

UNFAIR

To whom it may concern,

What follows is my account of events that occurred in my department over the last year. This process involved a multifaceted Title IX grievance, an investigation, a hearing before the Campus Conduct Hearing Committee, appeals based on apparent violations of college procedures and encroachment on academic freedom, a final decision by the president, and the implementation of his decisions by the dean of the faculty. I have tried to be fair and objective and provide relevant information supported by objective records and testimony, but, as will become clear, I have a bias. I support diversity and the many essential benefits it provides to our educational mission. I also believe academic freedom is fundamental to higher education. I reject the blithe assertion proclaimed by our college policy on sexual harassment that there is no conflict between these two values. I am frustrated by our administration's refusal to address the substantive questions I raised and their continuing to delay, deflect, and obfuscate. However, to paraphrase the Buddha (and more recently, James Comey): "Three things cannot remain covered for long: the sun, the moon, and the truth." The following account explains my position in greater detail.

Background

I have a friend. He's a teacher. He differs from me in many ways, but I've never doubted that he loves his students as much as he loves the subjects he teaches them. He loves Berea College, and is good at what he does. He is spontaneous, authentic, and provocative. I, like many of his colleagues and students, find his quirkiness enlightening as well as endearing.

Seven years ago, our department consisted of three "old (including one not-quite-so-old) white guys", two of whom were on the former president's "least wanted" list. Over the course of the last seven years, our department has grown: we now have three female colleagues and, by many measures, had become a model of diversity, inclusivity, & educational excellence.

Students appreciate our academic program; within 3 years of graduation, about 75% of them are enrolled in graduate programs. Our students regularly win awards for their research from the Kentucky Academy of Sciences; they rate the department at the top of course critiques for the amount they learn. Graduating seniors rate our program higher than any other large academic program at the college for modeling positive working relationships between men and women and modeling the value of diversity and inclusion. Our average graduating senior scores at the 85th percentile on the Major Field Achievement Test in Psychology. The department is growing. Over the last 5 years, larger proportions of the college's women, African Americans, and international students have chosen to major in Psychology than ever before. By all these measures, we provide a positive, supportive, and productive academic working environment.

The Grievance

Nonetheless, after 10 tortuous months, my friend and colleague, the, now-former, department chair, who contributed more than anyone to our program's success, was determined to have created a hostile environment in our department and has been "banished to the basement" of our building. Several faculty grievants, documented incidents charging him with having discriminated, retaliated, and created a hostile work environment based on race, gender, or sexual orientation over a 5 year period. Sadly, only one of them had ever told him directly that his words and behavior were unwelcome or offensive. No evidence was submitted that suggested he intended his words or actions to offend anyone, however, a Campus Conduct Hearing Board found him to be "impulsive", "erratic" and "oblivious". Although the investigation revealed that he immediately had ceased his behavior on the two occasions a grievant had indicated that they were offensive and unwelcome, and, throughout this convoluted and often mysterious process, he expressed an eagerness to resolve any & all issues informally, he was judged to bear sole responsibility for the hostility that had come to pervade the department.

The Investigation

An "investigation" was conducted, mostly before any of us, including my friend, knew that a grievance had been filed. Not too surprisingly, my friend's behavior during these 7 weeks of awkwardness & ambiguity was noted by the investigators to have "made the situation worse". The investigation itself seemed to ignore the fact that my friend's behavior on one occasion had reflected his own frustration with the extraordinarily disruptive and disrespectful behavior of a student in one of his classes. However, the investigators asserted that this complaint was exclusively "about faculty" and not about students and, thus, chose to ignore any evidence to the contrary. They imagined that academic freedom was a concept that was geographically limited and did not apply beyond the walls of the classroom, laboratory, or lecture hall. Thus, events that occurred in faculty offices, hallways or the copier room would not be covered by my friend's academic freedom. They assumed that the subjective reaction of an offended party was sufficient to establish a "hostile workplace" violation regardless of objective evidence to the contrary or reasons to suspect the grievance's objectivity, accuracy, or the validity of the impacts they alleged. From my perspective, it seemed clear that the investigation sought to prove a violation had occurred, rather than conduct an impartial consideration of all the relevant evidence. In my opinion, this was more "inquisition" than "investigation".

Nonetheless, some of the charges, the most serious ones involving my friend's alleged acts of discrimination & retaliation, were not supported by the Title IX office's inquiry. I imagine that the charge of retaliation was difficult to support since two of the three grievants had never done anything to indicate to my friend (either directly or indirectly)

that there had been a problem. Nonetheless, a nefarious narrative created years earlier had been elaborated and spread and was used by the grievants to interpret their experiences as having been discriminatory and hostile. Evidence, based almost entirely on two of the three grievants' subjective experiences was found to support charges relating to these subsequent events, and the case was forwarded to a Campus Conduct Hearing Board. Objective evidence and testimony from several other senior faculty members that my friend had not discriminated against women during the hiring process seemed to have been ignored. I wondered what kind of bureaucratic armadillos could bury their heads so deeply in their search for corroborative minutia that they could not hear the thunder of exaggeration and injustice booming all around them?

Since much of the initial inquiry was conducted prior to most witnesses being made aware of the actual charges, written documents containing their testimony and other evidence were submitted to the hearing board. Additionally, former faculty members, all seemingly reasonable persons, who had observed and experienced words and behaviors similar to those for which my friend was being charged, submitted letters of support indicating that they had not found my friend's words and actions to be threatening, demeaning, hostile, or otherwise offensive. They expressed the opinion that he was not a danger to anyone. Nonetheless, the Title IX Coordinator precipitously decided to lock him out of his office without prior notice because a grievant felt threatened. This was unwarranted, inappropriate, and unprofessional (and, like so many other apparent discrepancies in the process, ignored by the administration). Although the campus policy and procedures provide no basis for excluding documents from a Campus Conduct Hearing, most of the documents provided by my friend were excluded from consideration with obviously contradictory justifications: some documents were excluded because the authors would be testifying directly and thus their documents would be redundant to their testimony; other documents were excluded because their authors were not scheduled to testify, and, thus, could not be cross examined by board members. Is it any wonder my friend found these exclusions (and the reasoning behind them) to be arbitrary, capricious, and prejudicial? Nonetheless, the president concurred that the document exclusion was appropriate but provided no explanation, justification, or rationale. (With all due respect, I expect my first year students to demonstrate better critical reasoning skills in GSTR 110.) I couldn't help but wonder if the president had even read the final decision letter he had signed.

The CCHB Hearing

The mid-summer hearing itself was a grueling & contentious 9-hours, including a brief lunch break. My friend's physical condition has not been good for some time, and he usually takes long naps in the early afternoon. These naps became more important since the stress & uncertainty of the needlessly protracted and worrisome inquiry denied my friend many a night's sleep. Before my eyes, I saw my friend wither and fade during the hearing, participating less and less actively in questioning witnesses or even delivering the closing argument we had prepared together. Although still offering

occasional token resistance, there was clearly no energy left in his efforts, and much of the defense we had planned was abandoned. In closing, one grievant made the forceful (but false) assertion that college policy prohibited mediation in all cases of discrimination. Actually, college policies indicate that mediation is not appropriate only in cases of *sexual violence*. Herein lies an apparent misconception underlying the grievance, the investigation, and the CCHB hearing: my friend was not accused of sexual violence. The president's final letter suggests that as his advisor, I should have spoken up at this point; unfortunately, our college's procedures do not allow anyone except the grievants and the respondent to speak to the panel or witnesses during the hearing, and this rule was rigidly enforced by both the panel chair and the most zealous grievant.

The finding of the panel, strikingly similar in both content & tone to the investigative report, concluded that my friend "caused" the hostile environment and recommended a broad set of harsh consequences. I use the term "harsh" advisedly. One of the roles of the Title IX Coordinator is to assure equity across programs (and presumably also over time). The CCHB recommendations were almost identical to those I had levied, as provost, against a faculty member 15 years ago after he had aggressively and with clear & obvious malice, verbally assaulted a junior colleague, then accosted another faculty member threatening physical harm if he ever attended another faculty meeting. Although the consequences recommended in my friend's case were nearly the same as those levied in the previous case, the severity of the two incidents was very different. I defy any reasonable person to examine these two cases and argue that the transgressions (and thus the appropriate remedies) were even remotely similar.

The Appeals

As outlined by the Faculty Manual, my friend filed timely appeals based on the college's failure to 1) follow its own procedures and 2) recognize the protection of his words under the auspices of academic freedom. The appeal concerning academic freedom was heard by the Faculty Appeals Committee about two months after the Campus Conduct Hearing Committee concluded. I must admit that unlike the CCHB hearing, it was obvious that the members of the FAC had taken their charge seriously and carefully thought through the proceedings and endeavored to provide an equitable and inclusive process (even accommodating my friend's need for afternoon naps). While there are parts of their analysis with which I disagree, their findings are well-reasoned and supported by references to the Faculty Manual and the evidence presented to them. Their job was to consider the ways in which violations found by the CCHB may have been protected by my friend's academic freedom as a faculty member. (Unlike public universities, faculty members at private colleges like Berea College do not have automatic First Amendment Constitutional protections; however, when a college promises such protection in its publications, it is expected to keep it.)

The Faculty Appeals Committee Hearing

Although it was not the charter of the Faculty Appeals Committee to reconsider the evidence previously presented to the Campus Conduct Hearing Board or its process or decisions, several of the observations in the FAC's report seemed to support issues my friend had raised about the hearing and its findings and recommendations in his procedural appeal. One of his concerns was that the Title IX Coordinator seemed to have exerted undue influence on the whole process, including final deliberations and the preparation of the CCHB's report which is prohibited. Curiously, one of the three members of the CCHB panel declined to testify before the FAC and another agreed to testify but advised the committee that he would defer all questions to the committee chair. The chair did testify before the board, but her only responses were either, "I think the report speaks for itself," or "I don't remember..." Listening to her responses reminded me of confronting a student with evidence that s/he had plagiarized a paper (or Attorney General Sessions testifying before the Senate Judiciary Committee). The Faculty Appeals Committee also opined that the CCHB's charge that my friend's question during their hearing about feminism being a "protected class" reflected his lack of control should not be used as evidence of his hostility. Feminism (like fascism, fundamentalism, and cannibalism) is a philosophical point of view, and, thus, does not denote a protected class, and therefore cannot be the basis for a finding that someone's actions have violated the 1964 Civil Right Act.

The President's Decision

Now, the process is over and the president has provided his final rulings. Several of the inappropriate words and behaviors of my colleague were found to have contributed to a hostile environment. Basically, over a four year period of surreptitious observation by three trusted colleagues, my friend was found to have violated campus policy by having once used the phrase "militant lesbianism" in anger & frustration during a department meeting, twice attempted to discuss Chrissie Hynde's National Public Radio interview in which she suggested that getting drunk and showing up to a biker party in her underwear contributed to her gang rape 20 years ago, and discussing a Jewish American princess joke immediately before a department meeting two years ago. Charges found not to have occurred, not to have been violations of Title IX, to have been protected by my friend's academic freedom, or that otherwise disappeared from the original grievance included: criticizing the previous administration for requiring diversity training for all faculty members in response to a racially insensitive message from a junior faculty member, advocating for male (as well as female) applicants for a tenure track position in our department, noting that one grievant was "mostly collegial" in his recommendation for her tenure, making false statements on two grievants' tenure recommendations, "scoffing" at the concept of "white privilege", using the words "black militant feminist", asking a Title IX investigator if "feminists" constituted "a protected class", retaliating against the grievants by divulging the contents of the grievance filed against him to a friend, and other "unspecified" incidents occurring over the last five years.

One of the most frustrating aspects of this experience is that most of these grievances simply disappeared without explanation or acknowledgement. I suspect there may be some legal justification not to admit even obvious mistakes, but the lack of transparency has increased ambiguity and uncertainty. Although tempered by administrative latitude to negotiate and accommodate gradual resolution and attempt restoration to our now-decimated department, the president's final decision letter reflects many of the biases and misconceptions that were woven throughout our college's convoluted and arcane yet amateurish Title IX investigative and judicial processes.

My colleagues

Admittedly, I am disappointed by my departmental colleagues who lodged this grievance. I have spent much of my adult life (both in the United States Air Force and here at Berea College) promoting and defending the diversity & inclusiveness that Title VII & IX advocate (and, ironically, so has my friend). One might expect faculty members who teach students about things such as the fundamental attribution error, confirmation bias, the effects of anxiety and depression on perception and memory, group polarization, groupthink, framing effects, projection, reaction formation, and autistic hostility would be able to recognize the influence of these basic psychological phenomena in themselves and their own subjective experiences. However, none of us is perfect, and these phenomena affect me (and my testimony) as well as them & theirs. Nonetheless, I sincerely wish that any one of them would have come to me sooner and expressed her concern with my colleague's words or behavior, or at some point in this extended process been willing to attempt to resolve these issues informally. However, my frustration, my anger, and my rage at this travesty are reserved for the bureaucracy and administration that have not only allowed but exacerbated the persecution of my friend and colleague over the last year and substantially increased the level of hostility in my department in the process.

Other Factors & Issues

For starters, the dean could have required all our department members to participate in a mediated conflict resolution session when he first became aware of one faculty member's apparent deep distress. Similarly, our chair's mounting frustration with a student's disruptive and disrespectful behavior (which we later learned reflected classic symptoms of an autism spectrum disorder) could have been recognized and remedied to reduce the frustration and anxiety that prompted his impulsive and ill-advised use of language later judged to have "caused" our "hostile work environment". Having spent over 40 years involved in Title VII & IX related procedures, the investigation I witnessed in this case has been inherently biased, shamefully incomplete, and needlessly protracted. For the Title IX Coordinator to glibly quip that academic freedom is "not my job" in testimony before the FAC reflects a dereliction of duty not only on her part but also on the part of the administrators responsible for her appointment, orientation, training, and continuation in this critical role. To conduct the major portion of an

inquiry without even considering the respondent's point of view and to systematically exclude objective exculpatory evidence is fundamentally unfair. To have re-keyed a faculty member's office without prior notification (to even the dean) is a reprehensible breach of protocol.

Power is almost always a central issue in the determination of a "hostile environment". Perceived power and actual power are not the same. It is easy to over-estimate the "power" of department chairs at Berea College. In a fit of pique, following department chairs expression of a lack of confidence in his leadership, the past president, exercising his executive privilege, abruptly changed all their official titles to "program coordinator". Over the next few years, there was a change of administration and an extensive effort to remove the few prerogatives and many responsibilities of departmental leaders from college policies and procedures. Academic divisions led by designated division chairs were created as an intermediate administrative level between the academic dean and academic departments. An extensive faculty review of these changes several years ago revealed that these costly administrative changes achieved none of the promised benefits. Recently, the "department chair" title was resurrected, however, none of the revised policies designed to remove the power from this position were changed. Realistically speaking, even division chairs, despite their impressive list of responsibilities, have very limited real "power" or authority. The dean and president are the real "deciders" of academic matters at Berea College, and they have demonstrated a penchant for intervening anytime decisions made at subordinate levels are inconsistent with their priorities or desires. The power dynamics in this case appear to have been far less than those involving other "supervisors" in most employment relationships or other "hostile environments".

Sexual harassment by the creation of a hostile environment differs considerably from either "quid pro quo" harassment or sexual assault. Creation of a hostile environment need not be an intentional act or even an act that would be interpreted as offensive or inappropriate by most colleagues or coworkers. In fact, it appears that the "preponderance of evidence standard" (i.e., the chances are greater that the words or behavior in question were a violation than that they were not) was deemed sufficient to establish a violation. This standard was suggested several years ago by the Department of Education to increase the chances of success of prosecuting those charged with sexual assault on campuses. It is unclear that this standard was ever intended to cover discrimination by hostile work environment. Unfortunately, changes in the standards that increase the chances of securing correct and appropriate convictions, necessarily increase the likelihood of wrongful convictions (i.e., false alarms) as well.

If a reasonable person were to take a step back and squint at the many grievances enumerated in this case, she would be likely to conclude it was much more about politics than about sex. While "hostile work environments" clearly & intentionally designed to intimidate and oppress women exist, this was not one of them. There was never a hint of "quid pro quo" or the slightest indication that sexual desire played any

role in these circumstances. Scoffing at white privilege, discussing Chrissie Hynde's revelations about the role her own bad choices played in her gang rape, or disagreeing with the academic administration's decision to provide diversity training in response to an insensitive tweet by one individual are not the same as the kind of direct verbal and physical assaults contained in many of the current news stories about the alarmingly abusive behavior by various middle-aged male media and political icons. One of the unfortunate consequences of the time, energy and resources invested in the prosecution of this case by our Title IX Office was the apparently continued neglect experienced by many students who have had to wait weeks for administrative processing related to alleged serious sexual assaults.

"Hostile environments" must substantially interfere with the victims' ability to participate meaningfully in the educational process. All of the grievants in this case testified that they had been upset by their interactions with my friend, their former department chair. They indicated that their fear of the former department chair had kept them behind closed office doors and away from campus. The claim was made that this had reduced their effectiveness as faculty members, although no IEQ data or other corroboration was provided to support these claims. Two of the grievants alleged that the environment had become so hostile that they were forced to use the copier on the first floor of the Frost Building. A subsequent examination of copier use records for the last year did support the claim that these two faculty members had used the alternative copier (as had other members of the department), but the extent of their use was quite limited. For one faculty member, it was about 6% of her total copies and, for the other, it was less than 2%, nearly all of which had occurred in the week the grievance had been filed. This objective evidence was not considered in either the investigation or CCHB and subsequently ignored by senior academic leaders in considering the severity of the alleged violations.

An Absence of Leadership

For much of this process, our most senior academic and administrative leadership appeared to have "lawyered-up" and "hunkered down", leaving the rest of us to interpret and contend with a covert and contentious administrative process. Apparently, even listening to my frustrations and observations might have inhibited our leaders' capacity to render appropriate (i.e., legally-defensible) judgements about this case when their time to get involved eventually arrived. What part of our college's claim to provide a liberal arts education would suggest that decisions made with less information are superior to those made with more information or after considering diverse opinions and alternative viewpoints? Is a liberal arts institution one in which we expect faculty members to surreptitiously build cases to present to zealous, but misguided, bureaucrats to be used to persecute those who have the audacity to "scoff" at some pet theory or politically-correct perspective? I asked the president to speak out about the fundamental importance of academic freedom when it was clear from testimony that many faculty and staff considered this concept itself to be a mere

“loophole” to the college’s Title IX standards. One faculty member expressed the opinion that academic freedom was something reserved only for those considered to be her friends and the Title IX Coordinator glibly quipped to the FAC that academic freedom was simply “not my job”. The prevailing opinion among Title IX investigators was that academic freedom did not extend beyond the physical classroom or laboratory walls and that threats of “retaliation” charges appropriately restricted any and all conversations among colleagues about Title IX grievances, investigations, & proceedings. My request for clarification to the president was rebuffed with his observation that these times are “fraught” and acknowledgement that I found this situation frustrating.

I think an objective analysis of this debacle would reveal many instances when administrative decisions exacerbated the hostility within our department. Several years ago, one of the grievants received permission directly from the dean to seek external employment on every Friday. Although, my friend, as department chair, was expected to accommodate her desire not to be scheduled to teach on Fridays, he was not advised by the junior faculty member, nor by the dean, of the nature of this excusal. Is it possible that some form of the nefarious narrative developing among the grievants was used to justify the exclusion of the department chair (and division chair) from this conversation about extra-curricular employment? If so, why didn’t the dean intervene and require mediation at that point? Similarly, the level of hostility could have been greatly ameliorated at any time in the investigation by having a brief meeting of all department members to make clear what the *rules of engagement* would be during the investigation (this was a standard procedure in the Air Force and most other government agencies). Instead, a mediation meeting that had already been scheduled by the department chair was cancelled immediately, once the formal grievance was announced. The dean decided it was “too little, too late”. Requests for support to conduct such a meeting during the months in which this process has lumbered & lurched forward were similarly dismissed with the explanation that it was not yet time for the dean to get involved. Interestingly, the president himself, expressed surprise when informed of the dean’s lack of involvement in working to resolve the situation throughout the Title IX process. Apparently, the assumption was made that once the formal process was underway, mediation would be inappropriate. Such a meeting held at the beginning of proceedings might have prevented the development of an increasingly hostile environment that emerged from the continued isolation and lack of interaction among department members. Social psychologists refer to this as *autistic hostility*. Of course, such a meeting might have shown that a 10 minute conversation was all that was needed to allow department members to communicate more effectively and continue to work together. This would have undermined the grievants’ claims about the severity of the trauma they continued to experience in their self-imposed isolation and their subjective feelings about the level of hostility in their environment.

Academic Freedom

In my opinion, our identity as an institution of higher learning depends on our authentic commitment to freedom of speech, inquiry, and expression. Fascism is antithetical to this identity as well as our founding values & great commitments. Fundamentally, fascism's defining characteristic is the denial of rights some claim for themselves and those like them, to others. It is easy to spot the fascism apparent in the pronouncements of those on the far right such as Judge Moore's insistence that Muslims be excluded from serving in Congress or President Trump's epithetical advocacy of firing professional football players for exercising their freedom of speech by kneeling during the national anthem. Fascist tendencies within movements with aspirations more similar to our own are less apparent. Nonetheless, censorship of language we find to be offensive and the punishment of those who express politically-incorrect viewpoints critical of values we cherish are not compatible with our aspiration to become a marketplace of ideas. Fascism in the name of feminism, is still fascism, and it is time to recognize this. As Supreme Court Justice, Louis Brandeis observed many years ago, "Sunlight is the best of disinfectants." It is time to bring these Title IX machinations and intrigues out of the administrative shadows and share them with our colleagues and students. It is time for leadership; it is time to reclaim Berea College's radical commitments to do what is fair and just rather than what we perceive to be legally safe and politically correct.

Concluding Criticisms and Remarks

My friend is guilty of having a disability (severe ADHD, mixed type). He is impulsive and, at times, provocative. His comments are erratic and his jokes are occasionally politically incorrect or off-color. (In fact, a recent study found that adults with symptoms similar to his are many times more likely to be disciplined in the workplace than others.) However, my friend's leadership of our program as well as his contributions to the classroom, if judged by our collective performance (including, ironically, the grievants' own performance as faculty members) over the last few years (or the comments of hundreds of students about him over the last 17 years), has been outstanding. Our president's administrative decisions appear to have been made to protect the college from the potential of subsequent legal challenges. His decision letter contains many half-truths, distortions, exaggerations, apologies, inconsistencies, and rationalizations. It creates the impression that serious & pervasive violations of Title IX occurred in our department and are being taken seriously by the institution, while at the same time delegating final administrative decisions & actions to the dean. It ignores the contributions of others (i.e., grievants & administrators) to the current level of hostility within our department. It fails to mention all the charges of discrimination, retaliation, and hostility that were not supported by the investigation. It also ignores a plethora of incorrect assertions and misrepresentations made during the investigation and hearing process. Contrary to any credible theory of organizational behavior, his letter recommends continuation of the isolation that has itself exacerbated the hostility in our department for many months. It makes the ludicrous suggestion that my friend might

yet serve on the tenure and promotion committees of the grievants (despite the fact that any critical remarks he'd make would almost certainly result in charges of retaliation).

Nonetheless, I have hope for an eventual resolution, but not much pride in the process we have been forced to endure thus far. The president has expressed a willingness to re-open conversations about college policies concerning the interface between Title IX and academic freedom despite his reluctance to admit publically any flaws in the current process. My plea to you, whether you be a faculty member, student, member of staff, retiree, alumnus, or board member is to get involved in these conversations. Educate yourself, read, inquire, and show up. We need to hold ourselves and one another accountable. Freedom and diversity are both worthy goals, but integrating them will be neither simple nor quick. Berea College has a tradition of doing what is right even when it is not politically popular or administratively convenient. We need to reclaim that tradition; we need to find a better way to live and work together. Without justice, there can be no peace.

Respectfully,

A handwritten signature in black ink, appearing to read "David B. Porter". The signature is fluid and cursive, with a large initial "D" and "P".

David B. Porter, Professor, Berea College
Psychology & General Studies