

Analyzing the Elements of Title IX Sexual Harassment

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ANALYZING THE ELEMENTS OF TITLE IX SEXUAL HARASSMENT

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AGENDA



I. Overview of Title IX Sexual Harassment

II. Severe

III. Pervasive

IV. Persistent

V. Objectively Offensive

VI. Q&A

Overview of Title IX Sexual Harassment



Categories of Sexual Harassment

1

Quid Pro
Quo

2

Hostile
Environment

3

Assault/
Stalking



Sexual Harassment Definitions

Title IX Definition

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following [...]

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity [...]

Non-Title IX Definition Example

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following [...]

Unwelcome conduct that is sufficiently severe, persistent, or pervasive, that it creates an intimidating, hostile, or offensive environment [...]



Severe



Severe Definition & Considerations

Severe

(of something bad or undesirable) very great; intense; of a great degree

Considerations

- Level of alleged conduct
- Type of alleged conduct
- Totality of alleged conduct
- Power dynamic



Title IX Severe Conduct



Clear Examples:

- ⇒ Physical violence
- ⇒ Sexual assault
- ⇒ Extremely offensive act

Unclear Examples:

- ⇒ Texting a threat
- ⇒ Showing up at a dorm room unannounced
- ⇒ Sending small gifts

Case Study #1: Severe



While working alone in a campus building, Respondent took Complainant into an empty office and shut the door behind him.

What else would you want to know in order to make a "severe" determination?

Case Study #1 Details: Severe

1. Complainant was new to the job and Respondent was her supervisor.
2. Respondent separated her from the rest of the training group to work with him in an empty office.
3. After Respondent shut the door, he asked Complainant if she was scared.
4. Respondent told Complainant he was lonely and his wife had just left him.
5. Respondent told Complainant he wanted a married woman to care for and to take on dates.



Case Study #1 Outcome: Severe

1. Complainant was new to the job and Respondent was her supervisor.
2. Respondent separated her from the rest of the training group to work with him in an empty office.
3. After Respondent shut the door, he asked Complainant if she was scared.
4. Respondent told Complainant he was lonely and his wife had just left him.
5. Respondent told Complainant he wanted a married woman to take on dates and care for.

The acts of **separating** and **isolating** Complainant from her coworkers are reasonably understood to rise to the level of "severe."



Case Study #2: Severe



While in Complainant's dorm room, Respondent called Complainant a "f*cking bitch."

What else would you want to know in order to make a "severe" determination?

Case Study #2 Details: Severe

1. The students were in an on-again, off-again romantic relationship for three months.
2. This was the only time Respondent called Complainant a name.
3. Respondent called Complainant the name after she told him she falsely reported to their mutual friends that he had "raped her."



Case Study #2 Outcome: Severe

1. The students were in an on-again off-again romantic relationship for three months.
2. This was the only time Respondent called Complainant a name.
3. Respondent called Complainant the name after she told him she falsely reported to their mutual friends that he had "raped her."

The **single instance** of name-calling and the **context** does not rise to the level of "severe."



Pervasive



Pervasive Definition & Considerations

Pervasive

Existing in or spreading through every part of something; spread throughout

Considerations

- Modes of communication used (e.g. social media, phone calls, text messages).
- Impacts on different facets of Complainant's life/work.



Title IX Pervasive Conduct

Clear Examples:

- ⇒ Calls, texts, *and* social media communications
- ⇒ Disclosed graphic sexual details to Complainant *and* made repeated sexual comments about Complainant to their classmates

Unclear Examples:

- ⇒ Only contact through phone calls
- ⇒ Sending a LinkedIn connection request
- ⇒ Asking Complainant's friends about Complainant



Case Study #1: Pervasive



Respondent asked Complainant on four dates throughout an academic year (September – June).

What else would you want to know in order to make a “pervasive” determination?

Case Study #1 Details: Pervasive

1. Complainant and Respondent had one class together from September – December.
2. Complainant gave Respondent her number and said, “Maybe we can have coffee sometime.”
3. On four occasions, as they were exiting the classroom, Respondent asked Complainant out on a date.
4. The first three times, Complainant said, “No, maybe another time.” The final time, Complainant said, “No, I have a boyfriend, so you really should stop asking me out.”



Case Study #1 Outcome: Pervasive

1. Complainant and Respondent had one class together from September – December.
2. Complainant gave Respondent her number and said, "Maybe we can have coffee sometime."
3. On four occasions, as they were exiting the classroom, Respondent asked Complainant out on a date.
4. The first three times, Complainant said, "No, maybe another time." The final time, Complainant said, "No, I have a boyfriend, so you really should stop asking me out."

Respondent's **single method** of communication and the **number of communications** over a semester do not rise to the level of "pervasive"



Case Study #2: Pervasive



Respondent told Complainant about several graphic sexual encounters he had over his college career.

What else would you want to know in order to make a "pervasive" determination?

Case Study #2 Details: Pervasive

1. Respondent asked Complainant if he could talk to her about something, but did not disclose it was sexually graphic in nature.
2. Respondent told Complainant's friends and classmates he had sexual fantasies about Complainant.
3. Respondent told Complainant's friends every time he thought she wore something sexually revealing to class.
4. Respondent sent text messages to Complainant's friends and classmates about sexual acts he wanted to perform on Complainant.
5. Respondent sent Complainant graphic sexual messages through a classroom messaging system.



Case Study #2 Outcome: Pervasive

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3. Respondent told Complainant's friends every time he thought she wore something sexually revealing to class.
4. Respondent sent text messages to Complainant's friends and classmates about sexual acts he wanted to perform on Complainant.
5. Respondent sent Complainant graphic sexual messages through a classroom messaging system.

Respondent's use of **several different channels** to communicate to and about Complainant are reasonably understood to rise to the level of "Pervasive."



Persistent



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Persistent Definition & Considerations

Persistent

Existing for a long or longer than usual time or continuously

Considerations

- Frequency of the alleged conduct
- Duration of alleged conduct
- Type of alleged conduct
- Context of comments, messages, or actions



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Title IX Persistent Conduct



Clear Examples:

- ⇒ Daily unwelcome text messages
- ⇒ Frequent unwanted physical contact of a sexual nature
- ⇒ Multiple requests to engage in sexual activity within a short time

Unclear Examples:

- ⇒ Three inappropriate comments over the span of six months
- ⇒ Occasional text messages asking to hang out

Case Study #1: Persistent



Respondent expressed a romantic interest in Complainant in person and in text messages.

What else would you want to know in order to make a “persistent” determination?

Case Study #1 Details: Persistent

1. After Respondent initially shared his romantic feelings with Complainant, Complainant told Respondent she was only interested in being friends.
2. Respondent continued to contact Complainant via text messages.
3. Complainant asked Respondent to stop.
4. Respondent continued to contact Complainant via text messages and on social media, each day over the course of two weeks.
5. In his messages, Respondent asked Complainant to reconsider and to begin a relationship with him.



Case Study #1 Outcome: Persistent

1. After Respondent initially shared his romantic feelings with Complainant, Complainant told Respondent she was only interested in being friends.
2. Respondent continued to contact Complainant via text messages.
3. Complainant asked Respondent to stop.
4. Respondent continued to contact Complainant via text messages and on social media, each day over the course of two weeks.
5. In his messages, Respondent asked Complainant to reconsider and to begin a relationship with him.

Respondent's **repeated attempts** to communicate his romantic interest in Complainant and request Complainant start a relationship with him, met the definition of "persistent."



Case Study #2: Persistent



Respondent made comments about Complainant's "nipple" or "breast" while showing Complainant how to use gym equipment.

What else would you want to know in order to make a "persistent" determination?

Case Study #2 Details: Persistent

1. Respondent made seven total comments about Complainant's "nipple" or "breast."
2. Respondent also touched Complainant's ribcage and thigh.
3. The physical touching occurred over the course of two days.
4. Respondent's comments and conduct were similar in nature.



Case Study #2 Outcome: Persistent

1. Respondent made seven total comments about Complainant's "nipple" or "breast."
2. Respondent also touched Complainant's ribcage and thigh.
3. The physical touching occurred over the course of two days.
4. Respondent's comments and conduct were similar in nature.

Respondent's conduct of **repeatedly commenting** on Complainant's intimate body parts as well as engaging in **unwanted touching** of a sexual nature rises to the level of "persistent."



Objectively Offensive



Objectively Offensive Definition & Considerations

Objectively Offensive

Generally considered inappropriate or harmful; A reasonable person would find it offensive

Considerations

- Not a matter of personal taste or sensitivity
- Context is crucial
- Separate analysis from what Complainant states or feels



Title IX Objectively Offensive Conduct

Clear Examples:

- ⇒ Touching intimate body parts without consent
- ⇒ Obscene text messages
- ⇒ Taking pictures of a stranger in the bathroom

Unclear Examples:

- ⇒ Filming sexual acts
- ⇒ Taking the same classes as someone
- ⇒ Connecting with someone's family on social media



Case Study #1: Objectively Offensive



After class, Respondent showed Complainant part of a provocative music video.

What else would you want to know in order to make an “objectively offensive” determination?

Case Study #1 Details: Objectively Offensive

1. Respondent was Complainant’s professor.
2. They had previously spoken about music and Complainant shared she was in a band.
3. Complainant was showing Respondent recording sessions of her band.
4. Respondent showed Complainant 15 seconds of a music video to point out his friend who was the bass player in the video.
5. The music video depicted a woman in a bikini dancing in front of men sitting on a couch.



Case Study #1 Outcome: Objectively Offensive

1. Respondent was Complainant's professor.
2. They had previously spoken about music and Complainant shared she was in a band.
3. Complainant was showing Respondent recording sessions of her band.
4. Respondent showed Complainant 15 seconds of a music video to point out his friend who was the bass player in the video.
5. The music video depicted a woman in a bikini dancing in front of men sitting on a couch.

The **context** in which the video was shared and the **facts corroborating the context** (video shared for short duration of time) support that the conduct does not rise to the level of "objectively offensive."



Case Study #2: Objectively Offensive



Respondent went to Complainant's apartment shortly after they ended their romantic relationship.

What else would you want to know in order to make an "objectively offensive" determination?

Case Study #2 Details: Objectively Offensive

1. A few days after the breakup, Complainant and Respondent spoke on the phone and Respondent asked to come over to talk. Complainant eventually said he could.
2. When Respondent arrived, Complainant's roommates dissuaded her from talking to him, and they did not answer the door.
3. Respondent knocked on the door and window for 5-10 minutes.
4. When no one answered, Respondent went to a neighboring apartment to try to get them to help him get inside Complainant's apartment.
5. Complainant later said she was not scared or worried he would do anything further.



Case Study #2 Outcome: Objectively Offensive

1. A few days after the breakup, Complainant and Respondent spoke on the phone and Respondent asked to come over to talk. Complainant eventually said he could.
2. When Respondent arrived, Complainant's roommates dissuaded her from talking to him, and they did not answer the door.
3. Respondent knocked on the door and window for 5-10 minutes.
4. When no one answered, Respondent went to a neighboring apartment to try to get them to help him get inside Complainant's apartment.
5. Complainant later said she was not scared or worried he would do anything further

The **length of time** Respondent attempted to enter Complainant's apartment, and his **escalating behavior** reasonably rise to the level of "objectively offensive."



QUESTIONS?



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