

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

August 2023

Decisions Featured in This Issue:

1 Fifth Circuit Reverses District Court's Summary Judgment on Respondent's Title IX Discrimination Claims in Herpes Transmission Case

3 School Doesn't Violate Privacy Rights of Potentially Dangerous Former Student Through Public Surveillance of His Activities

5 Court Denies Writ Petition Challenging Tenured Professor's Firing, Affirms Summary Judgment for University

Warning: This newsletter contains references to graphic content.

U.S. Court of Appeals for the Fifth Circuit

Fifth Circuit Reverses District Court's Summary Judgment on Respondent's Title IX Discrimination Claims in Herpes Transmission Case

The Fifth Circuit Court of Appeals reversed the dismissal of a respondent's Title IX claims arising from consensual sexual encounters that may have caused a woman to contract herpes. On review, the court determined a material issue of fact remained on the student's erroneous outcome, selective enforcement, and archaic assumptions claims that the university violated Title IX by investigating and adjudicating his punishment in a manner demonstrating bias against him as a male.

STUDENT ACCUSED OF FAILING TO INFORM HIS CONSENSUAL PARTNER OF HERPES DIAGNOSIS

In fall 2017, first-year student John Doe enrolled at Rice University on a full-ride football scholarship and soon began dating Jane Roe, a junior. They discussed their dating histories, including that Doe contracted herpes in high school, before engaging in a consensual sexual relationship, which ended in early December 2017. Later that month, Roe texted Doe to say she thought she had herpes and likely got it from him. When Doe stated he "had it a long time ago," Roe told him he likely had "dormant herpes." When Doe asked what that was, Roe explained herpes isn't curable and someone has it "for life."

Roe submitted a formal complaint against Doe to Rice's Title IX office, alleging he failed to inform her of his herpes diagnosis, which resulted in Doe's interim suspension "to ensure the safety and well-being" of the university community pending investigation. Rice ultimately found Doe failed to adequately notify Roe she was at risk of contracting herpes from him and his subsequent unprotected sex with Roe was a "reckless action from which mental or bodily harm could result to another person" in violation of Rice's student code. While acknowledging Doe told Roe he had herpes, Rice concluded Doe never informed her of the details of the disease, its long-term effects, or how it was spread. On April 17, 2018, Rice issued a sanction of "rustication," meaning Doe could be on campus

for academics but not for other purposes without prior permission, through at least June 1, 2019. Doe was then told he lost his football scholarship, and he withdrew from the university.

In September 2019, Doe sued, alleging Rice's conduct violated Title IX. The district court granted Rice's motion for summary judgment and dismissed Doe's suit. Doe appealed.

A RATIONAL JURY COULD FIND RICE'S INVESTIGATION AND ADJUDICATION PROCEDURES RESULTED FROM ANTI-MALE BIAS

The Fifth Circuit noted multiple instances of deficient due process procedures in the university's treatment of Doe, which a rational jury could find resulted from anti-male bias, including:

- Doe was prohibited from entering campus, with only 24-hours' notice before he had a reasonable opportunity to present his perspective of the events with the advice of counsel
- Doe's attorney wasn't allowed to participate in the process or view documents in the disciplinary file to counsel him
- Rice disregarded and failed to investigate multiple credibility issues Doe raised about Roe
- Although Rice found Doe informed Roe of his herpes diagnosis, it sanctioned him anyway for failing to inform Roe of the risks of having sex with a herpes carrier, a rule not found in the university's student code
- Rice disregarded evidence Roe engaged in or was going to engage in similar conduct (not telling future sex partners of her herpes diagnosis), thus holding Roe, a female, to a different and lower standard than Doe, a male
- As a consenting adult female who was aware Doe had contracted herpes, Roe should have been responsible for her own sexual health

The court then turned to Doe's three theories of Title IX liability — erroneous outcome, selective enforcement, and archaic assumptions — agreeing with other circuit courts of appeals that regardless of the theory, the ultimate question is whether a reasonable jury could find sex was a motivating factor in the university's disciplinary decision.

To establish an erroneous outcome claim, a respondent must establish each of the following:

1. Particular facts casting articulable doubt on the accuracy of the outcome of the disciplinary proceeding
2. Gender bias caused the erroneous outcome

The court found Rice didn't thoroughly investigate Roe's sexual history to determine whether she contracted herpes before meeting Doe, didn't interview other students including Roe's other sexual partners, and disregarded repeated misrepresentations Roe made during the investigation (in contrast to Doe). Additionally, Rice didn't act against Roe when she disclosed her intent not to share her diagnosis with future sexual partners on campus or when Doe produced texts of Roe's "expletive-laden threats against Doe." Thus, the court concluded that a question of material fact remained as to whether the university reached an erroneous outcome.

To establish a selective enforcement claim, a respondent must show that regardless of their guilt or innocence, "either the punishment or the decision to initiate enforcement proceedings was motivated by gender bias." Doe alleged Roe had been engaged in the same behavior for which Doe was being investigated: failing to disclose the risk of transmitting a sexually transmitted disease. Rice claimed it didn't investigate this possibility because Doe and Roe weren't similarly situated, as Doe was the subject of a formal complaint while Roe wasn't. The court held that a question of material fact remained as to whether the university selectively enforced its policies against Doe by failing to treat Roe and Doe equally.

To establish an archaic assumptions claim, a respondent must show the university's actions were based on "overly broad and archaic assumptions about one sex or the other." Decisions based on "outdated and outmoded assumptions demonstrate a university's intent to treat one differently because of their gender."

The record showed Roe was a "consenting adult female" who was sexually knowledgeable and perhaps more educated about herpes and its transmissibility than Doe. Thus, the court similarly ruled that a question of material fact remained as to whether Rice's policy and adjudication arose from a view rooted in archaic assumptions about gender. As the court stated, a rational jury could find the university's policy "arose from the view that a more-knowledgeable male (Doe) had a duty to educate an unwitting female (Roe) about the precise risks of herpes transmission."

Thus, the Fifth Circuit concluded the district court erred in granting summary judgment to the university on each of Doe's Title IX claims and remanded the claims back to the district court for further proceedings.

THE BOTTOM LINE



Respondent Title IX lawsuits often fail when the plaintiff at most presents evidence of bias against respondents accused of sexual misconduct, rather than gender bias, against males because of their gender. This case should remind institutions to ensure their Title IX policies afford a comprehensive, unbiased investigation and disciplinary process

including careful consideration of the respondent's allegations, evidence, and testimony. If allegations are asserted against student complainants during an investigation, institutions should thoughtfully evaluate whether it's appropriate to investigate those allegations as part of the disciplinary process, even if the respondent doesn't make a formal complaint.

Doe v. William Marsh Rice Univ., 67 F.4th 702 (5th Cir. May 11, 2023).

RELATED UE RESOURCES

- [Higher Education Checklist: Title IX-Compliant Sexual Harassment Grievance Procedures](#)
- [Checklist: Sexual Harassment Investigations](#)
- [Checklist: Title IX Supportive Measures, Remedies, and Sanctions — After the Regulations](#)

Not a UE member?

Contact UESupport@ue.org to learn how your institution can access these resources.

Appellate Court of Connecticut

School Doesn't Violate Privacy Rights of Potentially Dangerous Former Student Through Public Surveillance

The Appellate Court of Connecticut affirmed a trial court's summary judgment decision in favor of a school and private investigation firm accused of invading a neighboring former student's privacy rights because (1) the school had a reasonable belief the student posed danger to the school community, (2) the school's reasons for surveilling him were reasonable, (3) the surveillance was conducted in a legal manner in a public setting where the student had no reasonable expectation of privacy, and (4) reasonable people wouldn't strongly object to the surveillance.

SCHOOL CONDUCTS SURVEILLANCE OF EXPELLED STUDENT FOLLOWING HIS RELEASE FROM PRISON

In the 1980s, Charles Cornelius lived in a home across the street from Hopkins School, a private school for grades 7-12 in New Haven, Conn. He attended Hopkins from 1982-87, was disciplined several times, and was ultimately expelled for plagiarism. In October 2001, without Hopkins' permission, Cornelius used an alias to obtain Hopkins stationery and attempted to send ethnic hate literature to 1,000 former alumni.

A couple months later, Cornelius was arrested. A lawful search of his home revealed a cache of weapons, including a high-powered 50-caliber rifle and several banned assault

rifles, over 1,000 rounds of ammunition, large volumes of bomb-making materials, false identification documents, and literature about school shootings, military tactics, bomb manufacturing, and white supremacy.

Cornelius was charged with, and pleaded no contest to, state criminal offenses of attempted illegal bomb manufacturing, three counts of illegal possession of an assault weapon, and making a false statement related to a firearm transfer. He was sentenced to 10½ years in prison, followed by 10 years of special parole (continued supervision coupled with rules and conditions needed to ensure public safety). He also pled guilty to federal charges of unlawful firearm transportation and possession of false identification documents; he was sentenced to two concurrent 18-month prison terms to be served after his state sentence.

In late 2013, the Department of Corrections (DOC) discovered in Cornelius' prison cell personal information of parole officers; materials about military tactics, chemical explosives, and firearms; and a photograph of a gun used in the Sandy Hook shooting. The DOC also found correspondence between Cornelius and the National Alliance, a neo-Nazi hate group informally connected to the Aryan Brotherhood.

The Hopkins School is a registered victim of Cornelius' crimes and consistently opposed his parole.

During parole hearings, the parole board's psychologist and a DOC intelligence officer expressed concerns about the potential threat of violence Cornelius posed upon his release. The FBI recommended continued monitoring of Cornelius for signs of future violence and conducted a threat assessment.

As a result, the DOC designated Cornelius a member of a security risk group, and he wasn't released from prison until July 2016.

In November 2017, Cornelius used Freedom of Information Act requests to seek information about Hopkins' campus security practices and the security of other state public schools. In November 2018, he moved back into his house across the street from Hopkins.

After Cornelius' release from prison, Hopkins hired a private investigating firm to surveil Cornelius, with the intent to protect its community and confirm he wasn't:

- Attempting to enter school property
- Attempting to stockpile weapons
- Meeting with parties to help him attack Hopkins

Investigators followed Cornelius as he traveled to and from his house to various businesses, shops, and restaurants. Investigators conducted surveillance primarily from inside a vehicle, and surveilled him on foot, occasionally entering the same businesses as Cornelius to continue surveillance. Investigators never went on Cornelius' property and only used basic equipment such as walkie-talkies, binoculars, and cell phone cameras.

In November 2018, Cornelius sued Hopkins and the private investigating firm, alleging invasion of privacy by intrusion upon seclusion. He alleged investigators surveilled him extensively in public spaces, including in locations where he engaged in private affairs.

In May 2021, Hopkins and the investigating firm filed motions for summary judgment, arguing their actions didn't constitute an invasion of privacy by intrusion upon seclusion. The trial court granted the motions, and Cornelius appealed.

INTRUSION IN PUBLIC PLACE UNDER CIRCUMSTANCES THAT AREN'T HIGHLY OFFENSIVE DOESN'T CONSTITUTE INVASION OF PRIVACY

To establish the tort of invasion of privacy by intrusion upon seclusion, a plaintiff must establish the intrusion was:

1. Intentional
2. Made upon the plaintiff's solitude, seclusion, private affairs, or concerns in a place where the plaintiff has an objectively reasonable expectation of seclusion
3. Highly offensive to a reasonable person

With respect to the second element, Cornelius argued investigators surveilled him conducting private affairs in public spaces, such as using his private banking information at an outdoor ATM, and that he had a reasonable expectation of seclusion in those places. He also argued there were issues of material fact as to whether investigators used advanced surveillance equipment that let them view his private banking information.

The appellate court rejected his arguments, holding investigators only surveilled Cornelius in public settings where he had no objectively reasonable expectation of seclusion. Further, Cornelius' unsupported assertion that investigators may have used advanced technology to surveil him was insufficient to establish a disputed issue of material fact.

The appellate court also was persuaded that Hopkins had legitimate reasons to surveil Cornelius, and there was a lack of evidence showing the school intended to hound or harass him.

With respect to the third element, a defendant has no liability for intrusion upon seclusion unless the intrusion is substantial and results from conduct to which a reasonable person would strongly object.

Cornelius argued the trial court improperly concluded:

- Hopkins had a credible and reasonable belief he posed a danger to the school community
- The duration, frequency, and types of surveillance performed were reasonable, in part because investigators never actually saw him engage in acts Hopkins intended to prevent

However, the appellate court agreed with the trial court. The appellate court found Hopkins' concerns for the safety of its community and the investigators' surveillance of Cornelius were reasonable and justified. The decision considered Cornelius' conduct as a student, his unauthorized use of school stationery, and his imprisonment for having weapons across the street from the campus.

The court also found other compelling evidence that a reasonable person wouldn't strongly object to or be highly offended by the surveillance conducted, regardless of whether Cornelius engaged in the criminal activity Hopkins sought to prevent.

This includes:

- Circumstances surrounding his delayed prison release
- Cornelius' attempts to get information on security practices at Hopkins and other Connecticut schools
- Hopkins' status as a registered victim of Cornelius' crimes

Having found the trial court properly rendered summary judgment on the second and third elements of Cornelius' intrusion upon seclusion claim, the appellate court didn't address the first element of the tort.

THE BOTTOM LINE

Schools concerned about threats to their community's safety may employ surveillance tools and engage private investigators to conduct surveillance of neighboring residents under certain circumstances. While invasion of privacy standards vary by state, in Connecticut, surveillance doesn't constitute an intrusion on seclusion if the school credibly and reasonably believes the person poses a danger to the community and the duration, frequency, and types of surveillance conducted wouldn't be highly offensive to a reasonable person.

Cornelius v. Markle Investigations, Inc. et al., 220 Conn. App. 135 (Conn. App. June 20, 2023).

RELATED UE RESOURCES

- [Checklist: Implementing Student Threat Assessment](#)
- [Threat Assessment Teams for Students Exhibiting Concerning Behaviors](#)

Not a UE member?

Contact UESupport@ue.org to learn how your institution can access these resources.

California Court of Appeal

Court Denies Writ Petition Challenging Tenured Professor's Firing, Affirms Summary Judgment for University

The California Court of Appeal found Santa Clara University (SCU) provided a fair hearing to a tenured faculty member before firing him for sexually harassing a student. The court also upheld the trial court's decision granting summary judgment to SCU.

INVESTIGATION OF PROFESSOR'S ALLEGED SEXUAL HARASSMENT OF A STUDENT RESULTS IN HIS FIRING

In winter 2015, Jane Doe, a Chinese national and MBA student at SCU, repeatedly met with her tenured economics professor, John Heineke, in his office for help with the course. After earning an "A" in the class, she accepted an offer to serve as Heineke's teaching assistant (TA) for the same course in fall 2015.

During spring 2015, Doe had lunch at off-campus restaurants with Heineke four times, twice at restaurants she chose. She

also sent him several complimentary emails in which she referred to him as a friend and thanked him for his "kind help." Doe and Heineke later disputed the extent of physical contact between them that spring, but Heineke admitted he tried to "mentor" Doe in European/American culture, and in doing so he once demonstrated a French greeting by pressing cheeks, kissing the air, and hugging her several times.

In June 2015, Heineke began emailing Doe requesting in-person meetings related to her TA responsibilities for the following fall. Doe said she wasn't available until that fall. Despite initially agreeing to defer meeting until September, Heineke emailed Doe again in late July and eventually expressed urgency by writing, "I NEED TO DISCUSS ECON-3400 WITH YOU—ASAP. WHEN ARE YOU AVAILABLE?"

Doe replied she wasn't available until after summer break. She also wrote: "BTW, I feel **VERY VERY UNCOMFORTABLE** when somebody touch my body, kiss me in the face and mouth, tell me some sex joke, aka sexual harassment."

Six hours later, Heineke replied by expressing disbelief, shock, and devastation and suggesting Doe misinterpreted his "gestures of friendship" due to cultural differences.

Doe's response began, "oh really?" and listed specific accusations, including that Heineke:

- Put his hands into the back pocket of her jeans and squeezed her butt
- Hugged her against him while kissing her mouth
- Asked her to sit with him in the same chair
- Asked her about sexual topics including whether she got hurt when she first had sex

Heineke emailed Doe, denying having done these "horrible things." He asked whether she would continue being his TA — noting he wanted her to do it "very badly because of your qualifications. Please say yes. You will not be sorry, and will learn a lot."

Doe didn't reply. Instead, she emailed SCU's equal employment opportunity office to report the alleged harassment. She repeated and elaborated on her allegations. SCU's Director of Equal Opportunity and Title IX Coordinator met with Doe, but Doe didn't respond to follow-up correspondence and didn't pursue the claim.

SCU thus didn't initiate an investigation or advise Heineke of Doe's complaint at the time.

Fifteen months later, another female student from China (Student A) complained to the equal employment opportunity office that Heineke sexually harassed her. The Title IX Coordinator hired an outside investigator to investigate this claim, and Student A, who knew about Doe's allegations, connected the investigator with Doe.

Finding Doe's allegations credible, the investigator opened a separate investigation into them. Without disclosing he had spoken with Doe, the investigator asked Heineke multiple times if anything like the allegations Student A made had come up before; each time Heineke said no and didn't disclose Doe's accusations.

The investigator interviewed seven witnesses about Doe's allegations and issued two reports. One concluded Heineke hadn't sexually harassed Student A and another found it likelier than not that Heineke harassed Doe.

Consistent with SCU's harassment policy, the investigator sent copies of the Doe report to the Provost, Doe, and Heineke. Heineke provided a written response to the investigation report. The investigator produced an addendum to the report to which Heineke also responded.

After meeting privately with Heineke as required by a separate faculty handbook process governing cases of alleged faculty misconduct, the Provost issued his decision, finding it "more likely than not" Heineke violated the harassment policy and finding Heineke's acts amounted to "gross misconduct" (the standard the faculty misconduct policy requires for firings to occur in less than a year). Heineke was advised of the appeals process and appealed to SCU's President, who affirmed the evidentiary findings and the remedy of termination and informed Heineke he had 30 days to bring a petition to the faculty judicial board (FJB).

The FJB conducted a three-day hearing, during which it made it clear that under the harassment policy, Heineke had the burden to demonstrate by a preponderance of the evidence that he didn't violate the harassment policy. The FJB found Heineke hadn't met this burden and affirmed SCU's finding of harassment and its decision to terminate.

Heineke filed an administrative mandamus petition challenging the proceedings that resulted in his firing. He also filed a separate civil action alleging, among other things, wrongful termination in violation of public policy against age discrimination, denial of a constitutional right to due process, and breach of contract. The trial court denied the mandamus petition and granted summary judgment in the civil action to SCU. Heineke appealed.

DENIAL OF MANDAMUS PETITION AFFIRMED BECAUSE SCU DIDN'T PREJUDICIALLY DEVIATE FROM FACULTY HANDBOOK PROCEDURES

The Court of Appeal explained a writ of mandamus may issue upon a showing the respondent failed to provide a fair hearing or the respondent committed a "prejudicial abuse of discretion," which occurs if the respondent didn't proceed in a manner required by law or the decision isn't supported by factual findings supported by evidence.

Heineke claimed the FJB hearing was unfair because the faculty handbook required his dismissal for misconduct to be conducted solely under the misconduct provisions of the faculty handbook and not under the provisions of the separate harassment policy appended to the faculty handbook. The court noted harassment plainly qualified as "misconduct" but because the handbook provided no guidance as to which set of procedures to use when harassment is the type of faculty misconduct at issue, "some confusion may have been inevitable."

However, the court concluded that to the extent there was any procedural error it didn't prejudice Heineke and he, in fact, received several extra procedural protections because of the interaction between the harassment and faculty misconduct policies.

Regarding Heineke's contention that under the misconduct policy, he should not have borne the burden of persuasion, the court found each of the following:

- It wasn't clear Heineke's reading of the handbook was correct
- He had likely waived this argument
- In any event, the alleged procedural error didn't prejudice him because the FJB's opinion made it clear the FJB found Doe's testimony compelling and credible and Heineke's testimony "did not persuade us that it was more likely than not that she was lying."

Because the FJB's opinion made it clear it didn't find evidence from Doe and Heineke equally credible, the burden of persuasion didn't impact the hearing's outcome.

The court also rejected Heineke's argument the evidence was insufficient to support a harassment finding, concluding Doe's detailed accounts in her testimony and her 2015 emails with Heineke constituted substantial evidence of alleged harassment.

SUMMARY JUDGMENT UPHELD BECAUSE HEINEKE LACKED EVIDENCE TO SUPPORT HIS CLAIMS

The Court of Appeal agreed with the lower court that there was no genuine factual dispute material to the elements of the three causes of action alleged against SCU.

Regarding his claim for termination in violation of the public policy against age discrimination, the court found Heineke had admitted he had no "objective evidence" he was discriminated against or fired because of his age or that SCU had a "policy" of discriminating against older faculty.

Regarding the due process claim, Heineke conceded SCU wasn't a state actor and thus wasn't subject to the due process clause. Heineke attempted to reframe his due process claim as a contractual "fair process" claim, but the court found the claim wasn't properly pled.

Regarding the breach of contract claim, the court found Heineke had offered no evidence of any breach. To the extent he claimed the processes through which he was fired failed to comply with the faculty handbook, the court rejected such arguments for the same reasons as in the mandamus proceeding.

THE BOTTOM LINE



Faculty fired for cause often allege procedural flaws in their termination proceedings must be corrected through a writ of mandamus (available in some states) and/or give rise to a breach of contract claim. This decision underscores that in a mandamus proceeding, the former faculty member must show a "prejudicial abuse of discretion" to be entitled to a legal remedy. Fired faculty also often allege the stated cause for their termination is a pretext for discrimination. Such allegations must be supported by objective evidence — not allegations — of discrimination to survive summary judgment.

Heineke v. Santa Clara Univ., Case Nos. A165818, A165842 (Cal. App. April 27, 2023).

RELATED UE RESOURCES

- [Lessons Learned from Claims: Higher Ed Employee-on-Student Sexual Harassment and Assault](#)
- [Training Faculty on Sexual Misconduct](#)
- [Faculty-Student Consensual Relationship Policies](#)
- [Properly Documenting Employee Disciplinary Actions](#)

Not a UE member?

Contact UEsupport@ue.org to learn how your institution can access these resources.



Get Coverage for Risks Other Insurers Avoid

With over 35 years dedicated to understanding the needs of colleges and universities, our policies cover the risks other insurance carriers limit or avoid, such as traumatic brain injury and sexual misconduct.



Contact info@ue.org or visit www.ue.org/discover-ue/2023 to learn more about our comprehensive coverage and the full benefits of being a UE member.



United Educators (UE), a reciprocal risk retention group, is a licensed insurance company owned and governed by about 1,600 members representing thousands of K-12 schools, colleges, and universities throughout the United States. Our members range from small independent schools to multicampus public universities. UE was created in 1987 on the recommendation of a national task force organized by the National Association of College and University Business Officers. Our mandate is to provide K-12 schools, colleges, and universities with a long-term, stable alternative to commercial liability insurance.



United Educators has been Rated A (Excellent) by AM Best every year since 1998.

For more information, visit www.ue.org or call (301) 907-4908.