for the conduct. If Jorge doesn't acknowledge doing so, forensic review of Hai-Jin's computer should be able to shed light on if someone is accessing her accounts
 - If, by a preponderance, you determine that Jorge is responsible for all of the above conduct, it clearly constitutes repetitive, as it occurred more than once. Remember, the conduct does not have to be identical, there just has to be at least two occurrences.
 - In addition to being repetitive, was Jorge's conduct menacing? Consider whether the conduct is threatening or meant to frighten or intimidate. What details of the above situation lead you to that determination?
 - The unwelcome nature of the emails and texts that Hai-Jin received, coupled with the unauthorized access and use of her social media, the latter of which, includes a component of control over Hai-Jin, likely qualifies as menacing. The note on the windshield just adds another intimidating element to the circumstances.

Stalking

Stalking, a term that has made its way into both popular vernacular and culture, can be quite difficult to identify, especially at first glance. As a determination of stalking requires you to consider the totality of the circumstances, a more comprehensive understanding of stalking dynamics will better equip you to render your determination. Let's address what we know about stalking patterns and then proceed to ATIXA's recommended stalking policy. We will then focus on each element of the policy so that you feel comfortable investigating and rendering decisions on allegations of stalking.

Stalking Dynamics and Statistics

There are multiple types of stalking, but the most common by far in the education context is Simple Obsessional.⁷³ This type of stalking occurs when an individual is fixated on another person with whom they had, have, or wish to have, some manner of personal relationship. It is important to note that stalking typically follows an upward trajectory toward violence and there is a significant intersection of stalking conduct and relationships characterized by interpersonal violence.

Studies show that female victims are much more likely to be stalked by men, while male stalking victims are stalked by both male and female perpetrators in approximately equal measure.⁷⁴ Individuals between the ages of eighteen and 24 experience the highest rates of stalking, making colleges a hotbed for this conduct.⁷⁵ Stalking tactics vary significantly, but the most frequently reported tactics are the following: being watched or followed; being spied on with a listening device, camera, or global positioning system; being approached in unwelcome places (e.g., home, school, or work); receiving unwelcome voice, text, or computer (social media or instant) messages; and receiving unwelcome telephone calls, including hang-ups.⁷⁶

Most stalking victims know their stalkers, although the extent and degree of this familiarity varies. The majority of female stalking victims are stalked by current or former intimate partners. Male stalking victims are stalked, in approximately equal measure, by current and former intimate partners as well as acquaintances. Regardless of gender, victims are also stalked by complete strangers and family members.⁷⁷ Most stalkers use more than one tactic to follow, track, and/or pursue their victims and utilize different temporal patterns.⁷⁸ Keep in mind that stalking is unusual in that it may occur even without contact or interaction between the two parties.

⁷³ http://www.esia.net/Forms_of_Stalking.htm

⁷⁴ In 2010, approximately 2,883,000 women and approximately 940,000 men reported being stalked. Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Please note that for the purposes of describing stalking patterns, this section refers to a gender binary because it is commonly covered in research and published studies. The authors fully recognize that trans, transitioning, and other individuals who do not identify with the gender binary experience stalking.

⁷⁵ *Id.*; William J. Fremouw, Darah Westrup & Jennifer Pennypacker, Stalking on Campus: The Prevalence and Strategies for Coping with Stalking, 42 *J. Forensic Sci.* 666-669 (1997); Beth Bjerregaard, An empirical study of stalking victimization, 15 *Violence and Victims* 389-406 (2000).

⁷⁶ NISVS, *supra* at 29.

⁷⁷ *Id.*

⁷⁸ Mohandie, K., Meloy, J.R., McGowan, M.G., & Williams, J. (2006). The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers, 51(1) *J. Forensic Sci.*

In the college context, stalking often goes unreported, and commonly resolves itself when individuals transition out of the community or transition into other relationships. Occasionally, the stalking behavior will re-emerge in a pattern as the new relationship unravels as well. Those who are overly controlling in relationships tend to want to control their partner after a breakup, sometimes, as well. Frankly, truly menacing stalking that escalates to violence is fairly rare at colleges. Mostly, we have messy breakups that have some precursor or light stalking elements, or an inability to let go and have a healthy breakup. What this means is that college Investigators tend to be less familiar with how to investigate stalking, because they simply lack experience due to the low volume of allegations that just aren't nearly as frequent as is reporting of sexual violence or IPV.

“Let’s dig a little deeper into lurking and stalking... Lurking is a type of fixation behavior that feels like stalking to the person who is the target. But, the lurker’s intentions are very different from the stalker’s.”

Perhaps the most vexing situations for colleges with respect to stalking, in addition to lack of exposure, come from two issues, the first of which is the Title IX/VAWA intersection of stalking, and the second is what we call the issue of lurking. Let’s discuss the Title IX/VAWA intersection first.

Under Title IX, stalking has to be either sex- or gender-based. It also has to create a hostile environment under the definitions provided above, to fall within Title IX. Most stalking in the college context won’t rise to that level. Then, there is VAWA. VAWA uses a broad definition for stalking, unlike Title IX, and does not impose a requirement that the stalking be based on sex (although most stalking in colleges is sex-based, at least in part). That means, because of the intersection of these laws, that colleges have to address stalking whether it is discriminatory or not. But, as we noted above, colleges don’t have to use the VAWA definition as policy; only for the reporting of stalking statistics. That is helpful, because, as briefly described in the VAWA definitions section earlier, the VAWA definition problematically fails to differentiate between lurking and stalking.

Let’s dig a little deeper into lurking and stalking and discuss the two in comparison. Lurking is a type of fixation behavior that feels like stalking to the person who is the target. But, the lurker’s intentions are very different from the stalker’s. The lurker isn’t a jilted lover or former partner, typically, but is often an unrequited lover who often does not know how to express their affection in healthy ways. Their attention is unwelcome, but their intention is not menacing. To the contrary, they want a relationship very much. But, unwelcomed romance, or its pursuit, is still creepy. Lurkers tend to maintain a steady-state to their interest, rather than the pattern of escalation over time, leading to violence, that characterizes stalking. The challenge to investigators is that stalkers and lurkers can look similar in pattern to their targets (stalkers have targets, lurkers have subjects), such that lurking is often reported as stalking. And, unfortunately, lurking meets the VAWA definition of stalking, because that definition is so poorly constructed. But, we don’t have to make the same mistake with college policy. Understanding these differences will help investigators and fact-finders to differentiate the lurker from the stalker.

Where this really comes to a head is with our population of students who are on the autism spectrum. They are prone to fixating, and don't read the social cues of disinterest well from the people on whom they are fixating. Community colleges, in particular, knew exactly where this paragraph was heading as soon as they started reading it, because 98% of what is reported to them as stalking is completely benign lurking by a student who has no malicious intent. If the framers of VAWA knew that its definition of stalking was being used to discriminate against students on the autism spectrum, we are sure they'd be aghast.

Don't get us wrong here, both lurkers and stalkers need to stop their behavior, but disciplining a lurker for puppy dog love or failure to read social cues is harsh and unnecessary. And, sanctioning a student on the spectrum for these kinds of behaviors is often not the best approach to changing the behaviors; sanctioning does not suddenly help someone improve their ability to read social cues or accept rejection. An intervention, coaching, cognitive behavioral therapy and other modalities, however, can help them understand the problematic nature of their behavior. Thus, our definition seeks to maintain that element of menace that differentiates stalking from lurking.⁷⁹

As we noted previously, this means the precursor behaviors in stalking that occur before menace kicks in won't be covered by this definition (and, of course, we want to intervene before the threshold of violence), but the above definition of sexual harassment will cover these behaviors adequately. That, to us, is a better approach than watering down the definition of stalking to the point of meaninglessness.

Model Policy

Stalking is repetitive and menacing pursuit, following, harassing, and/or interfering with the peace and/or safety of another.

Model of Proof

- Repetitive
AND
- Menacing
AND
- Pursuit
OR
 - Following
Or
 - Harassing
Or
 - Interfering
AND
- With the peace of another
OR
- With the safety of another

⁷⁹ Again, please note that the impact on the subject can feel the same regardless of intent, so ensure reporting parties receive information on support services.

Rubric

1. Was there interference with the peace or safety of another? If not, there is no policy violation. If so,
2. Was it the result of repetitive and menacing pursuit, following, harassing or interfering? If not, there is no policy violation. If so, there is a policy violation.

Repetitive

One assessment that must be made is whether the action(s) at issue is repetitive (or continuous). While this may seem simple in theory, isolating the conduct in practice is not always an easy task.

To constitute repetitive conduct, there must be at least two occurrences, although the repeated conduct does not have to be of the same type, or a long string of continuous incursions. To determine if the conduct is repetitive, consider the following questions: When did the action commence? Has the reporting party been bothered more than once? When did the reporting party first become aware of the conduct? Is there a pattern that the responding party has employed? Has the responding party used multiple methods to track, follow, or contact the reporting party? Has the conduct ceased or is it still ongoing? When was the last act?

The answers to these questions will help determine if there is more than one action at issue. The conduct need not, and likely will not, be of the same type. For analysis of this element, focus should be placed simply on determining whether there were two or more instances of behavior. If you determine that there was simply one act, you do not need to continue your analysis: there is no policy violation. If there are two or more acts, you must continue to assess the conduct. Keep in mind as well that when someone comes to believe they are being stalked, they are often identifying the behavior because it somehow became obvious to them. In most stalking investigations, however, you will find many steps taken surreptitiously by the stalker well before anything became apparent to their target. Thus, stalking looks very different from the vantage point of the stalker than it does from the vantage point of their target, who will most likely report it to you as a single incident. Whether you can find the precursor behaviors is an open question, but you need to know to look for them, as it is highly likely they are there, if indeed the conduct is stalking.

Menacing

In addition to being repetitive, the conduct at issue must *also* be menacing. In other words, the conduct must intend to control someone, restore a relationship at any cost, or obtain some other desired end for which the stalker is willing to cause harm if they don't get what they want. It is often hard to decipher a stalker's intent to cause harm, but that is what we are looking for. When we can't figure out the intent behind behaviors that include following, pursuit, harassment, or interference, we tend to look at whether the conduct is threatening or meant to frighten or intimidate. We prefer to look at the behavior from the perspective of the responding party, rather than

just the subjective perception of the behavior by the reporting party (e.g., is it *meant* to frighten, rather than just, “is it frightening?”). Menacing is included in this definition to separate stalking from lurking, as detailed above.

In order to ascertain whether the conduct is menacing, it is important to determine the relationship, if applicable, between the parties, both currently and in the past. Understanding the scope and nature of the relationship and interactions between the parties, even if they seem minimal or innocuous at first, will be essential to providing the relationship dynamic insights you will need to determine if stalking is occurring. Communication with both parties, as well as friends, co-workers, and others who may have witnessed or heard about the behavior, is paramount to understanding the conduct at issue and how it is intended and perceived.

There are certain instances where the question of whether the conduct is menacing is incontrovertibly clear, such as repeated threats indicating a clear intent to harm, or repeated online posts with negative comments and information about an individual’s specific whereabouts. There are other situations, however, that are much more ambiguous. Certain behavior, considered in isolation or from an outsider’s perspective, may not seem particularly pernicious, which is why it is imperative to consider the totality of the circumstances, including the scope of the conduct and its effects on the reporting party. A reporting party need not identify or label the conduct as menacing for the conduct to qualify as stalking, because menacing is really about the stalker’s intent. As discussed in more detail below, the standard used to determine whether the conduct is menacing is a reasonable person standard, given the circumstances. Would a reasonable person, placed in the reporting party’s shoes, believe that harm is impending and/or feel threatened by the behavior?

Pursuit, following, harassing, and/or interfering with the peace and/or safety of another

Information gathered in assessing the menacing element of this policy will likely overlap with your analysis of this element, which should focus on the action itself. What has the responding party done? How has the responding party targeted the reporting party? While not at all exhaustive, the below are examples of tactics and actions that could constitute stalking if the other elements of the policy definition are met:

- Unwelcome phone calls, voice or text messages, hang-ups
- Unwelcome emails, instant messages, messages through social media
- Unwelcome cards, letters, flowers, or presents
- Watching or following from a distance, spying with a listening device, camera, or global positioning system (GPS)
- Installing tracking apps or keystroke recorders on electronic devices
- Approaching or showing up in places such as the target’s home, workplace, or school when it is unwelcome
- Leaving strange or potentially threatening items for the target to find
- Sneaking into target’s home or car and doing things to scare the target or let the target know the stalker has been there⁸⁰

⁸⁰ NISVS, *supra* at 29.

Technology also serves as a forum for various stalking methods. Impersonating the target online, spamming the target's email accounts, using passwords to access or hack accounts, and posting information about the target are notably different tactics, but each may constitute stalking. In evaluating the behavior, remain open to different tactics: while there are frequently used methods, there is no "typical" stalking conduct.

Consider as well how the actions have affected the reporting party. Look at changes in behavior and routine to determine if the peace and or safety of the reporting party has been affected. Keep in mind that people experience, and react to, stalking tactics in unique ways and various combinations. Given that, stalking victims often experience one or more of the following:

- Self-blame
- Guilt, shame, or embarrassment
- Frustration, irritability, anger
- Shock and confusion
- Fear and anxiety
- Post-traumatic stress disorder (PTSD)
- Emotional numbness
- Difficulties with concentration
- Flashbacks
- Isolation/disconnection from others
- Vulnerability/trust
- Inability to perform at school
- Depression
- Sleep disturbances, nightmares
- Sexual dysfunction
- Fatigue
- Appetite loss/overeating
- Self-medication with alcohol/drugs
- Attention deficits
- Work performance issues

Determination

To render an accurate and appropriate finding, analyze each component of the policy separately, at least initially. This will provide you with a more complete comprehension of the behavior you are assessing and will make it easier to determine whether there has been a policy violation. All three elements must be present to constitute stalking pursuant to ATIXA's promulgated policy.

In analyzing these three elements, apply a reasonable person standard. Ask questions such as: How would a reasonable person feel if placed in the circumstances at hand? As with the previous analyses using the reasonable person, there is a subjective and an objective element as you consider not only how the reporting party considers the conduct, but *also* how the reasonable person would consider the conduct. Would the conduct at issue be menacing to that reasonable

person? Would it interfere with a reasonable person's peace and/or safety? If the behavior does not constitute the behavior described in this element, and you determine that the conduct would not interfere with the peace and/or safety of a reasonable person, there is no policy violation.

For these purposes, a "reasonable person" is a neutral, rational, cautious individual, without significant eccentricities or foibles, who adheres to societal norms. This could be the reasonable member of a college community, as OCR states, or could be a reasonable person who is roughly the same age, sex and gender identity as the reporting party, placed in the reporting party's shoes, and faced with the reporting party's circumstances. Courts and agencies apply different standards, but we blend various approaches in our own investigations by assuming that it is the reasonable person in the same or similar circumstances.

Other forms of analyses are also important. For example, work with the reporting party to document the actions and create a timeline. If the conduct is ongoing, encourage the reporting party to keep track of the behavior by retaining messages or writing down details, such as the date,

“For these purposes, a ‘reasonable person’ is a neutral, rational, cautious individual, without significant eccentricities or foibles, who adheres to societal norms.”

time, and place the conduct took place. Utilize your IT staff to help you use apps like TrapCall to identify masked caller IDs, learn how to unhide surveillance apps on phones, or identify malware.

As you understand and assess the conduct, keep in mind that reporting parties may not identify or consider the conduct at issue as stalking. The behavior may start out as welcome or merely annoying and evolve, over time and repetition, into behavior that meets the three elements of the policy. Remember that physical or corroborative evidence of stalking may be difficult to

obtain and understanding the context of the behavior and the relationship between the parties is imperative to assessing whether the action constitutes stalking.