



# Hostile Environment Basics

**Bricker**   
**Graydon**

**Title IX In Focus**  
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# Disclaimers

**We can't help ourselves. We're Lawyers.**

- We are not giving you legal advice
- Consult with legal counsel regarding specific situations
- You will receive slides for today's presentation after we've concluded

# And another one...

## Specific to the Title IX In Focus Webinar Series

- The 2020 and 2024 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss *some* of the required subject matter, none of these one-hour webinars will cover *all* of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

# Can We Post These Materials?

**YES – Post away!**

Institutions subject to the 2020 Title IX Regulations are required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.

Institutions subject to the 2024 Title IX Regulations are required to maintain training materials.



# Agenda

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- Legal origins of "Hostile Environment"
- Title IX Hostile Environment standards
  - Title VII
  - 2020 Regs
  - 2024 Regs
- Hostile Environment Takeaways

# First... Title VII Basics

- 42 U.S.C. § 2000e-2: Unlawful employment practices

## (a) Employer Practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, **or otherwise to discriminate** against any individual with respect to his **compensation, terms, conditions or privileges of employment, because of** such individual's race, color, religion, **sex**, or national origin; or

(2) to limit, segregate, or classify his employees or applicants in any way which would deprive or intend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

# History of Title VII

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- Part of the Civil Rights Act of 1964
  - Pre-dated Title IX by about 8 years
- Landmark federal civil rights law signed by President Lyndon B. Johnson
- Other provisions in the Act addressed voting rights, segregation in places of public accommodation, and nondiscrimination in the distribution of federal funds



## *Bundy v. Jackson* (1981)

- *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)
- Circuit Court case later cited by US Supreme Court
- Sandra Bundy (employee) and Jackson, Gainey, and Burton (supervisors)
  - Years of explicit sexual advances
- Court seemed clear that some of the employment decisions by these supervisors amounted to employment discrimination
  - Ex: denial of a promotion

## Novel Question

"What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the 'terms, conditions, or privileges of employment.' Though no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, **regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.**"

*Bundy*, at 943-44.

# "Psychological and Emotional Work Environment"

"Bundy's claim on this score is essentially that 'conditions of employment' include the psychological and emotional work environment that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation... illegally poisoned that environment." *Bundy*, at 944.

- Compared to a recent 5th Cir. Case alleging an offensive work environment on the basis of ethnicity discrimination – *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)
- "Terms, conditions, or privileges of employment" = expansive concept

# "Heavily Polluted"

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"One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."

*Rogers, at 238.*

## ***Bundy* relying on EEOC Guidance (later codified as regs)**

- See 29 CFR 1604.11(a)-(f):

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 work environment.

- Sound familiar?

# Meritor Savings Bank

- *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)
- Mechelle Vinson (employee) and Sidney Taylor (supervisor)
- 11-day bench trial, but did not resolve conflicting testimony about the existence of a supervisor-supervisee sexual relationship
- Confirmed 2 types of sexual harassment under Title VII:
  - Quid pro quo (conditioning employment benefits on sexual favors)
  - "Hostile or offensive working environment"
    - Cited *Bundy v. Jackson*, 641 F.2d 934 (1981)
    - Cited 1985 EEOC Guidelines on Discrimination Because of Sex

# Tangible Economic Loss

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- Employer argued that discrimination under Title IX only included "tangible loss" of "an economic character"
  - SC rejected this view
- Noted that *Rogers* (mentioned earlier – discrimination on the basis of ethnicity) - first court to recognize a cause of action based upon a discriminatory work environment

## Not all workplace conduct...

"Of course, as the courts... recognized, **not all workplace conduct** may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. See *Rogers v. EEOC, supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, **it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'**"



# Takeaways

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- Tangible loss not required for Hostile Environment SH
- But, must alter/interference with the environment
  - Can't just be offensive
- "Sufficiently severe or pervasive" under *Meritor*
- "Mere utterance" may not affect conditions to the point of creating a hostile environment

# Hostile Environment Standard – 2020 Regs

34 CFR 106.3 of the 2020 Title IX Regulations: Sexual Harassment means...

- Conduct **on the basis of sex**, that is
- **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

NOTE: Severe, pervasive, and objectively offensive

# Hostile Environment Standard – 2020 Regs Notes

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- Higher standard than pre-2020 and 2024 regs
  - Doesn't mean conduct that meets the lower standard can't be addressed – just through a "Non-Title IX process"
- Examples and guidance in the 2,000ish pages of the Preamble
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (Preamble, p. 30159)
- Always remember to look at impact

# Hostile Environment Standard – 2024 Regs

34 CFR 106.2 of the 2024 Title IX Regulation: Sex-Based Harassment

- **Unwelcome**
- **Sex-based** conduct
- Based on the **totality** of the circumstances
- **Subjectively and objectively** offensive
- **So severe or pervasive**
- Limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

NOTE: Severe OR pervasive

# Hostile Environment Standard – 2024 Regs Factors (1 of 2)

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- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following (i)-(ii):
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;

# Hostile Environment Standard – 2024 Regs

## Factors (2 of 2)

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- (Continued) Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following (iii)-(v):
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct and the context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education program or activity

# Hostile Environment Basics

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- Impact is required
  - Remember the *Bundy* Court's concern with emotional psychological environment at work
  - If a tree falls in the woods...
  - Offensiveness alone is never the determining factor
- Consistency is key
  - Think intake
  - Think investigations
  - Think outcomes
  - Document, document, document
- Always think about whether HE is an issue
  - This may accompany other Title IX conduct
  - Is HE a separate charge? If so, be consistent.

# Upcoming Title IX In Focus Webinars

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October 31, 2024: Common  
Issues in Investigating IPV

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November 21, 2024: Title IX  
Litigation Update

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February 27, 2025: Employee  
Sexual Misconduct Cases

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March 27, 2025: The  
Romanticizing of Stalking  
Behavior

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April 24, 2025: Sexual  
Misconduct Hearings

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May 29, 2025: Title IX Litigation  
Update

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# Upcoming Higher Ed Webinars




- Higher Education Free Webinar Series:
  - Protecting Student Privacy in the Age of AI – January 15, 2025
- Title IX Trainings – THIS WEEK!!
  - On-Demand foundational sessions
  - Live Trainings via Zoom for Coordinators, Investigators, Informal Resolution Officers, and Hearing Officers

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