ELRC 7605 Final Exam Responses

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**Question 1**

 Kim, a mid-level administrator for Nadal College (NC), has multiple complaints against her employer and has consulted an attorney for assistance. Kim’s complaints involve issues with a recent promotion not received due to perceived Title VII of The Civil Rights Act of 1964 violations, including disparate treatment and sexual harassment.

**Title VII of The Civil Rights Act of 1964**

 **“**Title VII of Civil Rights Act of 1964, U.S.C. §§ 2000e et seq., is the most comprehensive and most frequently utilized of the federal employment discrimination laws. In 1972, it was extended to cover educational institutions both private and public. (Kaplin, Lee, Hutchens, & Rooksby, 2020, p. 164). Title VII is enforced by the Equal Employment Opportunity Commission (EEOC) which has authority to oversee complaints, adjudication, and compliance. While employees may sue employers over Title VII violations, employees must file a claim with the EEOC first, and have it adjudicated.

Title VII makes unlawful employment practice(s) for an employer to (1) fail or refuse to hire or to discharge any individual with respect to compensation, terms, conditions, or privileges on the basis of race, color, religion, sex, or national origin and (2) to limit or segregate employees in any way which would deprive an individual of employment opportunities or adversely affect status as an employee on the same basis as above. (Civil Rights Act of 1964) Employees who feel their rights have been violated on a matter of disparate treatment and/or disparate impact may file a claim with the EEOC. These two claims serve as the two basic types of claims that may be brought under Title VII claims. In Kim’s case, she is consulting her attorney to make a claim on disparate treatment due to her gender and based on sexual harassment which will be discussed in detail later.

**Disparate Treatment**

Disparate treatment claims can be made when an individual is denied a job or promotion based on their protected class. In Kim’s case, she mentions not being selected for a recent promotion, with the institution instead choosing a male, Pete, who has only served at NC for one year while Kim has been serving at NC for ten years, seemingly due to her gender. The position to which Kim was denied the promotion involved working with the men’s football and basketball teams in a new living-learning community. NC could likely make a “BFOQ” rebuttal in this instance because it would have a bona fide occupational qualification necessary for the operation of the living-learning community with the men’s sports teams that a male be selected for the position and Kim’s claim of disparate treatment would likely not have merit. That is of course if the living-learning community position would require the position holder to be involved in the “living” aspect with male athletes. “Sex could be a permissible BFOQ for a locker room attendant or, perhaps, for certain staff of a single -sex residence hall” (Kaplin et al., 2020, p. 165).

While it does appear that this position would have a BFOQ for the position holder to be male, if the living-learning community position did not have a BFOQ then Kim may be awarded reinstatement, back pay, and punitive damages such as in the *Clark v. Claremont University* *Center* (1992), case where the Second Appellate Court of California affirmed a lower court’s verdict and damages, including reinstatement and back pay in finding plaintiff was denied tenure and promotion based on his race.

**Sexual Harassment**

 Kim also refers to two specific instances of sexual harassment, one involving Andre, the Vice President of Student Affairs which is Kim’s supervisor, and instances of sexual harassment based on her same-sex relationship with the city’s mayor and her active role in the on-campus LGBT community. The EEOC defines workplace sexual harassment as

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual 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” [29 C.F.R. § 1604.11(a)].

**Hostile Work Environment.** In the claim of sexual harassment directed at her sexual preference, Kim reports receiving homophobic cartoons in her campus mailbox and on her windshield. In this case, there is no specific evidence presented that implicates from whom the cartoons are coming from but that may not necessarily matter. “Whether or not the alleged harasser is an employee, if the target of the harassment is an employee, the employer may be liable for the unlawful behavior” (Kaplin et al., 2020, p. 169). In this instance, Kim reports having reported her grievances regarding the cartoons to her institution’s human resources department, and that they failed to act stating there is not much they can do.

“Name-calling, sexual jokes, sexual touching, sexually explicit cartoons, and other sexual behavior by supervisors or coworkers have been found to constitute sexual harassment” (Kaplin et al., 2020, p. 169). Because the cartoons received promote a hostile work environment for Kim, it is likely that the employer could be liable for failure to act as in the case of *Martin v. Howard University* (2000), where an employee was harassed by a homeless individual that frequented the law school library. (Kaplin et al., 2020) The Supreme Court additionally held in the landmark case *Meritor Savings Bank v. Vinson* (1986),that speech itself can create a hostile environment which would be a violation of the law.

**Quid Pro Quo.** Kim can also likely make a sexual harassment claim under quid pro quo harassment. Kim reports multiple instances of her direct supervisor, Andre, making statements regarding wanting to “turn her” and show her “what she’s been missing”. To make matters worse, Andre, also VP of Student Affairs, served on the selection committee for the living-learning position that Kim was denied promotion for. Kim feels that she was denied the promotion out of retaliation for having rejected Andre’s advances which would if proven, constitute quid pro quo harassment. Per the EEOC’s standard for sexual harassment, Kim may make a claim that it was implicit that she must accept and approve of Andre’s advancements to continue in her position or, in this case, be promoted. It is important to note that while Andre’s intent may not have been to cause a hostile work environment for Kim, a reasonable person would find his behavior to constitute harassment, and therefore constitute it as such.

 Lastly, Kim mentions to her attorney failure to report Andre’s behavior but that does not necessarily impact her claim of quid pro quo harassment. The Supreme Court in *Faragher v. City of Boca Raton* (1998), held that an employer may be held “vicariously” liable for actionable discrimination caused by a supervisor if the employee was not properly trained on reporting procedures for harassment complaints including if the reporting policy and procedures were not made clear.

**Case Summary**

While I don’t feel Kim would be successful in a claim of disparate treatment, Kim would be successful in filing a Title VII complaint based on *prima facie* elements of sexual harassment both based on her sexual orientation and quid pro quo sexual harassment. While damages for the sexual harassment may be warranted, whether Kim is entitled to the position she was passed up for will likely hinge on the court, Kim, and NU’s ability to justify a reasonable accommodation for the position she sought if ruled that a BFOQ was not present warranting a male hold that role.

**Question 2**

 Annie, a 19-year old sophomore at Open House University (OHU) has recently fallen victim to domestic assault at the hands of her prior boyfriend, Newton, who also attended OHU with her. Annie has now filed suit against OHU alleging they are responsible for her injuries. This case revolves around elements of negligence and violations of Title IX of the Educational Amendments of 1972 (Title IX). In addition, we will review whether violations of the Family Educational Rights and Privacy Act (FERPA) occurred by OHU in distributing directory information that led Newton to Annie’s residence where the injuries were received.

**Tort Liability / Negligence**

Annie and her parents are filing suit against OHU in a private cause of action alleging first that OHU was negligent in their handling of Annie’s case. “For the tort of negligence, the legal definition will be met if the institution owed a duty to the injured party, the institution failed to exercise due care to avoid the injury, and that failure was proximate cause of the injury” (Kaplin et al., 2020, p. 99). The first injuries occur to Annie after an assault occurring shortly after Annie and Newton engage in an evening of underage drinking and illicit drug use on campus at a sorority event. At this formal, a Greek life advisor, and employee of the college notices Annie and Newton are intoxicated and advise them to leave. Once back at Annie’s residence hall, another employee, the RA, confronts Annie and Newton about their raucous behavior and reports back to her room. After “hanging out,” Newton begins to make unwanted sexual advances on Annie, and once she refuses, begins to hit her, punch, and destroy her property.

 It is noted in this case that Newtons prior aggressive behavior has already gotten him banned in previous semesters from Annie’s residence hall. It appears that OHU staff should be aware of Newtons aggressive behavior and had the opportunity multiple times in the evening to separate Annie and Newton. Initially, one might find proximate cause to the university for their failure to intervene the night of the formal; however, I reject this notion due to contributory negligence. There is no indication that Annie was forced to consume alcoholic beverages or illicit drugs and said actions could have reasonably contributed to Annie’s later encounter that evening with Newton, including favoring an assumption of risk. Elements of negligence may also fail to be established based on courts failing to find duty to protect on the college’s behalf such as in *Freeman v. Busch* (2003). In this case, the 8th Circuit Court of Appeals held that the college did not hold custodial duty over the student after she was raped following consumption of alcohol at a party. While Annie is not likely to have merit on principles of negligence, she could pursue claims against violations of Title IX.

**Title IX**

Unfortunately, Annie’s story does not end the night of the formal. Annie, the next morning, informs the university of the hostile environment caused by Newton, which is subsequently reported to police. After not speaking to Annie for some time, Newton is given Annie’s directory info and proceeds to her residence where he injures her once again. Annie will likely have a claim against OHU based on Title IX violations specifically related to hostile environments and for lack of appropriate initial institutional response. Title IX claims are directed to the Office of Civil Rights. While the law does not require Annie to submit a complaint to the college first, she would have to allow for timely response before the Office of Civil Rights would review her case. Because OHU is a public university receiving federal funds, they must comply with all statutes and regulations of Title IX.

**Known / Should Have Known.** Newton’s two incidents of injury causing rage against Annie were not first-time offenses and the university was aware of Newton’s behavior. Prior outburst from Newton had already gotten him banned from Annie’s residence hall and his erratic, moody behavior has been reported to residence hall staff. In the 2011 Dear Colleague Letter issued by the Department of Education (DOE), DEO recognizes and provides clear guidance for institutional response regarding student-on-student harassment. The letter advises institutions to separate parties involved, protect from retaliation, prevent recurrence, and address/remedy effects.

 In Annie’s case, OHU initially complied with DOE guidance to separate her from Newton as he was banned from Annie’s residence hall for the prior semester. After the first incident, OHU should have put in safeguards to ensure Newton was unable to seek retaliation against Annie and prevent reoccurrence.

 With Newtons behaviors, even diagnosed manic depressed and an alcoholic, the university could have done more to protect Annie. Even within the right of the I believe that starts with placing a flag on her directory information so that it remained private.

**FERPA**

I did want to mention that a FERPA violation doesn’t appear to exist here. Normally, student’s directory info does not fall under protected records under the Family Educational Rights and Privacy Act. As part of OHU’s response however, Annie’s directory information should have been eligible to be marked private or retracted due to the hostile environment and possibilities of retaliation by Newton.

**Case Summary**

Annie is not likely to win her suit against OHU based solely on negligence; however, she is likely owed relief based on Title IX violations. In *Davis v. Monroe County Board of Education* (1999), the Supreme Court held that student on student harassment created “intimidating, hostile, offensive, and abusive school environment” and held the school district liable for deliberate indifference. In Annie’s case OHU could have done more to protect Annie. Additionally, Annie does have the right to seek a private cause of action suit against OHU as affirmed in *Franklin v. Gwinnett County Public Schools* (1992).

**Question 3**

 As a continuation of the Annie and Newton case from Question 2, Newton now feels that he was discriminated against due to his mental disability and wants to file suit. Reviewing elements presented in question 3, I believe Newton’s claims surround issues with campus policy, Fourth Amendment, Fourteenth Amendment, and Section 1983 of the Civil Rights Act.

**Campus Policy**

Generally, courts have reviewed on specific complaints from students by ruling whether the institution followed their policies and procedures that serve as a contract. In doing so, courts have deferred to judgement of institutions on conduct and academic related matters if institutions afford due process and are patently fair. In Newton’s case, OHU provided him with due process, initially by going through the disciplinary process prior to raping Annie and even after the rape, Newton was expelled from the residence hall but allowed to continue his studies pending a full-dress hearing.

**Fourteenth Amendment**

Thanks to the landmark case *Dixon v. Alabama State Board of Education* (1961), and the 14th Amendment, Newton did have the right to due process especially since OHU is a public institution. The Fourteenth Amendment calls for procedural and substantive due process on the interest of liberty and property. In Newton’s case the court will have to decide if OHU was followed procedural and substantive due process. We believe OHU did not allow for procedural due process based on hearing notice such that the Newton’s right to liberty has been infringed due to being expelled as a result of the hearing. Newton very likely has a due process claim after the room search incident as they only allowed Newton three days’ notice for this disciplinary hearing. In the case of *Goss v. Lopez* (1975), the Supreme Court side with a K-12 student after a student was suspended without any opportunity for a hearing. Notably here, there is no specific number of days required; however, with the sanction of being expelled on the table, Newton should be afforded additional time for a hearing notice to prepare.

**Fourth Amendment**

 One of the aspects of this case centers around the entry of Newton’s dorm in the residence hall. Courts have ruled, such as in *State v. Hunter* (1992),that searches can stand muster if done for health or safety reasons. The Supreme Court held in *State of Washington v. Chrisman* (1982), that students may be held liable for items found during entry if items were found in plain view. While the Fourth Amendment provides protections against illegal search and seizure, OHU is afforded the right out of their housing contract to enter Newton’s dorm residence out of fear for public health, specifically Newtons. Upon entry, the hall director finds Newton on his bed, passed out, and foaming at the mouth. It is also reported that the residence director notices a bottle of Ambien and some alcohol lying next to Newton. Because these items were in plain view of the hall director, Newton could be disciplined for having the alcohol and prescription drug Ambien if not prescribed to him.

 While waiting for police to arrive, the hall director continues searching Newton’s dorm for weapons and finds a handgun under the bed, ammunition in a desk drawer, and cocaine in the closet. Because these items were not in plain view, Newton should enjoy Fourth Amendment protections on these items criminally speaking. While OHU can legally discipline him institutionally for violating the code of conduct due to the alcohol and Ambien found in addition to the guns, bullets, and cocaine, the campus police will be unable to successfully prosecute Newton criminally because the additional items found were not in plain view.

**Section 1983 of Civil Rights Act**

Lastly, and most directly mentioned in this question, we must visit whether a violation of Section 1983 of the Civil Rights Act (Section 1983) has occurred in disciplining Newton due to his mental illness, which, is the underlying basis of Newton’s claims against OHU. Section 1983 states that:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable…” (42 U.S.C. 1983).

Section 1983 claims, like many others should first be adjudicated by the Office of Civil rights but individuals do enjoy the right to file suit under Section 1983 violations. While OHU had notice of Newton’s mental disabilities, they were not wrong in expelling him due to Newton’s now multiple instances of threatening himself and others.

**Case Summary**

Newton will likely not be successful in his pursuit of damages claiming he was discriminated against because of his mental disability because OHU had a valid reason to expel the student based on his behaviors being detrimental to himself and other students at OHU. Newton’s suit should instead focus on not being afforded procedural due process in the matter of being expelled. Additionally, criminally speaking, Newton should be found not guilty regarding the charge of intent to distribute cocaine.

**Question 4**

The Association for the Humane Treatment of Mental Illness (AHTMI) has planned some events on campus exercising their right to free speech to educate Open House University (OHU) students on their organizations mission. Part of these planned events include a demonstration as well as hosting a speaker. Representing the American Civil Liberties Union (ACLU) in this case, I believe that the First Amendment rights of these students were infringed.

**The First Amendment**

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances” (U.S. Const. amend I). We will review this case using the First Amendment and recent court rulings as our guide looking at exceptions to free speech, rights to free speech (including to organize and protest), restricting open forums, and hate speech. I will also present evidence that disallowing Norman Maine was a violation of the First Amendment.

**Right to Free Speech Demonstrations**

Students have the right to non-disruptive exercise of the right of free speech. The Supreme Court ruled in *Tinker v. Des Moines Independent Community School District* (1969), that students wearing of a wrist band was non disruptive and thereby was protected free speech. There are some exceptions to the right to free speech however that must be considered in this case along with the exercise of free speech in an open forum.

**Exceptions to Free Speech.** There are important free speech exceptions that exist but that are not present in this case. Those are: fighting words, true threats, incitement to violence, obscenity, defamation, sexual harassment, and private forums with constitutional limits. No part of AHTMI’s actions involved the above exceptions and should thereby be considered free speech.

**Free Speech Zones.** OHU is a public campus and thereby an open forum for free speech to exists. Representing ACLU, I am disturbed by the “Free Speech Alley” that exists on OHU’s campus. As an open, public area, students should not be restricted to certain areas for free speech display especially if multiple other outlets of communication do not exist. Texas Tech saw its policy regulating free speech areas amended in the *Roberts v. Haragan* (2004), case. Kaplin et al. (2020) recommends postsecondary administrators be attentive to doctrines of overbreadth and vagueness in response to the *Roberts* (2004), ruling.

**Test of Time, Place, and Manner.** OHU would be within its rights of shutting down the demonstration of AHTMI with students using bullhorns if it could show that these actions by the students were hindering its educational mission. One should be able to easily imagine the disturbances caused by these students to educational instruction by yelling in bullhorns surrounding classrooms. While “Free Speech Alley” should not exist, the Dean of students is within rights to stop the demonstration if location of demonstration is near educational learning centers and if in fact disruption to learning is being caused. This is known as the “Burnside Test” in part which states that “Conduct by the student, in class or out of it, which for any reason whether it stems from time, place, or type of behavior materially disrupts classwork or involves substantial disorder or invasion of the rights of others is of course not immunized by the constitutional guarantee of freedom of speech” (393 U.S. at 513).

**Hate Speech**

As an exception to free speech, stopping or intervening in hate speech would not be a violation of the First Amendment. There is no indication that AHTMI exhibited any sort of hate speech. While one may view running around with straight jackets and yelling through a bull horn to be obnoxious, it would be a stretch to consider those actions as hate speech. OHU has a policy that disallows students from “engaging in speech that is directed at someone with the intent of upsetting them” and that policy is overly broad and at the same time also very vague. An example of being overly broad and/or vague was handed down in *Doe v. University of Michigan* (1989), where the US District Court for Eastern Michigan found that behavior that stigmatizes or victimizes in this case was overly broad and that the terms of the policy were vague.

**Regulating Speakers on Campus**

Lastly, the Dean of Students violated the First Amendment by not allowing Norman Maine to speak on campus. While assuming the Dean of Students dismissed the speaker out of fear of the incitement of violence, there is no constitutional basis to do so. “As *Shamloo* suggests, and *Tinker* states expressly, administrators seeking to regulate protest activity on grounds of disruption must base their action on something more substantial than mere suspicion of dear of possible disruption” (Kaplin et al., 2020, p. 666). AHTMI’s case, the speaker, Norman Maine, was listed as being new to the speaker’s circuit and likely did not have a history of inciting violence therefore, Norman should have been allowed to give his speech.

**Case Summary**

The ACLU likely has a case representing AHMTI against OHU. There are multiple instances such as free speech zones, having students cease protected demonstrations, and cancelling a public speaker without just cause that would likely cause AHMTI to prevail in court.

**Question 5**

Rafa is a student affairs administrator at Key Biscayne State College (KBSC) and has been fired after he attended an off campus non-college sanctioned event where he used illicit drugs and where a student who was also participatory in the illicit drug use died. In addition to losing his job, Rafa is being sued by the family of the deceased student for wrongful death. We will first review Rafa’s firing and then opine on the matter of civil immunity Rafa is trying to invoke.

**At-Will Doctrine**

As an administrator at KBSC, Rafa is likely an at-will employee and is not afforded in due process in his termination decision. “In fact, at-will employment at public colleges may defeat an employee’s assertion of due process protections because no property interest is created in at-will employment” (Kaplin et al., 2020, p. 140). Any reasonable individual could clearly glean from this case that Rafa had no respect for the rule of law, his administration, and KBSC students. Rafa was asked by KBSC administration to stay away from Freak Fest due to past student related safety litigation. This event, held off campus, had a foreseeable bad outcome based on prior events being known to have included underage alcohol consumption and illegal drug use.

 Rafa put KBSC in jeopardy as the advisor for the college’s Interfraternity Council (IFC) when he accompanied IFC members to Target to purchase supplies to host a booth at Freak Fest. These actions could very likely muddy the waters of institutional involvement and sanctioning of the event. In addition to the jeopardy he placed KBSC in due to actively participating in the event as an advisor, he also caused shame to come to the institution as the death of her student, including the cause, was released by the news media.

 Rafa provided more than enough reason for KBSC to separate him from his position with the college and is not guaranteed any due process.

**Immunity Defense**

Roger, a student and member of IFC, goes with Rafa during the event to an undisclosed location to do lines of cocaine. From the cocaine use, Roger has several medical issues and expires. In the aftermath, Roger’s family files suit against Rafa for wrongful death. Rafa argues in his civil suit that he should be immune from damages due to Roger’s death.

 There is one major issue with Rafa’s defense using immunity and that is his act of gross negligence by using the cocaine with Roger. Negligence claims, or tort, fall under state law. Even though he was asked not to attend the party, Rafa did so and his support of IFC’s booth in this episode would likely be justification for him committing this act in his “official duties.” While Eleventh Amendment immunity would normally be involved here as Rafa would have been acting as a state actor, in Rafa’s case, Rafa’s actions would be found grossly negligent and therefore he would not be eligible for immunity.

**Case Summary**

In question 5, Rafa’s separation was legal and he is not owed due process due to having an administrative role. In addition, his defense of immunity to his civil suit with Roger’s family will not be granted because of his gross negligence.

References

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Davis v. Monroe County Bd. of Educ., 526 U.S. 629

Dixon v. Alabama State Board of Education, 294 F.2d 150

Doe v. University of Michigan, 721 F. Supp. 852

Faragher v. City of Boca Raton, 524 U.S. 775

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60

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Appendix I

I, Gregory Stuart Johnson, attest that I did not receive any assistance on this exam other than class notes, the textbook, and other scholarly sources. I did not discuss this exam or my answers with classmates or any other person. I attest that this work is solely my own. I understand the University’s academic dishonesty policy and am subject to appropriate sanctions should it be found that I received unfair assistance on this exam.

Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date: 06/20/2020