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At Issue

A **RISK MANAGEMENT NEWSLETTER** FOR COLLEGES AND UNIVERSITIES

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The Rise of **"Reverse Title IX"** Lawsuits

Do Colleges and Universities Have Anything to Fear?

By: James G. Ryan, Partner-in-Charge of the Commercial Litigation and Education Litigation Department and Hayley B. Dryer, Associate at Cullan and Dykman LLP

How is an institution supposed to balance its obligations under Title IX to timely respond to allegations of sexual misconduct and provide well-established protections for the complainant, while at the same time, afford proper due process rights to the accused student? The stakes are high all around as both the courts and the U.S. Department of Education struggle to find an answer to this question. In the meantime, and at an increasing rate, students who have been accused of sexual misconduct are suing their institutions under Title IX.

By way of background, Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. To establish a discrimination claim under Title IX, a plaintiff must show that the defendant discriminated against him/her because of sex, that the discrimination is intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions. Educational institutions can be held liable for "deliberate indifference" to known acts of student-on-student misconduct, where the misconduct was so severe, pervasive, and objectively offensive that it effectively deprived the victim of access to educational opportunities or benefits.

Traditionally, the alleged victim of campus sexual misconduct was the party who filed a Title IX claim against the educational institution. Accused parties typically only brought Title IX suits when they felt that the institution deprived them of due process or breached a contractual provision. Recently, however, accused parties have started bringing Title IX claims similar to those available to alleged victims, claiming that the institution unfairly punished the accused male students because of their gender-status. Legal experts

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have started calling these claims "reverse Title IX" lawsuits. Indeed *Insider Higher Ed* first reported on the existence of "reverse Title IX" suits in 2013. Since then, "there are at least 68 pending lawsuits alleging gender bias by accused students, many of them filed in the last two years."[1] Accused students have already filed claims against Vassar College, the University of Massachusetts Amherst, the University of Michigan, Duke University, and a host of other campuses.

So far, however, "reverse Title IX" suits have not gained much traction, with male students failing to prove gender discrimination in cases against Vassar, St. Joseph's University, Miami University, and the University of South Florida. Recently, Judge Gregory Woods of the Southern District of New York also dismissed a Title IX lawsuit against Columbia University, asserting "reverse Title IX" lawsuits do not constitute sex-based discrimination. In 2013, Paul Nungesser was accused of rape by fellow Columbia University ("Columbia") student, Emma Sulkowicz. Columbia ultimately found Nungesser "not-responsible" for "non-consensual sexual intercourse." Notwithstanding Columbia's decision, however, Sulkowicz maintained that Nungesser raped her. In 2014, she undertook an art project, with the support and direction of faculty at Columbia, entitled *Mattress Performance (Carry That Weight)*. The project consisted of protest art where Sulkowicz carried her mattress in protest of Nungesser being on campus. The project received national media attention, inspiring the anti-assault movement *Carry That Weight*. Sulkowicz vowed to continue the project until Columbia expelled Nungesser or he left voluntarily.

Nungesser subsequently brought a Title IX lawsuit against Columbia, arguing that, although Columbia found him "not responsible" for the alleged sexual misconduct, the school "looked the other way" while Nungesser was tried in the court of public opinion and subjected to harassment by his peers. He claimed that because of Columbia's indifference to Sulkowicz's actions, (i) his social and academic experience at Columbia suffered, (ii) he was precluded from attending on-campus career recruiting events, and (ii) consequently, was unable to obtain employment in the United States. The Southern District of New York considered the issue on summary judgment and ultimately dismissed the claim. In its decision, the court wrote:

Nungesser's argument rests on a logical fallacy. He assumes that because the allegations against him concerned a sexual act that everything that follows from it is "sex-based" within the meaning of Title IX. He is wrong. Taken to its logical extreme, Nungesser's position would lead to a conclusion that those who commit, or are accused of committing, sexual assault are a protected class under Title IX. The statute does not permit that result.

In other words, according to the Southern District of New York, referring to a person as a rapist, falsely or not, is not inherently gender based; it is an allegation brought because of a person's conduct, not his or her gender status. Consequently, such harassment is outside the scope of Title IX. As set forth in the decision:

To hold otherwise would, in essence, create a new right of action under which all students accused of sexual assault could bring a Title IX claim against their educational institutions — so long as they could plausibly plead that the accusations were known to the institution and that the institution failed to silence their accusers — simply because the misconduct they were accused of has sexual elements.

While this recent decision from the Southern District of New York supports the notion that being called a rapist due to one's alleged conduct, whether false or not, is not gender discrimination under Title IX, the court did provide Nungesser with thirty days to amend his complaint to explain why Title IX should apply. Should Nungesser fail to sufficiently allege a Title IX claim, the court suggested alternatives under state law – defamation and slander. However, if Nungesser convinces the court to consider his claim under Title IX, educational institutions should be ready to defend against increased "reverse Title IX" litigation.

When properly implemented, Title IX shields students and guides institutions on how to maintain a safe campus environment. At the same time, Title IX can be, and currently is, being used as a sword (by both victims and accused students) in an effort to punish institutions for improperly responding to claims of sexual misconduct. In this regard, institutions must ensure that they are doing everything they can to effectively recognize, prevent, and respond to allegations of sexual misconduct in order to ensure compliance with the heightened expectations of the federal and state governments, as well as the media and general public. Preparation, prevention and proper and comprehensive training are instrumental components in this regard. A small amount of training and proactive risk management can save institutions time and money while reducing the risk of campus sexual assault.

If you or your institution has any questions or concerns regarding employment or education related issues, please contact James G. Ryan at jryan@cullenanddykman.com or (516) 357-3750 or Hayley B. Dryer at hdryer@cullenanddykman.com or (516) 357-3745.

[1] https://www.insidehighered.com/news/2015/05/01/students-accused-sexual-assault-struggle-win-gender-bias-lawsuits

Retaliation Claims

Let's Hope Common Sense Prevails

By: **Ken Jones**, Esq. Hall, Booth, Smith

The Equal Employment Opportunity Commission (EEOC) is in the process of updating its guidance on workplace retaliation. For the frontline professionals dealing with employment matters, it should seem obvious that it is prohibited to retaliate against an employee that files some type of discrimination complaint with the EEOC. The grey area has always been trying to determine what "retaliation" is. The easy examples are termination, demotion, or a reduction in pay. Doubtless, we can all agree that an employer that takes one of these actions in response to an EEOC complaint will be met with another claim.

It is clear employers and human resource officers are faced with the reality that from the claimant perspective, every action taken is "in retaliation" for their having filed an EEOC complaint. Any perceived slight, real or imagined, could trigger a follow up retaliation claim to the underlying claim. The pendulum is swinging further to the employee's side. Wright Specialty policyholders, as employers, may feel the pendulum has swung too far.

According to a recent EEOC press release, retaliation claims have doubled since 1998 and now comprise about half of all EEOC claims. Numbers like this suggest there may be true acts of retaliation, but it could be that any perceived slight, or just claimant vengeance, is driving this statistical increase, too. It is not just follow up retaliation claims by "Employee Al" that are on the rise; many are first-time retaliation claims filed by "Employee Betty" after she has spoken in favor of, or supported, Al's claim. If there is a causal connection, Betty can have a retaliation claim for a "protected activity" and "opposition activity" related to Betty's support of Al.

Employers must be critical of their own actions, and take seriously any allegation of retaliation if it is raised. The best defense is a record trail that documents the complainant's job actions and performance measurements. Secondly, don't get caught punishing Betty because she supported Al's complaint.

If Al files an EEOC complaint, it is critical to document and keep files on his actions. Other than immediately terminable actions, if Al is constantly a problem or pushing the envelope on the job, you should already have each incident documented if you foresee terminating Al. Do the same for Al's EEOC complaint. Keep a record.

If either "Al" or "Betty" makes a complaint, meet with the appropriate supervisor and employee, and have a clear and concise plan of action in place to review the complaint. Document what occurs during the meeting and all responses as a record of what was said. It is likely the complainant employee will say "I never said that" or some other denial of what transpired in the meeting, but in the end, if it is contemporaneously documented, and on file, that may prove to be invaluable evidence in front of the EEOC, or a jury.

While the EEOC is looking to expand or clarify retaliation claims coming in, EEOC officials should strike a balance, recognizing the concerns of both employers and employees. The EEOC is an investigative body, and its function is to enforce antidiscrimination laws that are designed to provide a fair workplace with equal opportunities for all job applicants and employees.

Distracted Driving

Who are the Offenders?

By: **Robert Bambino**, CPCU, ARM Wright Specialty Insurance

The Centers for Disease Control and Prevention (CDC) cite statistics indicating more than eight people are killed and 1,161 injured in crashes daily in the U.S. involving a distracted driver. The National Highway Traffic Safety Administration defines distracted driving as driving while doing another activity that takes your attention away from driving. According to the U.S. Department of Transportation — National Highway Traffic Safety Administration (NHTSA), *Distracted Driving 2013*, the number of distracted-affected crashes as a result of cellphone use has increased over 50 percent from 2010 to 2013.

Three components to distracted driving are: visual, such as taking your eyes off the road; manual, taking your hands off the wheel; and cognitive, taking your mind off driving.

DEMOGRAPHICS

The NHTSA data also helps us understand who is most likely to drive distractedly and be involved in an automobile accident.

- Drivers in the 20-29 age group are responsible for the largest number of drivers involved in distracted-affected fatal accidents overall, and distracted-affected fatal accidents involving cell phone use.
- Ten percent of all drivers 15 to 19 years old involved in fatal crashes were reported as distracted at the time of the crashes. This age group has the largest proportion of drivers who were distracted at the time of the crashes.
- In April 2012, the NHTSA in Y*oung Drivers Report the Highest Level of Phone Involvement in Crash or Near-Crash Incidences* published data showing that drivers under 24 are much more likely to text while driving than older drivers.

The CDC provides other information about young adults and teenage drivers.

- In 2013, more than two out of five students who drove in the past 30 days sent a text or email while driving.
- Those who text while driving are nearly twice as likely to ride with a driver who has been drinking.
- Students who frequently text while driving are more likely to ride with a drinking driver or drink and drive than students who text while driving less frequently.

A July 2009 study by the Virginia Tech Transportation Institute reported that texting while driving heavy vehicles increases the risk of crashing by 23 times compared to non-distracted driving. This study also revealed that texting activities take a driver's eyes from the road for an average of 4.6 seconds, which is the equivalent of blind travel while crossing a football field at 55 miles per hour.

STATE LAWS AND DISTRACTED DRIVING

The majority of the states have some type of law addressing distracted driving. According to the Insurance Institute for Highway Safety - Highway Loss Data Institute, 14 states and the District of Columbia ban talking on a hand-held cellphone while driving. The use of all cellphones by novice drivers is restricted in 37 states and the District of Columbia, and, 46 states and the District of Columbia ban text messaging for all drivers. Novice drivers are banned from texting in two states (Missouri and Texas). Twenty states and the District of Columbia prohibit the use of cell phones by school bus drivers.

PREVENTION – UNDER 24 AGE GROUP

Besides employing younger people as part of the general workforce, colleges and universities allow students to drive college-owned vehicles as both employees and volunteers. As a rule, automobile insurance follows the vehicle and people who drive vehicles within the scope of their permission are "insureds" under a commercial automobile policy. This creates a liability exposure for the college as the vehicle owner. Even with a commercial auto policy in place, colleges still face exposure for catastrophic losses that exceed policy limits, non-covered losses, reputation risk and loss of employee productivity due to participation in the defense of claims and litigation.

It seems that younger drivers present the largest risk to themselves and others based on an analysis of distracted driving accident trends.

Some ways to reduce distracted driving include:

1. Enforce applicable state laws.
2. Establish a policy prohibiting the use of hand-held cellphones while driving a college-owned vehicle, except in an emergency. This includes texting and email. The National Safety Council (NSC) has information to prevent distracted driving incidents at: http://www.nsc.org/learn/NSC-Initiatives/Pages/distracted-driving-awareness-month.aspx Scroll down for the link to request the material.
3. Inform the college community about driving restrictions.
4. Train student and volunteer drivers about distracted driving. Have them sign a copy of the policy. Follow-up periodically to enforce the message, and violations should have consequences.
5. Use posters to reinforce the message. Posters are also available at the NSC website.
6. Install instructional labels in vehicles that prohibit texting, cellphone use, eating and other activities.
7. Set an example. Administrators and senior staff must follow the policy as well.
8. Follow technological solutions that restrict cellphone use while the automobile is being driven. Blocking software, apps that limit cellphone use when the car is in motion, and docking stations are examples.
9. Put public safety announcements on the college website and on social media.
10. Distracted driving is not limited to cellphone use. It includes using navigational devices, adjusting the sound system, cameras, lane alerts and climate controls.

There must be penalties for violations of college policies for all employees, regardless of age or position. When fairly and equally applied, consequences such as loss of driving rights, formal reprimands, suspensions or terminations will help reduce the incidents of unwanted behavior.

RESOURCES AND REFERENCES

Centers for Disease Control and Prevention – Injury Prevention and Control: Motor Vehicle Safety. Distracted Driving. March 2016. (http://www.cdc.gov/motorvehiclesafety/distracted_driving/)

Governors Highway Safety Association. Distracted Driving Laws http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html

The Insurance Institute for Highway Safety – Highway Loss Data Institute. Distractive Driving , Cell Phones and Texting. March 2016 http://www.iihs.org/iihs/topics/laws/cellphonelaws

U.S. Department of Transportation – Driver Distraction in Commercial Vehicle Operations. 2009 www.distraction.gov/downloads/pdfs/driver-distraction-commercial-vehicle-operations.pdf

U.S. Department of Transportation – National Highway Traffic Safety Administration (NHTSA), Distracted Driving 2013 (http://www.distraction.gov/downloads/pdfs/Distracted_Driving_2013_Research_note.pdf)

U.S. Department of Transportation – National Highway Traffic Safety Administration (NHTSA) Young Drivers Report the Highest Level of Phone Involvement in Crash or Near-Crash Incidences. April 2012. http://www.distraction.gov/downloads/pdfs/traffic-safety-facts-research-note-04-2012.pdf

California Supreme Court To Decide Public University's Legal Duties Arising Out Of Classroom Stabbing

By: **Richard H. Nakamura Jr., Partner, Morris Polich & Purdy, LLP**

When Katherine Rosen enrolled at UCLA as a freshman in the Fall of 2007, the tragedy at Virginia Tech was still a raw memory. Reassurances were pouring forth from university administrators across the county. "Welcome," a UCLA brochure proclaimed, "to one of the most secure campuses in the country." Two years later, Rosen was attacked by another student, Damon Thompson, while working in a chemistry lab on campus. Thompson had grabbed Rosen by the neck and attacked her with a knife. Rosen almost died. Thompson was charged with attempted murder and found not guilty by reason of insanity.

Rosen sued UCLA, claiming the public university breached a legal duty to protect her. And on that critical legal issue of whether a public university like UCLA owes a general duty to protect its students from the criminal acts of other students, two California judges looking at Rosen's lawsuit have said "yes." Two have said "no." The California Supreme Court will resolve the split and finally decide whether such a duty exists and, if it does, what steps must be taken by the educational institution to comply.

This case has national implications. Courts throughout the country are divided on the question of whether a university owes an affirmative duty to protect its students. A leading national legal treatise points out the split: some state courts impose a duty to protect with "less than ringing endorsements," while other state courts decline to impose a duty but only in "narrow, fact-specific terms that do not rule out the possibility of recognizing a duty in other contexts." (Restatement (Third) of Torts: Physical and Emotional Harm § 40, Reporter's Notes, comment l (2012) (collecting cases on both sides of this issue). A "bright-line" legal rule is elusive in this context.

In Rosen's case, the trial judge who denied UCLA's motion for summary judgment identified three bases for finding a legal duty to protect Rosen: (1) a special relationship based on Rosen's status as a student; (2) Rosen's status as a "business invitee" on UCLA's campus; and (3) UCLA's voluntary assumption of a duty by overseeing Thompson's psychological treatment. But the trial judge was reversed by the California Court of Appeal in a 2-1 decision. The majority concluded that none of the three sources of a legal duty identified by the trial court were supportable in this case. The dissenting justice, however, honed in on the special relationship. The dissenting justice declared that he "would find such a special relationship exists between a college and its enrolled students, at least when the student is in a classroom under the direct supervision of an instructor, and the school has a duty to take reasonable steps to keep its classrooms safe from foreseeable threats of violence."

The case is being closely watched. And for good reason. The California Supreme Court has been called "the most influential state court in the nation." (New York Times, March 11, 2008, "Around the U.S., High Courts Follow California's Lead.")

This is how the issue is being teed up in California. UCLA told the California Supreme Court that the dissenting justice did not say the majority got the law wrong. Rather, in UCLA's view, Rosen and the dissent want to "rework [ ] the law substantially," particularly the special relationship doctrine. Imposing a duty, UCLA asserted, would "unravel decades of California jurisprudence" establishing:

(a) the absence of any legal duty to protect against criminal acts by third parties;
(b) that the K-12 special relationship and duty of supervision does not extend to the college context outside the setting of discrete programs such as athletics; and
(c) that only mental health professionals face potential liability for failing to warn of dangers posed by the mentally ill, and then only in the face of an articulated serious physical threat against identifiable persons.

Finding a legal duty within any of these doctrines would, in UCLA's view, be nothing short of "revolutionary."

At the Court of Appeal, several colleges and universities, including Stanford University, California State University, Pomona College, Pepperdine University, Claremont McKenna College and California Community Colleges, signed an amicus brief supporting UCLA. Also weighing in were the Jed Foundation — a national nonprofit organization promoting the emotional health of college students nationwide — and the Consumer Attorneys of California. All are expected to continue expressing their views at the California Supreme Court.

All colleges should take note of this case and monitor its outcome. Although it is a California matter, it will influence decisions in state courts throughout the country.

The case is called **The Regents of the University of California v. Superior Court of the State of California, S230568.** Briefing is still ongoing, with oral argument and a decision likely to occur sometime in 2017.

Resource Center

Training or information about today's risk management-related subjects can be found in the Wright Specialty E-Learning or Title IX Learning Centers online.

Wright Specialty is host to a number of online risk management resources. Take advantage of the free safety education courses available on Wright's 24/7 web-based training center. Visit our Title IX Resource Center to keep up with changing developments or browse our seasonal Risk Alerts to stay up-to-date on school-based risk management and safety issues. With years of experience insuring school risks, Wright Specialty Insurance provides valuable guidance for school administrators to help reduce injuries to students, staff and visitors, and to prevent damage to property. You can access our national Employment Liability Hotline for help with every day employment-related issues. The Hotline is available Monday - Friday from 8:30 a.m. to 6:00 p.m. eastern time. Call 866-758-6874.

For easy registration for our e-Training Center and for access to the Resource Center, contact Erica Gotay, your Wright Specialty representative, to receive your access code at: 516-750-3902 or EGOTAY@wrightinsurance.com

News&Views

School-related civil rights complaints surged to a new record last year as the U.S. Education Department fielded an unprecedented 10,392 grievances, with nearly half of them related to alleged discrimination against students with disabilities, new data shows. Since the Office for Civil Rights (OCR) began tracking the complaints in 2011, the number of alleged cases reported annually has essentially doubled with 46% of the complaints, or 4,806, related to disability.
(Source: USA Today May 4, 2016. Using data from the US Education Department)

Litigation against employers continues to rise.
Employers in the United States faced a record number of class-action lawsuits in 2015, with more than 1,300 rulings across the nation.
(Source: Risk and Insurance. April 2016)

Health, Higher Ed Most Vulnerable to Cyber Attacks.
Sensitive information, high turnover and low security budgets are the reasons cited.
(Source: *Cyber Threats.* Risk and Insurance, May 2016 http://www.riskandinsurance.com/health-higher-ed-vulnerable-cyber-attacks/)

Atlantic Hurricane Season.
2016 Atlantic Hurricane Season to be at a near average level, with 12 named storms, five hurricanes and two major hurricanes.
(Source: *Hurricane News.* Weather.com https://weather.com/storms/hurricane/news/2016-hurricane-season-forecast-atlantic-colorado-state-csu)

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