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PROCEED AT YOUR OWN RISK: THE BALANCE BETWEEN ACADEMIC FREEDOM AND SEXUAL HARASSMENT

John E. Matejkovic and David A. Redle***

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.¹

I. INTRODUCTION

Sex is a central part of human existence and as such is an appropriate subject for academic consideration and discussion. In many school districts, sex education classes begin in the latter years of elementary school, and almost every high school includes some sex education, even if only as a part of a general “health” class. Sex is an appropriate topic of discussion in anthropology classes, sociology classes, and civics or current events classes at the high school level. Similarly, sex is an appropriate topic at the college level not only in anthropology and sociology classes, but also in English composition classes and classes dealing with human relations issues generally. Sex is an especially appropriate topic in colleges of business when discussing a business’s human relations function or in business law classes reviewing equal employment opportunity law.

Despite its appropriateness for discussion in an academic context, sex can also be a difficult or contentious subject. Many schools have adopted policies and guidelines related to sexual harassment and professional behavior in and out of the classroom. Society is generally very sensitive to issues of sexual abuse and harassment, and this often

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1. Am. Assn. of U. Profs., *1940 Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/statements/Redbook/1940stat.htm> (1940).

makes any academic discussion of sex-related issues a delicate matter. Indeed, awareness of sexual harassment is increasing,² as evidenced by over 13,000 annual filings of sexual harassment claims since 1994 with the Equal Employment Opportunity Commission (EEOC) and corresponding state fair employment practice agencies.³

While a discussion of sex-related issues may be an academic necessity in some situations, instructors need to be aware that there is a very fine line that may exist between a legitimate classroom discussion and an offensive one. Of particular concern, especially in the current climate of academia, is the fact that what an instructor believes may be a legitimate classroom discussion may result in his or her loss of employment with very little recourse. Sexual harassment especially becomes a concern in the educational context when principles of sexual harassment conflict with concepts of academic freedom.

As discussions of sex are often difficult and/or sensitive, two germane questions arise: (1) When does classroom conduct or discussion rise to the level of sexual harassment? (2) At what point is classroom conduct or discussion protected under the rubric of academic freedom? These are the issues and concerns discussed in this article.

This article begins in Part II with an analysis of the concept of academic freedom recognizing that, despite its evolution, academic freedom continues to be a concept that is somewhat vague and undefined. The authors suggest that, at a minimum, academic freedom includes the freedom to investigate and research topics without regard to current atmospheres of political correctness or controversy, the ability to engage in classroom behavior to convey information in a manner which is professionally appropriate to the subject matter taught, and the ability to discuss relevant, controversial issues in the classroom. In Part III of this article we analyze sexual harassment and the legal protections afforded in an academic context. This concept is considered from two perspectives: (1) Title IX protections against a hostile work environment or *quid pro quo* harassment; and (2) other tort protections related to sexual harassment, such as negligent hire and negligent supervision. The focus of Part IV examines the collision between the collision between the concept of a hostile work environment and other tort protections related to sexual harassment. Generally Parts III and IV offer a survey of the

2. While this paper focuses on sexual harassment, it is important to remember that unlawful harassment can be found to occur on the basis of any legally protected classification (e.g., race, religion, age, disability).

3. U.S. Equal Empl. Opportunity Commn., *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 2004* (available at <http://www.eeoc.gov/stats/harass.html>) (last modified Jan. 27, 2005).

important case law in these areas. The authors conclude that educators and educational institutions should be cautioned to *proceed at their own risk* when utilizing sex and related subjects in the classroom.

II. ACADEMIC FREEDOM

While the phrase “academic freedom” has been used in many court decisions, it remains a rather vague, undefined concept.⁴ Academic freedom has evolved over time based upon application of constitutional protections to students, faculty, and administrators of educational institutions.

From the faculty or administrative perspective, this amorphous concept of academic freedom evolved along with concepts of tenure or under collective-bargaining agreements. While tenure does not provide complete protection to faculty members for any activities in which they might engage, it allows academics freedom to engage in a wide range of intellectual activities, as tenure statutes usually guarantee employment except in cases of incompetence, neglect of duty, immorality, unsatisfactory performance, insubordination, or conviction of a felony, drunkenness, or criminal behavior.⁵ While currently they seem clearly unconstitutional as a violation of First Amendment rights, many states had laws banning teachers who were members of the Communist Party, advocated communism, or refused to sign oaths of loyalty.⁶ Though many may argue that tenure can be a mixed blessing, it is clear that freed from concerns about “unjust” terminations, faculty members are able to engage in broader areas of academic pursuit as well as exercise of their First Amendment freedoms of speech and association.⁷

Although faculty may enjoy more liberties and independence in their academic pursuits as a result of the development of academic freedom, there is a dearth of cases and treatises attempting to provide a single,

4. This paper is not designed to provide a comprehensive discussion of the evolution or parameters of “academic freedom.” Readers interested in the history, evolution, or vagueness of “academic freedom” are directed to any number of other articles discussing the concept in more detail, such as *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1048 (1968); Charles Alan Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027 (1969); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 Yale L.J. 251 (1989); and others.

5. See Cal. Educ. Code Ann. § 44932(a)(1)–(a)(11) (2006); Colo. Rev. Stat. §22-63-301 (2005); Conn. Gen. Stat. §10-151 (2004); Fla. Stat. § 231.36(3) (repealed 2003); Ohio Rev. Code Ann. § 3319.16 (Anderson 2006); S. C. Code Ann. § 59-25-430 (2005) (also listing drunkenness and use, sale, or possession of drugs).

6. Cal. Educ. Code Ann. at § 44932(a)(9), (a)(10).

7. Obviously, the First Amendment freedoms involved are only protected against state action; a private school teacher might not find such protections available.

clear, and universally accepted definition of academic freedom. However, the concept of academic freedom is never clearly defined in any particular court decision. It is often cited as a concept or a concern in a particular case, but the United States Supreme Court has never clearly defined what academic freedom is, nor who it protects.

It would seem that the concept of academic freedom exists to promote broad latitude in not only the topics or subjects that should be taught or considered in an academic setting, but also to provide wide latitude in how those topics or subjects may be taught. As one commentator notes, "Lacking definition or guiding principle, the doctrine [of academic freedom] floats in the law, picking up decisions as a hull does barnacles."⁸ As another commentator asks, "To whom does [academic freedom] belong?"⁹ Many legal analysts agree that academic freedom should guarantee First Amendment rights of freedom of expression to the extent the exercise of those rights is consistent with the normal activities of a university. Some commentators note that recognized limitations such as "time and place" regulations may be appropriate and permissible on the campus to ensure order, avoid conflict, etc.¹⁰

The authors of this article recognize the absence of support for a universally accepted definition of academic freedom. For the purposes of this paper, the authors define academic freedom to include the freedom to investigate and research topics without regard to current atmospheres of political correctness or controversy, the ability to engage in classroom behavior to convey information in a manner which is professionally appropriate to the subject matter taught, and the ability to discuss relevant, controversial issues in the classroom.

The concept of academic freedom was generally recognized by the United States Supreme Court as early as 1957, in *Sweezy v. New Hampshire*.¹¹ *Sweezy* involved an investigation of a professor by the New Hampshire Attorney General, pursuant to the state's Subversive Activities Act.¹² During the course of the investigation, Sweezy refused to answer certain questions posed by the Attorney General, and was cited for contempt.¹³ The contempt citation was upheld by the lower courts

8. Byrne, *supra* n. 4, at 253.

9. Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 Tex. L. Rev. 1247, 1249 (1988).

10. E.g. Wright, *supra* n. 4, at 1041-46 ("I do not read the first amendment as granting rights in a vacuum, but rather as granting rights that exist at a particular time and place.").

11. 354 U.S. 234 (1957).

12. *Id.* at 236-38.

13. *Id.* at 244.

but reversed by the Supreme Court, which held that the process involved in the investigation violated the due process clause of the Fourteenth Amendment because it infringed Sweezy's First Amendment rights.¹⁴ In oft-quoted language, the Court stated:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity¹⁵ and understanding; otherwise our civilization will stagnate and die.

Following the Court's general recognition of the protections of academic freedom, subsequent decisions expanded teachers' constitutional rights to engage in "outside" political activity in the mid-1960s, in cases such as *Johnson v. Branch*,¹⁶ *Rackley v. School District*,¹⁷ and *Williams v. Sumter School District*.¹⁸ The most significant ruling in this regard was that of the United States Supreme Court in *Keyishian v. Board of Regents*¹⁹ in which the First Amendment right of freedom of association was applied to teachers who belonged to "subversive" organizations.²⁰ Specifically mentioning academic freedom for the first time, the Court found academic freedom to be a "special concern of the First Amendment."²¹ In fact, the Court noted that academic freedom was necessary for the "robust exchange of ideas" which should occur in an academic setting.²²

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of the

14. *Id.* at 254–55.

15. *Id.* at 250.

16. 364 F.2d 177 (4th Cir. 1966).

17. 258 F. Supp. 676 (D.S.C. 1966).

18. 255 F. Supp. 397 (D.S.C. 1966).

19. 385 U.S. 589 (1967).

20. *Id.* at 591.

21. *Id.* at 603.

22. *Id.*

multitude of tongues, [rather] than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).²³

Subsequent cases decided by the Supreme Court established that academic freedom exists only in relation to the educational context involved. For example, in *Tinker v. Des Moines Independent Community School District*,²⁴ school officials suspended a number of high school students for wearing black armbands to the school in protest of the U.S. involvement in the Vietnam conflict.²⁵ The lower courts had upheld the suspensions on the basis that the school officials acted properly to prevent any disturbances in the school and to maintain discipline.²⁶ The Supreme Court reversed, noting that no disturbance actually occurred and the wearing of the armbands was "pure speech" protected by the First Amendment.²⁷ The Court noted that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁸ However, the Court also noted that public schools may limit speech to promote educational goals.²⁹

Nineteen years later, the Court reminded educators that academic freedom exists only in relation to the educational context involved. It indicated in another decision that freedom of expression protections are not the standard educators and administrators are to apply in the dissemination of student expressions in school-sponsored expressive activities (e.g., a school newspaper). In *Hazelwood School District v. Kuhlmeier*,³⁰ a group of high school students challenged their principal's decision to pull an article discussing teen pregnancy and the impact of divorce from the school newspaper.³¹ The principal's justification in pulling the article was that what the students discussed "anonymously" in the article could be identified.³² The Court noted that First Amendment rights of high school students are not coextensive with the rights of adults in other settings. The Court went on to distinguish *Tinker* by noting that the freedom of expression standard in that case is not the same standard for determining when a school may lend its name and

23. *Id.*

24. 393 U.S. 503 (1969).

25. *Id.* at 504.

26. *Id.* at 504-05.

27. *Id.* at 505-06, 514.

28. *Id.* at 506.

29. *Id.* at 506-07.

30. 484 U.S. 260 (1988).

31. *Id.* at 263.

32. *Id.*

resources to the dissemination of student expression.³³ The Court held that the First Amendment is not violated when school officials exercise editorial control over the style and content of student speech in school-sponsored expressive activities, as long as those actions are reasonably related to legitimate pedagogical concerns.³⁴

In a 1994 result analogous to *Hazelwood School District*, the Second Circuit in *Silano v. Sag Harbor Union Free School District Board of Education*³⁵ found no academic freedom protection for a teacher who used a film strip showing nude men and women to demonstrate the phenomenon of “persistence of vision” to a tenth grade mathematics class.³⁶ The court found that no First Amendment violation occurred, relying in part on *Hazelwood* and noting that high school officials were allowed to regulate “legitimate pedagogical concerns” based upon consideration of the students’ ages and levels of maturity.³⁷

When evaluating the *Silano* decision (i.e., at issue was the effect of actions as related to high school students), it is notable that there are fewer considerations of age or maturity taken into account in academic freedom questions at the college or university level because generally any students involved are adults. Many of the decisions involving colleges or universities specifically address issues of sexual harassment and academic freedom based upon the actions and discussions of instructors in the classroom. Most court decisions addressing academic freedom concerns hold that academic freedom provides protection only when the questioned activities are relevant to the academic circumstance. “The principle of academic freedom under the First Amendment serves to protect the utterances in question only if they are germane to course content as measured by professional teaching standards.”³⁸ However, as stated by the Ninth Circuit, “Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor’s classroom speech.”³⁹

Further, while most academics may believe that academic freedom is an individual or personal freedom, a more recent, and very significant, federal court of appeals decision held that academic freedom applies only to educational institutions, and not to individual instructors. In *Urofsky v.*

33. *Id.* at 272–73.

34. *Id.* at 273.

35. 42 F.3d 719 (2d Cir. 1994).

36. *Id.* at 721.

37. *Id.* at 722–23.

38. *Bonnell v. Lorenzo*, 241 F.3d 800, 804 (6th Cir. 2001).

39. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996).

Gilmore,⁴⁰ six professors employed by various public colleges and universities in Virginia challenged the constitutionality of a state statute prohibiting any state employee from accessing or downloading sexually explicit materials on any computer owned or leased by the state.⁴¹ The first challenge by the professors was that the statute was unconstitutional as applied to all state employees, which the court handily dismissed. The court noted that the speech at issue was being regulated on a narrow basis (i.e., the prohibition only applied to use of state computers, and did not prohibit state employees from accessing or discussing any material using their own computers, on their own time), and the First Amendment concerns were outweighed by the state's legitimate interest in workplace efficiency and maintaining a workplace free of sexual harassment.⁴²

The professors' second challenge was that the statute unconstitutionally interfered with their First Amendment right of academic freedom, as they would be prohibited from accessing information regarding human sexuality that was germane to their academic pursuits.⁴³ In fact, one professor complained that the statute effectively censored his web site, which contained information regarding studies of sexuality, among other things.⁴⁴

After discussing the evolution of the concept of academic freedom in the United States and noting that cases such as *Sweezy* and *Keyishian* actually did not address academic freedom as a concept applicable to individual teachers,⁴⁵ the court held that more recent Supreme Court decisions established that academic freedom meant that educational institutions had leeway to determine what was to be taught, and in what fashion. The court wrote:⁴⁶

Taking all of the cases together, the best that can be said for Appellees' claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the "right" claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic

40. 216 F.3d 401 (4th Cir. 2000).

41. *Id.* at 404.

42. *See id.* at 406, 409; *see also id.* at 422 (Luttig, J., concurring).

43. *Id.* at 409–10.

44. *Id.* at 410 n. 9.

45. *Id.* at 412–14.

46. *Id.* at 414 (citing decisions in *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) and *Regents of the U. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985)).

freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.

Overall, academic freedom still remains a vague and ambiguous concept that seems to receive recognition by the courts in a variety of inconsistent, and often ill-defined, circumstances. While the concept has received recognition and ratification from the United States Supreme Court, questions still remain as to who is protected by academic freedom. Even though there is substantial case law indicating that academic freedom applies to individual professors, the Fourth Circuit's decision in *Urofsky* casts some doubt as to whether academic freedom is an individual professor's right or a right that extends only to educational institutions. Likewise, as previously mentioned, the vagueness of the concept of academic freedom, including its lack of a clear definition and uncertainty regarding who is entitled to its protections, becomes more problematic in connection with sexual harassment concerns.

III. SEXUAL HARASSMENT

Generally speaking, the law of sexual harassment arose from Title VII of the Civil Rights Act of 1964.⁴⁸ Initially, courts found that Title VII was violated when instances of repeated, unwanted sexual advances, derogatory comments, gestures, and similar conduct, were directly related to obtaining employment, promotions, raises, etc.⁴⁹ This concept is now more commonly referred to as *quid pro quo* sexual harassment.⁵⁰

In 1980, the EEOC expanded the definition of sexual harassment beyond the *quid pro quo* form of harassment when it issued guidelines setting forth a definition of sexual harassment that included the idea of a "hostile working environment":⁵¹

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual

47. *Id.* at 415 (footnote omitted).

48. 42 U.S.C. § 2000e (2000).

49. *E.g. Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (The court found Title VII to have been violated when the plaintiff was fired after refusing her supervisors sexual advances. "[R]espondeat superior does apply here, where the action complained of was that of a supervisor [who has the authority] to hire, fire, discipline or promote, or at least to participate in or recommend such actions . . ."); see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70–71 (1986) (clearly describing the "quid pro quo" concept).

50. Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Harv. J.L. & Pub. Policy 307, 308 (1998).

51. 29 C.F.R. § 1604.11(a) (2005).

harassment when[:]

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁵²

The concept of hostile work environment was recognized and enforced by the United States Supreme Court in *Meritor Savings Bank v. Vinson*.⁵³ In 1993, the Court expanded an employer's liability for hostile work environment sexual harassment by ruling that no diagnosed psychological injury was required to state a claim where the conduct was severe and pervasive and would be offensive to a "reasonable woman."⁵⁴

A. Title IX

The prohibition of unlawful discrimination and harassment, whether *quid pro quo* or hostile working environment, is included in the protections of Title IX of the Education Amendments of 1972 which states that:

No 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 assistance⁵⁵

Under Title IX, an aggrieved individual has a private right of action against an offending institution,⁵⁶ and it is clear that if any program of an institution receives federal funds, the entire institution is subject to the provisions of Title IX.⁵⁷

The U.S. Supreme Court has consistently recognized the protections afforded under Title IX. In 1992, the Court in *Franklin v. Gwinnett County Public Schools*⁵⁸ reiterated that Title IX provides an individual basis for claims of sexual harassment or gender discrimination against educational institutions as well as a basis for awarding monetary damages.⁵⁹ In *Franklin*, the court considered the protections afforded

52. *Id.*

53. 477 U.S. at 67.

54. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

55. 20 U.S.C. § 1681(a) (2000).

56. *Cannon v. U. of Chi.*, 441 U.S. 677, 717 (1979).

57. *Civil Rights Restoration Act of 1987*, 20 U.S.C. § 1687.

58. 503 U.S. 60 (1992).

59. *Id.* at 76.

under Title IX for a female student who was harassed by a teacher/coach.⁶⁰ The female student reported instances of sexual conversations, forced kissing, and even coerced intercourse that occurred on school premises.⁶¹ The teacher involved in this harassment ultimately resigned, although the school personnel suggested the student not pursue the matter.⁶² In a unanimous decision, the Court held that the student could recover monetary damages under Title IX,⁶³ and more importantly, affirmed the Title IX protections against sexual harassment.

Generally, enforcement of Title IX protections is assigned to the U.S. Department of Education's Office for Civil Rights (OCR), which can terminate federal funding for educational institutions found to be in violation of the law.⁶⁴ In 1997, the OCR disseminated the "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (hereinafter the Guidance).⁶⁵ The Guidance specifically states that Title VII of the Civil Rights Act should provide a framework for evaluating sexual harassment claims under Title IX,⁶⁶ and that Title IX prohibits *quid pro quo* and hostile environment acts.⁶⁷ The Guidance also specifically notes that educational institutions may be held strictly liable for instances of *quid pro quo* harassment,⁶⁸ just as courts have imposed strict liability under Title VII for cases of *quid pro quo* sexual harassment.⁶⁹

In hostile environment claims, the Guidance imposes liability on educational institutions where an employee of the institution appears to be acting on behalf of the institution or is aided in carrying out the harassment by his or her position of authority.⁷⁰ A constructive notice standard applies to other hostile environment claims.⁷¹

Courts have regularly held that Title IX imposes duties on educational institutions to prevent sexual harassment of students in the

60. *Id.* at 63.

61. *Id.*

62. *Id.* at 64.

63. *Id.* at 76.

64. 20 U.S.C. § 1682 (2000).

65. 62 Fed. Reg. 12034 (Mar. 13, 1997).

66. *Id.* at 12046 n. 2.

67. *Id.*

68. *Id.* at 12039.

69. *E.g. Meritor Savings Bank*, 477 U.S. at 70–71 (clearly describing the "quid pro quo" concept); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (indicating in dicta that affirmative defenses should be allowed for hostile environment cases, but not for *quid pro quo* cases).

70. 62 Fed. Reg. at 12039 (Mar. 13, 1997).

71. *Id.* at 12039–40.

same fashion that Title VII imposes duties on employers to prevent sexual harassment of employees.⁷² With regard to employee-to-student sexual harassment the Supreme Court in *Gebser v. Lago Vista Independent School District*,⁷³ held that actual notice of the harassment was necessary before an educational institution could be held liable under Title IX, with the educational institution demonstrating “deliberate indifference” to the situation (i.e., failing to act).⁷⁴ The court specifically rejected imposing liability on the basis of constructive notice (e.g., “the institution should have known”), but further held that discriminatory animus was not required.⁷⁵ Four justices dissented, noting that sexual harassment by a teacher violated a duty the school assumed in return for federal financial aid and the teachers had far greater authority over students than employers had over employees.⁷⁶ Thus, the dissenters noted, the standard for liability under Title IX should be at least roughly the same as that used to impose employer liability under Title VII sexual harassment claims.⁷⁷

Subsequently, though courts have applied an “actual notice” requirement to encompass reports from persons other than the victim of the sexual harassment,⁷⁸ the “deliberate indifference” standard has proven somewhat more problematic. The *Gebser* decision indicates that there must be almost a conscious decision to not remedy the harassment,⁷⁹ while the Sixth Circuit has noted that “deliberate indifference” arises when an educational institution turns a “blind eye” to the situation it knew or should have known about, and which does nothing to end the harassment.⁸⁰

Despite the vagueness of the “deliberate indifference” requirement, it is clear that the courts have little difficulty allowing liability issues to proceed to trial under Title IX where there is some form of notice of the

72. *E.g. Oona v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) (“Title VII standards apply to hostile environment claims under Title IX.”).

73. 524 U.S. 274 (1998).

74. *Id.* at 290.

75. *Id.* at 289–91.

76. *Id.* at 297–99 (Stevens, Souter, Ginsberg, & Breyer, JJ., dissenting).

77. *Id.* (Stevens, Souter, Ginsberg, & Breyer, JJ., dissenting).

78. *E.g. Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 743–44 (N.D. Ohio 2000) (“The Court held [in *Gebser*] that an education institution’s liability will depend on a showing of actual notice and deliberate indifference.”).

79. 524 U.S. at 290–91.

80. *Id.* at 290. *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 262–63 (6th Cir. 2000) (finding that the District responded inadequately to the plaintiff’s complaints of harassment); *see also Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 609–10 (8th Cir. 1999) (citing *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996)).

harassment, and the institution does little or nothing to remedy it.⁸¹ In fact, *Chontos v. Rhea*⁸² gives authority for the proposition that “deliberate indifference” is a question of fact to be determined by a jury.⁸³ In *Chontos*, there was evidence showing the institution knew of a professor’s reputation of harassment, but did nothing to rectify the situation.⁸⁴ In contrast to the vagueness of the notice requirements under Title IX, the affirmative defense available under Title VII gives employers an incentive to act quickly to address and remedy complaints of harassment.⁸⁵

B. Related Causes of Action

While to this point this article has focused on potential sexual harassment liability under Title IX, educators should also be aware of other bases for liability. In addition to the claims already considered, victims of sexual harassment in an academic setting have been successful in making tort-based claims against an educational institution based upon theories of negligent supervision, negligent hiring, etc.⁸⁶ Unsurprisingly, the courts have not imposed tort-based liability on institutions where there has been no notice of sexual harassment or any evidence in the employee’s past that would indicate proclivities towards sexual harassment.⁸⁷

To avoid the barriers of Title IX, or to increase the possibilities of recovery, several cases impose liability pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (hereinafter “Section 1983”).⁸⁸ Section 1983 provides a procedure to vindicate violation of federally protected rights,

81. *E.g. Massey*, 82 F. Supp. 2d at 735 (The court denied the defendant institution’s motion for summary judgment and found that the institution was put on notice via several complaints, comments, as well as a long history of suggestive pedophilia conduct by the offender, thus fulfilling the “deliberate indifference” requirement.).

82. 29 F. Supp. 2d 931 (N.D. Ind. 1998).

83. *Id.* at 938.

84. *Id.* at 936–37.

85. *E.g. Faragher*, 524 U.S. at 807 (noting that the holding was adopted, in part, to accommodate Title VII’s basic policies of encouraging forethought by employers). Affirmative defenses are only available in cases where no tangible employment action was taken by the employer against the employee. *Id.*

86. *E.g. Shante D. v. City of New York*, 638 N.E.2d 962, 962 (N.Y. 1994) (The City of New York was found to be the legal cause of plaintiff’s injury because of the school’s failure to provide “requisite supervision.”).

87. *E.g. Medlin v. Bass*, 398 S.E.2d 460, 462–63 (N.C. 1990) (Employer had no way of knowing of defendant’s pedophilic tendencies, since the person he used as a reference said nothing about a previous assault and the recommendations contained no information indicating that the defendant was a pedophile.).

88. *E.g. Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 660 (1978).

but creates no substantive rights.⁸⁹ It can be used in addition to, or instead of, Title IX to impose liability in certain circumstances. However, those circumstances must involve a clearly recognized, federally protected right. As such, the Section 1983 cases that pertain to Title IX issues generally involve acts of sexual assault, coerced intercourse, and rape, which are usually state crimes.

Furthermore, defendants in Section 1983 actions are often protected by a “good faith” based qualified immunity if they took some action in response to a complaint.⁹⁰ To recover under Section 1983, the plaintiff must show a “custom” of deprivation of constitutional rights by showing a continual, widespread pattern of misconduct, or deliberate indifference by the institution after receipt of notice of misconduct.⁹¹ Where there is not a clearly protected right (e.g., in those instances which may constitute hostile work environment sexual harassment), liability under Section 1983 may be difficult to establish.

Moreover, under the Eleventh Amendment, states have immunity from suit in federal court.⁹² If the educational institution is a “state institution” (which would probably not apply to claims against private colleges and universities), it must either consent to the suit by waiving its Eleventh Amendment immunity or there must be a federal statute explicitly waiving the state institution’s Eleventh Amendment immunity.⁹³ In this type of case, Title IX should effectively become the main basis for claims because Title IX conditions receipt of federal financial aid on the institution expressly waiving its Eleventh Amendment immunity.⁹⁴

89. 42 U.S.C. § 1983.

90. *E.g. Hagan v. Houston Indep. Sch. Dist.*, 51 F.3d 48, 51–53 (5th Cir. 1995) (Defendant’s actions were enough to protect him from liability, though those actions were not successful, as “simple ineffectiveness is not enough to overcome qualified immunity.”).

91. *Larson ex rel. Larson v. Miller*, 76 F.3d 1446, 1453 (8th Cir. 1996) (citing *Jane Doe A. v. Spec. Sch. Dist.*, 901 F.2d 642, 645 (8th Cir. 1990)); Colleen R. Courtade, *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit under 42 U.S.C.A. § 1983 — Modern Cases*, 81 A.L.R. Fed. 549, 558–559 (2005).

92. The Eleventh Amendment states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

93. *See e.g. Breen v. Tex. A&M U.*, 213 F. Supp. 2d 766, 771–72 (S.D. Tex. 2002) (citing *Will v. Mich. Dept. of St. Police*, 491 U.S. 58, 66 (1989)) (holding that because Texas had not waived its sovereign immunity, nor has Congress abrogated state immunity in any other provision, that an administrator of a student’s estate was barred against federal suit against Texas A&M University due to the Eleventh Amendment protections).

94. 42 U.S.C. § 2000d-7(a)(1); *Litman v. George Mason U.*, 186 F.3d 544, 548, 550, 555 (4th Cir. 1999); *see also Klemencic v. Ohio State U.*, 10 F. Supp. 2d 911, 918 n. 7 (S.D. Ohio 1998) (citing *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998)).

Clearly, sexual harassment is unlawful in the employment context under Title VII and in the educational context pursuant to Title IX which borrows some standards and concepts from Title VII. Protections against *quid pro quo* and hostile working environment sexual harassment are available and the OCR is charged with the responsibility of ensuring such protections are enforced. Additionally, other theories of tort liability (e.g., negligent retention, negligent hiring) are available as potential causes of action for those against whom harassment is perpetrated.

However, sexual harassment becomes problematic in the educational context where protections against sexual harassment conflict with the concept of academic freedom. As was asked earlier, when does classroom conduct or discussion become sexual harassment, or at what point is the conduct or discussion protected under the rubric of academic freedom?

IV. SEXUAL HARASSMENT AND ACADEMIC FREEDOM

A. Quid Pro Quo

In cases of *quid pro quo* sexual harassment, there are no issues of academic freedom that interfere with the imposition of liability. Where there is a tangible academic reward or benefit in exchange for sexual favors, the courts have no problem holding at least the offending party responsible.⁹⁵

In addition to holding the offending party responsible for actions that constitute sexual harassment, there are occasionally issues of vicarious liability on the part of the institution employing the offender.⁹⁶ One such example, *Johnson v. Galen Health Institutes, Inc.*,⁹⁷ involved a student seeking to become a licensed practical nurse.⁹⁸ One of the student's instructors began what became an increasingly severe pattern of harassment, starting with touching, then inappropriate comments about her body (e.g., referencing to the student's "boobies" and "cha-chas"),

95. *E.g. Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (Affirming the grant of summary judgment against the offender for creating a hostile environment—rather than *quid pro quo* sexual harassment. The employers were not held vicariously liable.).

96. *E.g. Gebser*, 524 U.S. at 290. *See also Alexander v. Yale U.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980) (citing *Barnes v. Costle*, 561 F.2d 983, 1000–01 (D.C. Cir. 1977) (MacKinnon, J., concurring)) ("inaction . . . does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct"); *Crandell v. N.Y. College of Osteopathic Medicine*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000).

97. 267 F. Supp. 2d 679 (W.D. Ky. 2003).

98. *Id.* at 682.

and eventually leading to a *quid pro quo* proposition – which she refused.⁹⁹ When the instructor gave the student a failing grade, she filed a complaint with the Kentucky Commission for Human Rights.¹⁰⁰ She subsequently communicated her complaints directly to the school when it inquired regarding her Kentucky Commission for Human Rights claim.¹⁰¹

Eventually, the plaintiff sued the school in United States District Court, alleging violations of Title IX.¹⁰² Although the court held that a valid *quid pro quo* claim of sexual harassment was stated when the issue was whether the plaintiff's failure was a direct result of her refusal of the instructor's proposition, it granted the motion for summary judgment on the *quid pro quo* claim because the school did not have sufficient notice.¹⁰³ Indeed, the plaintiff went to all her classes and made no complaints to the school prior to the end of class.¹⁰⁴ And, the court also granted the motion for summary judgment on the plaintiff's hostile environment claim.¹⁰⁵

Another example of potential vicarious liability for an institution that employs an offender can be found in *Gyda v. Temple University*.¹⁰⁶ The *Gyda* court held that the plaintiff alleged a viable *quid pro quo* claim when he and his supervising professor mutually terminated a romantic relationship.¹⁰⁷ The supervising professor subsequently adopted a hostile, rude, and harassing manner toward the student.¹⁰⁸ The plaintiff raised the issue that the supervising professor had made his life more difficult in the laboratory. Noting Title VII precedent where *quid pro quo* liability had been imposed merely when the work life became "more difficult," the court held a valid *quid pro quo* claim under Title IX had been made, and the school had potential liability under such a claim.¹⁰⁹

B. Hostile Environment

Like *quid pro quo* claims, hostile environment sexual harassment

99. *Id.*

100. *Id.* at 683.

101. *Id.*

102. *Id.* at 681.

103. *Id.* at 689.

104. *Id.* at 687.

105. *Id.*

106. 2000 U.S. Dist. LEXIS 7099 (E.D. Pa. May 23, 2000).

107. *Id.* at *5.

108. *Id.* at **5, 17, 19–20.

109. *Id.* at *20 (citing *Walker v. Macfrugals Bargains, Closeouts, Inc.*, 1994 U.S. Dist. LEXIS 18136 (E.D. La. Dec. 9, 1994)).

claims often do not involve issues of academic freedom. Hostile environment sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or create an intimidating, hostile, or offensive environment.¹¹⁰

A rather egregious example of a hostile environment claim in which a plaintiff attempted to attach liability to the employer of the offender is *Wills v. Brown University*.¹¹¹ Wills was a student who went to talk to one of her professors about difficulties she was having with class materials.¹¹² During the discussion with her professor, the two prayed, and the professor pulled the student onto his lap twice and fondled her.¹¹³ During the course of the university's investigation the professor admitted to most of the allegations made by the student.¹¹⁴ The plaintiff filed a written complaint with the associate dean and her complaint was investigated.¹¹⁵ As a result, the professor was placed on probation and a written reprimand was issued cautioning him to avoid any such actions in the future.¹¹⁶ The associate dean deemed these disciplinary actions appropriate because he believed that this was the professor's first offense.¹¹⁷ As it turned out, not only was this not the professor's first such offense, but it was not his last offense, either. He was terminated two years later for harassing other female students.¹¹⁸

The plaintiff's suit named both Brown University and the professor, and sought recovery under Title IX for hostile environment sex harassment and quid pro quo sex harassment.¹¹⁹ Plaintiff also alleged a number of tort-based claims: assault and battery; negligent hiring, supervision, and retention, and entrustment; and intentional and negligent infliction of emotional distress.¹²⁰ An additional claim was stated under state statute for sex discrimination.¹²¹

A default judgment was entered against the professor in the amount

110. *Kinman*, 94 F.3d at 467 (citing *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 474 (8th Cir. 1995)).

111. 184 F.3d 20, 23-24 (1st Cir. 1999).

112. *Id.* at 23.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 24.

119. *Id.*

120. *Id.*

121. *Id.*

of \$275,000.¹²² Brown University's motion for summary judgment was granted as to the claims of negligent hiring, retention, and intentional and negligent infliction of emotional distress.¹²³ And at trial, at the end of plaintiff's case, the court granted Brown University's motion for directed verdict as to the quid pro quo and assault and battery claims, allowing only the negligent supervision and hostile environment claims to go to the jury.¹²⁴ The jury returned a verdict in favor of Brown University on both claims.¹²⁵

The appellate court ultimately affirmed the trial court's judgment in all respects.¹²⁶ With respect to the Title IX claims, the court found little credible evidence that the University had any notice of improper conduct prior to the plaintiff's complaint.¹²⁷ And once the University received the plaintiff's complaint, an investigation and remedial measures followed, thereby overcoming the "deliberate indifference" standard.¹²⁸

Another example where a hostile environment claim was made against both the offender and his employer is the case of *Frederick v. Simpson College*.¹²⁹ In *Frederick*, the plaintiff was a Russian immigrant enrolled in school to obtain a teaching certificate.¹³⁰ One of the plaintiff's professors, Steven Rose, allegedly created a hostile environment by use of vulgar language, general comments concerning sexual activity, and staring at the plaintiff, among other things.¹³¹ After the final in-class meeting, the plaintiff was invited by Rose to call him at any time if she needed anything.¹³² Subsequent to the class ending, the plaintiff and Rose had several conversations, some initiated by the plaintiff, and they even met off of school premises.¹³³

Even though the plaintiff and Rose maintained a relationship long after the class had ended, with Rose writing a number of reference letters at the plaintiff's request and the plaintiff giving Rose a book and a letter as gifts, the court found that such activities were insufficient to give the administrators actual notice.¹³⁴ Further, the court dismissed the

122. *Id.*

123. *Id.* at 25.

124. *Id.*

125. *Id.*

126. *Id.* at 27.

127. *Id.* at 26–27.

128. *Id.* at 27.

129. 149 F. Supp. 2d 826 (S.D. Iowa 2001).

130. *Id.* at 828.

131. *Id.* at 829–30.

132. *Id.* at 830–31.

133. *Id.* at 830–32.

134. *Id.* at 838–39.

plaintiff's Title IX claim against the college because the college had undertaken an investigation of the allegations.¹³⁵ Indeed, the court found that, although the investigation may not have been very thorough, it was enough to disprove the deliberate indifference standard mandated by *Gebser*.¹³⁶

Yet another attempt to attach liability to both the offender and his employer is *Zimmer v. Ashland University*.¹³⁷ In *Zimmer*, the plaintiff was a student on the Ashland University swim team who alleged that her swim coach repeatedly made sexual comments to her. The swim coach told her "that she looked good in a blue bathing suit on different occasions" and performed massages on her despite her request that the college's athletic trainer treat her ailments.¹³⁸ The student and other members of the women's swim team met with the athletic director to complain about the coach, with the result that the athletic director informed the coach that his actions were unacceptable.¹³⁹

Even after the meeting with the athletic director, the plaintiff alleged that the coach made at least three more inappropriate comments to her.¹⁴⁰ The plaintiff then transferred to another university because she did not want to be on the swim team with that particular coach.¹⁴¹ Even though the court noted that the plaintiff's claim of a hostile educational environment was not as severe as in other instances, the court still held that the evidence of the inappropriate conduct, given that the plaintiff transferred to another college in order to avoid experiencing any further inappropriate conduct, was sufficient to state a hostile environment claim in violation of Title IX.¹⁴²

The court further held that because the plaintiff had complained to the athletic director who had authority to remedy the situation, but who failed to do more than issue a vague reprimand, the university's motion for summary judgment based on *Gebser* was denied.¹⁴³ The plaintiff's tort-based claims for intentional infliction of emotional distress were dismissed against the university and athletic director, but were maintained as to the coach.¹⁴⁴ The plaintiff's tort-based claims against

135. *Id.* at 840.

136. *Id.* at 840.

137. 2001 U. S. Dist. LEXIS 15075 (N. D. Ohio Sept. 5, 2001).

138. *Id.* at **5-6.

139. *Id.* at **7-8.

140. *Id.* at *8.

141. *Id.* at **8-9.

142. *Id.* at **25-32.

143. *Id.* at **18-19, 21-25, 32.

144. *Id.* at **35, 37.

the university for negligent hiring were similarly dismissed, but a tort claim of negligent retention was allowed to proceed.¹⁴⁵

C. Classroom Academic Activities

In considering the above cases, it is important to keep in mind that they all involved rather egregious violations. In an employment context, there would be little dispute about whether sexual harassment occurred, in contrast to the academic setting, where there may not be a basis for such a position. Because of the rather clear factual circumstances, there are generally no issues of academic freedom to consider. However, academic freedom does become a central issue where the factual circumstances concerning the alleged sexual harassment are based solely on conduct that occurs in, and is germane to, classroom academic activities.

One example in which academic freedom was at the center of the of the factual circumstances of the alleged sexual harassment is *Cohen v. San Bernardino Valley College*.¹⁴⁶ The plaintiff Cohen was a tenured professor at the College, who had taught English and film studies since 1968.¹⁴⁷ Over the years, Cohen had assigned provocative essays to his students and also played “devil’s advocate” during class discussions.¹⁴⁸ In the spring of 1992, Cohen stated in class that he wrote for *Hustler* and *Playboy* magazines and read some articles aloud.¹⁴⁹ Cohen then assigned the class to write essays defining pornography.¹⁵⁰ One of his students was offended by the language used in class and by Cohen’s repeated focus on topics of a sexual nature.¹⁵¹ The student asked for an alternative assignment to the “define pornography” paper, but Cohen refused.¹⁵² The student stopped attending Cohen’s class and received a failing grade for the semester.¹⁵³ She then filed a complaint about Cohen’s statements and conduct to the chair of the department, asserting that Cohen had sexually harassed her.¹⁵⁴

After an administrative hearing, the College’s grievance committee found that Cohen had violated the College’s policy against sexual

145. *Id.* at *41.

146. 92 F.3d 968 (9th Cir. 1996).

147. *Id.* at 970.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

harassment.¹⁵⁵ Ultimately, Cohen was found guilty of creating a hostile learning environment in the classroom.¹⁵⁶ Cohen was required to provide a syllabus concerning his teaching style, purpose, course content, and methods; attend a sexual harassment seminar within ninety days; undergo a formal evaluation procedure in accordance with the collective bargaining agreement; become sensitive to particular needs and backgrounds of his students; and modify his teaching strategy when it became apparent that his techniques created a climate which impeded the students' ability to learn.¹⁵⁷

Cohen was also advised that additional violation of the sexual harassment policy could result in further disciplinary measures, including suspension or termination.¹⁵⁸ Cohen sued the College under Section 1983, claiming that the College's actions violated his First Amendment rights to academic freedom.¹⁵⁹ The District Court decided Cohen's claim on the basis that the college's sexual harassment policy was unconstitutionally vague.¹⁶⁰ In particular, the court noted that until the student complained, Cohen's teaching style had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College.¹⁶¹ Since Cohen's teaching style went unchallenged for years, the court held that it was unconstitutional to punish him on the basis of a policy that did not clearly advise him what was and was not acceptable.¹⁶²

Remanding the case back to the district court, the Ninth Circuit held that the district court should order the college to remove the disciplinary decision from Cohen's personnel file and enjoin the College from further implementing any discipline based upon the vague harassment policy.¹⁶³ But, it further noted that the individual defendants were protected by the qualified immunity under Section 1983 because they acted upon a reasonable, good faith belief that their actions in disciplining Cohen were consistent with the law.¹⁶⁴ Even though Cohen's academic freedom claim was vindicated, he received no damages from the courts—a hollow victory, at best.

155. *Id.* at 971.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 969.

160. *Id.* at 971–72.

161. *Id.* at 972.

162. *Id.*

163. *Id.*

164. *Id.* at 973.

While not involving a sexual harassment claim, another case provides an important example of how an instructor's academic freedom may be recognized with no remedy for the disregard of such freedoms. In *Dube v. State University of New York*,¹⁶⁵ the court upheld a professor's academic freedom to teach that Zionism was a form of racism in a class called "The Politics of Race."¹⁶⁶ The class addressed three manifestations of racism: Nazism in Germany, Apartheid in South Africa, and Zionism in Israel.¹⁶⁷ A complaint about the contents of the course was filed by a visiting professor from Israel who wrote a letter to the dean of the college, objecting to Zionism being characterized as racism.¹⁶⁸ An investigation was undertaken by the executive committee of the University Senate, which unanimously determined that the plaintiff's teachings were within the bounds of academic freedom.¹⁶⁹

Nevertheless, substantial public furor grew over the contents of the class.¹⁷⁰ The plaintiff became eligible for tenure during the 1983–84 academic year, and the peer committee voted six to one in favor of recommending tenure, and voted four to three in recommending promotion to associate professor.¹⁷¹ However, the dean of the College of Humanities and Fine Arts recommended that the plaintiff be denied tenure and promotion based upon the plaintiff's alleged failure to provide the quantity and quality of written scholarship required by the college; the university's president concurred.¹⁷²

The plaintiff filed suit under Section 1983, seeking compensatory and punitive damages against the individual defendants and the University, as well as a permanent injunction that would require the defendants to appoint him to a tenured position.¹⁷³ The plaintiff's complaint alleged that the College's denial of tenure "based on his discussion of controversial topics" violated his First Amendment academic freedoms guaranteed in his contract, and the tenure review process denied him of his due process rights.¹⁷⁴

The court denied the defendants' motion for summary judgment on Dube's First Amendment claim, holding that the College's actions in

165. 900 F.2d 587 (2d Cir. 1990).

166. *Id.* at 589.

167. *Id.*

168. *Id.*

169. *Id.* at 590.

170. *Id.*

171. *Id.* Dube requested and was granted a postponement until 1984–85. *Id.*

172. *Id.* at 591.

173. *Id.* at 592.

174. *Id.* at 589.

denying tenure to the plaintiff were objectively unreasonable and violated the plaintiff's First Amendment academic freedoms.¹⁷⁵ With regard to qualified immunity under the Eleventh Amendment, the court ruled that it was not available to the defendants because qualified immunity does not shield government officials, acting in their individual capacities, whose conduct violates plaintiff's constitutional rights.¹⁷⁶ Thus, the court recognized the validity of the plaintiff's academic freedom claims, even in the face of qualified immunity.

As an example of a hostile environment sexual harassment claim, the plaintiff in *Silva v. University of New Hampshire*¹⁷⁷ used a sexual analogy to describe the concept of "focus" in writing as part of a freshman English class on technical writing.¹⁷⁸ The plaintiff's statement was:

I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.¹⁷⁹

Two days later, during the second technical writing class, the plaintiff used a belly dancer's definition of belly dancing to illustrate how a good definition combined a general classification with concrete specifics in a metaphor.¹⁸⁰ The plaintiff had used both examples in his classes on numerous occasions and the belly dancing simile for at least two decades.¹⁸¹

Six students from the class met with an associate professor subsequent to the technical writing class, and complained of sexual harassment.¹⁸² The University investigated and determined that the plaintiff's comments violated its sexual harassment policy. As a result, the plaintiff was suspended without pay for one year.¹⁸³ The plaintiff filed suit against the university under Section 1983 and under various state law claims.¹⁸⁴

The district court granted the professor's motion for a preliminary

175. *Id.* at 594–98, 600.

176. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

177. 888 F. Supp. 293 (D.N.H. 1994).

178. *Id.* at 298–99.

179. *Id.* at 299.

180. *Id.*

181. *Id.*

182. *Id.* at 300.

183. *Id.* at 311.

184. *Id.* at 297.

injunction,¹⁸⁵ halting the university's suspension.¹⁸⁶ The court also found that the professor had a protected liberty interest in his employment¹⁸⁷ because the plaintiff's comments were not of a sexual nature, but in fact, were legitimately related to the pedagogical concern of explaining the topic at hand in a fashion the plaintiff believed the students could comprehend.¹⁸⁸ The determinative factor in this case was the intent and use of the allegedly offensive language. The plaintiff had specifically chosen an analogy which he believed the students could relate to and which was directly related to his legitimate pedagogical concern of explaining a classroom concept.¹⁸⁹

Another example involving a claim of hostile environment sexual harassment can be found in *Gretzinger v. University of Hawaii Professional Assembly*.¹⁹⁰ In *Gretzinger*, the plaintiff was a student of Professor Lamb and claimed hostile environment sexual harassment during the course of a classroom discussion of rape and sexual harassment.¹⁹¹ The student further alleged that Lamb sexually assaulted her (although no specifics were ever identified) on several occasions.¹⁹² When the student complained to the University, an investigation ensued, resulting in the dismissal of her charges.¹⁹³

The student subsequently filed suit, claiming violations of Title IX, the Equal Protection Clause of the Fourteenth Amendment, Section 1983 violations, and a tort-based claim of intentional infliction of emotional distress.¹⁹⁴ Prior to trial, the university settled, but the suit proceeded against Lamb.¹⁹⁵ The trial court dismissed all of the plaintiff's federal claims, noting that the plaintiff had made an allegation under Title IX of retaliation and had proved no retaliation.¹⁹⁶

Similarly, the court dismissed the plaintiff's Section 1983 claim on the plaintiff's admission (as she was acting *pro se*) that such claim was

185. *Id.* at 326–27.

186. *Id.* at 332.

187. *Id.* at 317–18.

188. *Id.* at 312–13, 316.

189. The court granted summary judgment to the university on the plaintiff's procedural due process claims that challenged the adequacy of the "informal" sexual harassment procedures, *id.* at 321, and to several individual defendants on the plaintiff's breach of contract claims as the individual defendants were not party to the contract (collective bargaining agreement) in question. *Id.* at 329.

190. 1998 U. S. App. LEXIS 15370 (9th Cir. July 7, 1998).

191. *Id.* at *2.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at *3.

196. *Id.* at *7.

based on the Title IX retaliation claim and, since the plaintiff had not proved Title IX retaliation, dismissal of the Section 1983 claim was also appropriate.¹⁹⁷ The Ninth Circuit agreed with the district court's dismissal of the plaintiff's claims and further agreed "that detailed instructions on the law of sexual harassment would have merely confused the jury as to the elements of an emotional distress claim."¹⁹⁸

Of some interest is the fact that Professor Lamb also filed suit against the University of Hawaii, alleging a violation of his First Amendment rights based upon the University's investigation of the sexual harassment allegation, but was unsuccessful.¹⁹⁹ The Ninth Circuit held that the University was immune from suit under the Eleventh Amendment and further held that the individual defendants had a qualified immunity which precluded the imposition of liability under Section 1983, based upon the fact that they had a duty to investigate the sexual harassment claim, and the courts had yet to define what the professor's First Amendment rights were under the circumstances.²⁰⁰

Another notable holding discussing the significance of hostile environment sexual harassment is *Vega v. Miller*.²⁰¹ In *Vega*, a professor was reprimanded as a result of an exercise demonstrating the concept of "clustering" during a composition class.²⁰² Clustering is a form of brainstorming exercise where the topic to be discussed is written on a blackboard.²⁰³ Various terms offered by class members are also recorded on the blackboard and "clustered" into groups so that students might appropriately write on the topic in such a way as to avoid redundant terms or concepts.²⁰⁴

The exercise at issue occurred during the last ten minutes of the plaintiff's class.²⁰⁵ The subject suggested by the students was "sex," which Professor Vega understood to be "sex and relationships."²⁰⁶ As the students began to call out words and terms relevant to the subject, some of them began to use crude and vulgar language.²⁰⁷ Vega

197. *Id.* at **8-9.

198. *Id.* at *8.

199. *Lamb v. U. of Haw.*, 1998 U. S. App. LEXIS 10775 at **2, 6-7 (9th Cir. May 28, 1998).

200. *Id.* at **2-3, 5-7.

201. 273 F.3d 460 (2d Cir. 2001).

202. *Id.* at 462-63.

203. *Id.* (Plaintiff carried out a "free-association exercise called 'clustering,' in which students were invited to select a topic [which was written on the black board], then call out words related to the topic, and finally group related words together into 'clusters.'")

204. *Id.*

205. *Id.* at 476, 480.

206. *Id.* at 463.

207. *Id.*

cautioned his students that the use of some of the terminology they were suggesting was not appropriate for most people and should be used rarely or not at all.²⁰⁸

Interestingly enough, none of the students or their parents ever complained about the exercise; instead the issue came to the attention of the college administrators when they were investigating a complaint of a student on an unrelated matter.²⁰⁹ When the college administrators became aware of Vega's exercise, a meeting was arranged between the plaintiff and the vice president of academic affairs.²¹⁰

The plaintiff handed over copies of his lesson plans and his notes on the exercise that included many of the provocative topics and terms that had been shouted out by the students during the course of the exercise.²¹¹ The plaintiff was terminated for his "reliance on sex as a theme and his use of sexually-explicit vocabulary."²¹²

The plaintiff filed suit in U.S. District Court, alleging a Section 1983 violation based upon infringement of his First Amendment rights of academic freedom.²¹³ The trial court denied the defendants' motion for summary judgment on the grounds of qualified immunity and the College administrators appealed.²¹⁴ While the Second Circuit reversed the trial court's decision and remanded the case with specific instructions that the case be dismissed on the basis of qualified immunity, the court specifically noted that the plaintiff had been disciplined for permitting a classroom exercise initiated for legitimate pedagogical purposes.²¹⁵

However, in light of the unclear nature of the scope of academic freedom at the time of the College's actions, the court held that qualified immunity did attach in each of the cases as the administrators were acting within what they believed were legal parameters then in existence.²¹⁶ Thus, even if Professor Vega's First Amendment rights were violated, as the classroom exercise was initiated for a legitimate pedagogical purpose,²¹⁷ he still had no recourse against the College.²¹⁸

208. *Id.* Vega did not caution his students during the exercise, but after the exercise. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 463-64.

213. *Id.* at 464.

214. *Id.* at 464-65 (referring to those appellant defendants only).

215. *Id.* at 467, 471.

216. *Id.* at 468-71.

217. *Id.* at 471 n. 13.

218. *See also Bonnell*, 241 F.3d at 802-03 (wherein a college professor was denied injunctive relief from disciplinary action for routinely sprinkling profanity into classroom discussions as part of his normal conversation).

As all of these cases illustrate, even in the name of academic freedom, educators must proceed with caution when utilizing controversial subjects, such as sex, as teaching tools in the classroom. Indeed, these cases demonstrate the tension between the protections against sexual discrimination and harassment and the principles of academic freedom.

V. CONCLUSION

Definitions and applications of both concepts of academic freedom and sexual harassment have evolved significantly in recent decades and, no doubt, will continue to transform even further. What is abundantly clear is that the protections of academic freedom come into conflict with protections granted to students under Title IX against sexual discrimination and harassment. Indeed, as the court in *Bonnell* recited:

Since the precise frontier between academic freedom and sexual harassment remains to be defined by the courts case by case, a teacher . . . may be able to find safety and comfort under the [First] Amendment only if the words uttered are found in appropriate textual materials and the utterances are pertinent to discussion of those materials. Beyond this point, the teacher enters uncharted territory and proceeds at his or her own risk²¹⁹

Obviously, cases of *quid pro quo* sexual harassment are unlawful, as are those cases of hostile environment sexual harassment that involve egregious facts, such as touching, groping, and other offensive activities which occur outside the classroom.

When the sexual harassment complaint is based upon in-class activities, an inevitable collision occurs between academic freedoms and sexual harassment protections. Based upon review of the case law, it would appear that where any sexually oriented discussion is specifically and legitimately related to a valid pedagogical end, the academic freedom claims must prevail. It is when no legitimate pedagogical end is involved that the sexual harassment protections will prevail.

It should also be apparent that individual professors may find enforcement of their academic freedoms problematic as, for the most part, their claims will be based upon Section 1983, which recognizes a qualified immunity for the actions of university or college administrators when they are acting in good faith, based upon their understanding and application of the law. In addition, where administrative personnel seek

219. *Id.* at 804 (citing a memorandum by Defendant written March 4, 1998, issuing a warning to Plaintiff).

to enforce sexual harassment policies, there is the added concern of vagueness, which may make the policy indefensible under the First Amendment and Fourteenth Amendment due process considerations.

Thus, while sex may be a central part of human existence and an appropriate subject for academic discussion and learning, and given the recent case law, educators should act cautiously and *proceed at their own risk* when exploring the line between academic freedom and sexual *discrimination* and harassment.