FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Register for the 2019 Fraternal Law Conference

Once again, we want to thank everyone who attended the 2018 Fraternal Law Conference. At 220 people, it was our biggest conference yet . We also want to thank everyone who provided feedback following the conference. We are grateful for your input and are always working to improve the conference each year.

We are thrilled to announce that the 2019 Fraternal Law Conference will once again be at Great American Ballpark, the home of the Cincinnati Reds baseball team! The Ballpark has some fantastic meeting and event space in a setting like no other! Our guests will be staying directly across the street from the Ballpark at the brand new AC Hotel by Marriott overlooking the Ohio River in downtown Cincinnati.

The Conference will be all day on Thursday November 7, 2019 and will conclude at noon on Friday November 8, 2019. Details will follow.

Discounted registration is still open through May 31, so register today! You can register for the conference here.

We can't wait to see you at the 2019 Fraternal Law Conference at Great American Ballpark.

WHAT'S INSIDE THIS ISSUE:

FRATERNAL LAW™
A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Court Finds for Alpha Chi Rho in Zoning Challenge

By Tim Lynch (Fraternal Law) and Jeffrey Rosario Turco, ESQ. (Office of Jeffrey Rosario Turco)

Fraternal Law previously reported on a Pennsylvania state case involving the Penn State fraternity chapter of Alpha Chi Rho (AXP) and the State College Borough Zoning Appeals Board.[1] In a major case update, the Centre County Court of Common Pleas overruled the Borough Zoning Appeals Board's finding that AXP violated the Borough zoning ordinance for operating a fraternity house after losing its university recognition status.[2] The Court's decision enforces the long-held rule that, under the due process clause, a property owner has the right to continue a legal nonconforming use of its property following zoning ordinance amendments. Under this rule, municipalities are prevented from restricting an existing legal nonconforming use of a property, despite a change to its zoning ordinance.

AXP's house was built and used by its members, before the Borough zoning ordinance was amended to include a definition of "fraternity house," which required fraternities to obtain university recognition. When AXP lost its recognition in 2017, the Borough attempted to prohibit the AXP members from using their fraternity house, claiming the unrecognized AXP's use violated the "fraternity house" definition under the zoning ordinance. On appeal to the Borough Zoning Appeals Board, the Board affirmed the Borough's finding of violation.

The AXP property association challenged the Board's decision, claiming that AXP's use of the property as a fraternity house is a pre-existing nonconforming use and thus did not violate the zoning ordinance. The property association also challenged the substantive validity of the Borough zoning ordinance. Persuasively, AXP argued that the definition's University recognition requirement gave Penn State authority to determine whether a fraternity house complied with the zoning ordinance, based solely on Penn State's arbitrary recognition method.

In an astonishing victory, the Common Pleas Court agreed that the property's use of the fraternity house predated the zoning ordinance and was a legal nonconforming use. Judge Oliver in her opinion wrote: "a municipality lacks the power and authority to restrict a property use when the property was not so restricted when purchased and the use is otherwise lawful. (citation omitted).[3]

Unfortunately, the Court did not answer the validity challenge to the zoning ordinance. Fraternal Law has been following similar cases where municipalities have arbitrarily delegating the determination of lawfulness of use to a university. Most notable is the Township of Hanover, who has delegated zoning power to Dartmouth College who, like Penn State, utilizes its derecognition method to revoke a house corporation's zoning permit.[4] We at Fraternal Law believe these delegation arrangements are unlawful and will continue to provide our readers with updates as these challenges are presented.

Reflecting on this major victory, here are some thoughts from the AXP chapter attorney, Jeff Turco:

In June of 2017, as the Phi Lambda Chapter of Alpha Chi Rho at Pennsylvania State University (PSU) prepared to celebrate its 100th anniversary, the University was still in the midst of the devastating news of Tim Piazza's death. During this same time, PSU withdrew recognition of the Alpha Chi Rho Chapter for a period of one year beginning August 2017 and lasting through August 2018. PSU promptly sent notification of the suspension to the Borough of State College, which then refused to issue an occupancy permit for our AXP men to live in their fraternity house for the 2017-2018 school year. Of course, our men had already signed leases with us for the school year. We promptly appealed the Borough's decision and continued with business as usual in operating the house as our fraternity house.

A brief history is relevant to this discussion. AXP was founded at PSU in 1917 and our 425 Locust Lane house was built by, and for us in 1922. The Borough of State College first adopted a zoning ordinance in 1959. The 1959 zoning ordinance made the AXP house a non-conforming use but importantly did not contain a definition of a "fraternity." In, or around, 1981, the Borough amended its zoning ordinance to add a definition of "fraternity" which expressly required a fraternity to be "affiliated" with PSU. After litigation which demonstrated a lack of clarity to the "affiliated" requirement, in 2010, the Borough again amended its zoning ordinance to expressly define a fraternity as a group "recognized" by PSU. It is based on this definition, and the mere notice by PSU of the withdrawal of recognition, without any substantive detail, that the Borough attempted to prohibit the use of our house as the AXP house. The Borough's position was that we could either: 1) rent to another PSU recognized fraternity or 2) apply for a non-renewable two-year boarding house permit. It should be noted that AXP filed an extensive appeal of the Chapter's suspension detailing numerous violations of the written procedures then applicable to fraternity discipline with the PSU VP of Student Affairs. But AXP did not even receive the courtesy of an acknowledgement of receipt, much less a hearing or response.

Our zoning appeal was heard before the State College Borough Zoning Appeals Board. The basis of our appeal was: 1) our use of the AXP house as a fraternity house was protected by our non-conforming status and 2) the ordinance was both unlawful and unconstitutional due to it effectively delegating the Borough's zoning authority to PSU. At the Zoning Appeals Board hearing, the Borough zoning officer acknowledged that she knew nothing about the underlying allegations against AXP by PSU nor did she have a copy of or know what, if any, due process PSU afforded AXP or any other fraternity similarly situated. AXP offered live testimony of a 1956 graduate brother who confirmed the fraternity house use prior to the 1959 adoption of the zoning ordinance. This undisputed testimony led the Zoning Appeals Board to conclude that the AXP house was in fact a protected non-conforming use. Despite this conclusion, the Zoning Appeals Board upheld the application of the 2010 definition to the AXP house because:

the Board finds persuasive the need to preserve the qualities of the single-family residential neighborhoods. There can be no question that it is a proper exercise of the Borough's police powers to preserve an environment where it is safe and appropriate for people to be able to raise a family And it also goes without saying that a group of young people living in a communal setting, without controls, is prone to behavior that is less than appropriate for a family setting. Moreover, the Borough must have the ability to amend the definition of a particular use to meet the changes in mores and behavior that inevitable (sic) occur in any society over time.

As a result of the Board's decision to apply the 2010 definition of fraternity to AXP, the Board denied AXP's appeal. Appeal to the Centre County Court was timely taken and in late August 2018 oral argument was held. The primary arguments were the same, with an additional procedural argument related to the admission of certain PSU documents. Approximately three times during the oral argument, the presiding judge expressed concern over the Zoning Board's understanding of and interpretation of the law of non-conforming status. For this reason, it did not come as a complete surprise when the Centre County Court issued its decision overturning the Zoning Board's denial of AXP's appeal. In so doing the Court's decision reads in relevant part:

In argument before the Board and before this Court, the Borough cited to Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), arguing it has a legitimate interest in preserving the residential qualities of single family residential neighborhoods, and that it can best serve that interest by ensuring that controls are in place to curb unwanted behaviors that are many times associated with fraternity living. (citation omitted). The Court agrees that the Borough asserts a legitimate, indeed important, interest, and that it is an appropriate exercise of the Borough's police powers to adopt ordinances that preserve desired qualities such as peace and tranquility in residential neighborhoods. The issue, however, is whether the Borough may extinguish an existing, lawful nonconforming use through the adoption of such ordinances. Based on the authorities cited and discussed above, the Court concludes it may not, and that the Board's December 26, 2018 decision must be reversed.

The Court did not rule on the substantive validity challenge to the Borough zoning ordinance in light of its decision. The Zoning Appeals Board filed a Notice of Appeal in early December 2018 with the Pennsylvania Commonwealth Court. Anyone who would like a copy of the pleadings and decisions to date, can email me at: jrturco@turcolawoffice.com. Special thanks to our great legal team led by Matthew J. Crème, Jr., of Nikolaus & Hohenadel, LLP, 212 North Queen Street, Lancaster, PA 17603.

[1] Fraternal Law, Number 154, March 2018 Edition, "Losing University Recognition Could Mean Losing Your House"; Fraternal Law, Number 157, November 2018 Edition, "Penn State Fraternity Houses Should 'at the very least' Continue to be Used by Students."
[2] 425 Property Association of Alpha Chi Rho, et al., v. State College Borough Zoning Appeals Board, et al., Court of Common Pleas, Centre County, No. 2018-0285 (C.P. Nov. 19, 2018).
[3] Id. at 5.
[4] See Fraternal Law, Number 150, September 2017 Edition, "Dartmouth College and the Town of Hanover, NH A Dystopian Partnership."

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Florida Supreme Court Rejects challenge to Hazing Statute

By Tim Burke (Fraternal Law)

Robert Champion, the drum major of the Florida A & M "Marching 100" band, died in November of 2011 following his participation in the hazing ritual known as "Crossing Bus C". Those who "crossed" from the front to the back of the bus were beaten as they did so. 7 years later questions around the Florida hazing statute under which prosecutions related to the death occurred have finally been resolved.

Dante Martin, the apparent ringleader in overseeing Champion's "crossing", had been convicted of manslaughter, felony hazing resulting in death, and two counts of misdemeanor hazing. He was sentenced to 6 ½ years in jail. He had challenged his convictions arguing that the Florida hazing statue was unconstitutionally overbroad and void-for-vagueness. On December 13, 2018 the Florida Supreme Court rejected these arguments and upheld his conviction.[1]

The Florida definition law defines hazing as:

Any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to, initiation or admission to or affiliation with any organization operation under the sanctions of a post secondary institution. 'Hazing' includes, but is not limited to, pressuring or coercing the student into violating State or Federal Law, any brutality of a physical nature such as whipping, beating, branding, exposure to the element, forced consumption of any food, liquor, drug, or other substance or other forced physical activity that would adversely affect the physical health or safety of the student, and also includes any activity that would subject the student to extreme mental distress such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student. Hazing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal or legitimate objective.

Separate sub sections of the Florida hazing law make it a criminal third degree felony to recklessly or intentionally commit any act of hazing which results in seriously bodily injury or death or a first degree misdemeanor if that conduct creates a substantial risk of bodily injury or death.

Martin's attorney argued that the statute was unconstitutionally overbroad because it criminalized constitutionally protected speech and conduct. The court dismissed that argument stating "the focus of the criminal hazing statute thus is undoubtedly on physical harm and the risk of physical harm. Any impact on speech or expressive conduct is insubstantial and purely incidental to the purpose of preventing physical harm."

Martin's argument that the statute was void-for-vagueness was similarly dismissed. The court declined to focus on terms which might be vague such as "extreme mental stress" or "extreme embarrassment" or the "mental health and dignity of the hazing victim". Those terms were not relevant to Martin's conviction as the court noted that:

No actual ambiguity in terms of the statue has been identified by Martin that has any bearing on the offenses for which Martin was convicted. The conduct in which Martin was involved falls squarely and unambiguously within the statutes core proscription of 'brutality of a physical nature such as whipping' or 'beating' that 'intentionally or recklessly' 'results in serious bodily injury or death' or 'creates a substantial risk' of such harms.

Hazing definitions frequently may have terms in them which may not be entirely clear. What conduct does constitute "extreme embarrassment" as opposed to mere teasing or poking fun? There is little in the way of court guidance to help answer those questions. But when a victim is beaten to death, as was the case of Robert Champion, or a new member, typically underage, dies as a result of alcohol poisoning from excess consumption of alcohol that was part of a test for or a "tradition" leading to membership, it's relatively easy for courts to find that the conduct is appropriately condemned by law.

[1] Martin v. State 43 FLA.L.W. 621 (FLA.DEC.13, 2018).

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Investigation into Tragic Death of Ohio University Student Focused on Hazing

By Katherine Schoepflin (Fraternal Law)

Hazing is in the headlines once again, and this time all eyes are on Ohio University. OU has issued a cease-and-desist letter to the Epsilon Chapter of the Sigma Pi Fraternity after the death of 18 year-old pledge Collin Wiant.

Wiant was pronounced dead on Monday, November 12, 2018 after he was found unconscious at an off campus apartment believed to be an unofficial, and unsanctioned, annex of the Sigma Pi Chapter House. Accordingly to University Spokesperson Carly Leatherwood, such "annex houses" are not recognized by the University.

Following Wiant's death, the University Office of Community Standards and Student Responsibility issued a cease-and-desist letter ordering the Chapter to stop all operations, official and unofficial, immediately out of what they called "an abundance of caution". The letter states that the Office had received information that the Chapter had "engaged in conduct that put the health and safety of its members at risk and did not comply with the student code of conduct". It also instructed the Chapter's President, Elijah Wahib, to disclose a full list of members, potential new members or pledges, and any pledges no longer in the process of joining the Chapter. The letter said failure to comply would result in "both individual and organizational charges". [1]

An investigation into these alleged violations and the death of Collin Wiant are still ongoing. Carly Leatherwood says pending the outcome of these investigations, the University has no current plan to address these off campus "annex-houses".

Fraternal Law will continue to monitor these developments

[1] Stankiewicz, Kevin, and Sheridan Hendrix. "Ohio University Shuts down Fraternity as Police Probe Pledge's off-Campus Death." The Columbus Dispatch, The Columbus Dispatch, 15 Nov. 2018, www.dispatch.com/news/20181114/ohio-university-shuts-down-fraternity-as-police-probe-pledges-off-campus-death

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

K-12 Case with Potential Future Implications for Greek Groups

By Ilana Linder (Fraternal Law)

Although it is uncommon for Fraternal Law, or higher education law more generally, to intersect with K-12 education law, there are some interesting takeaways that can be gleaned from public school cases. One such example is a recent case out of Vermont, where the parents of a high school football player who committed suicide after being physically assaulted by teammates sought to hold their son's school district liable for his death. [1]

Over a year before the student, Jordan Preavy, transferred to a different high school in the district, numerous reports surfaced of verbal harassment in the form of homophobic comments among other football players. The school district immediately and appropriately responded to these reports, and the verbal assaults eventually ceased before Jordan switched schools.

Upon transferring to his new school and joining that school's football team, Jordan was subjected to at least one instance of physical assault resembling hazing behaviors. Specifically, one player forcibly held Jordan down while another assaulted him with a broomstick by jabbing it at his buttocks through his clothing. Approximately one year after this incident, Jordan took his own life. Jordan never reported the incident to his family or the school. However, several months after Jordan's death, the school learned not only of this particular incident, but also became aware that other occurrences of physical and/or sexual assault prevalent among the sports teams.

Jordan's family argued that the school district breached the duty it owed to Jordan by failing to protect him from a foreseeable harm. They pointed to the prior verbal assault incidents as sufficient notice to make the physical assault(s) foreseeable. However, both the trial and state Supreme Courts disagreed. To the contrary, knowledge that football players were making homophobic comments to each other, with no accompanying physical contact, did not put the school on notice of any predictable assault. Furthermore, the occurrence of other physical assaults in the interim was deemed irrelevant to the school's duty; because the school was not aware of the occurrences, it did not have any opportunity to intervene until after it was too late. Moreover, the Court rejected plaintiff's claim that the increase in school bullying/harassment nationally or on other school campuses, without more, constituted evidence of such foreseeability. Accordingly, since the school did not breach its duty of ordinary care owed to Jordan, it could not be held liable for Jordan's death.

National fraternities and sororities that find themselves in similar positions as this school district, and may find the school's arguments particularly useful to defend against liability claims. After all, whether a national entity knew or should have known that tortious or criminal behavior was possible is often the decisive factor for cases in which plaintiffs attempt to hold the national organization liable for the actions of individual members or local chapters. Accordingly, a national fraternity may absolve itself of any liability for injuries at the local level if it can establish, as Jordan's school district did, that the national organization was neither aware of any prior/ongoing occurrences, nor did it have a meaningful opportunity to intervene to prevent future harm until it was too late.

Finally, an attempt to hold one entity responsible on the basis of a similar occurrence at a different institution or school would likely be rejected by courts. For example, just because one university is put on notice that a particular fraternity chapter engaged in sexual misconduct, it does not follow that all other universities in every state that have a chapter of that same fraternity are similarly put on notice of foreseeable sexual assault by members of that fraternity.

[1] Stopford v. Milton Town Sch. Dist., 2018 VT 120 (2018).

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Largest Ever Settlement Reached in Hazing Case

By Timothy Burke (Fraternal Law)

David Bogenberger died on November 1, 2012 of alcohol poisoning following what was reported to have been an "event at an off-campus fraternity Pi Kappa Alpha, where fraternity members and members of various sororities hosted 'Mom and Dad's Night'". Pledges were required to answer questions and drink vodka. Tests following Bogenberger's death showed a blood alcohol level five times the legal limit for a driver to be considered under the influence of alcohol.

It took 6 years, but at the end of November 2018, it was announced that the lawsuit that followed Bogenberger's death had been settled for what is claimed to be the largest amount ever in a hazing case, fourteen million dollars. The lawsuit may also have had the largest number of individual defendants in a hazing death case. In addition to naming the Pi Kappa Alpha International Fraternity and its chapter at Northern Illinois University (NIU), 22 members of the chapter were named, specifically including many of its officers, and 22 individual sorority women who were alleged to have some role in the activities which lead to the death.

22 members of the fraternity had been found guilty of misdemeanors, ordered to pay fines of between $500-$1000, perform 100 hours of community service, and spend 24 months on either supervision or conditional discharge. [1]

In January of 2018, the Supreme Court of Illinois released a decision that may very well have set up the case for settlement. The Court affirmed the earlier dismissal of the International Fraternity but it also affirmed a lower appellate court's reversal of the trial court's dismissal of the local chapter and its officers, pledge board members, and active members and reversed the dismissal of the non-member sorority women. That decision effectively put all of the individual defendants back in play in the case and undoubtedly, in the process, those individuals 'parents' homeowners policies as well as the insurance policy covering the chapter.

A November 30 Chicago Tribune Article quoted Attorney Michael Borders who had represented the former president of the Pi Kappa Alpha Chapter at NIU. While he refused to discuss how much his client had paid toward the settlement- undoubtedly there is a confidentiality agreement with regards to that in the settlement- he was quoted as saying:

"Given the Supreme Court's decision, the defendants realized this was going to be a challenging case to defend, and that with 40-plus defendants and 20-plus law firms, it was going to be a long and expensive and uncertain litigation . . .In any case, and this is no exception, the defendants pay more than they think they should and the plaintiffs get less that what they think they're entitled to." [2]

In addition to the amount of the settlement, the most unusual aspect of this case was the inclusion of non-member sorority women, and because of that it is worth noting how the Supreme Court had described their conduct:

"On the one hand the non-member women were not alleged to have had any part in planning the event, and they could not vote as to which pledges would be admitted into the NIU chapter. Yet, they willingly agreed to participate in the hazing event and actively did so filling the pledges cups with vodka, asking the pledges questions, directing the pledges to drink, calling the pledges derogatory names, and decorating "vomit buckets". We see little difference between the non-member women's participation in the hazing event and the members participation." [3]

That description by the state's highest court no doubt sent a message to the women, their attorneys, and their insurance carriers.

No doubt the unusually large number of defendants, involving many more pockets and many more insurance policies, contributed to the very high settlement. But whatever the reason, the high settlement will attract much attention and contribute to arguments for higher financial damages in other hazing cases.

Similarly, as discussions continue regarding the development of a model anti-hazing statute, the relatively light criminal penalties will support arguments for enhancing the criminal penalties for hazing, especially when the hazing results in death or serious injury.

---

[1] May 8 2015 Chicago Tribune Article by Clifford Ward "22 Former NIU Frat Members Guilty of Misdemeanors in Death of Pledge"

[2] November 30 2018 Chicago Tribune Article by Matthew Walberg "$14 Million Settlement for Family of NIU Student David Bogenberger, Who Died in Fraternity Hazing Incident

[3] Bogenberger v. Pi Kapppa Alpha Corporation et. al., 2018 IL 120951, 104 N. E. 3d 110

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by
Fraternal Partners, a Division of Manley Burke,
a Legal Professional Association

Lawsuit Filed Following Criminal Plea Bargain

By Katherine Schoepflin (Fraternal Law)

The former President of the Phi Delta Theta Chapter at Baylor University and the National Fraternity are being sued for $1 million dollars following a plea deal stemming from a 2016 sexual assault case. The deal guaranteed no jail time for the accused.

Former Chapter President Jacob Anderson was accused by a then sophomore known only as Donna Doe of sexually assaulting her at a fraternity party in 2016 and leaving her “to die face down in her own vomit”. Anderson entered into a plea on December 11, 2018. Under the terms of the plea, Anderson will serve 3 years of probation and pay a $400 fine, but will not have to register as a sex offender and will not face jail time. Since Anderson plead no contest to a lesser charge of unlawful restraint instead of sexual assault and did not go to trial, there is a chance the charge will never appear on his record.

Donna Doe says this verdict isn’t enough to get justice for what happened to her, or to protect other women in the future. Donna has filed a lawsuit against Anderson and Phi Delta Theta and is expected to seek damages of $1 million. Doe has named 26 defendants, including all the officers of the Chapter, in the suit which alleges, among other things, that the Fraternity did not have policies or procedures in place to monitor the alcohol consumption of guests, knowingly served alcohol to minors, and did not have a policy in place for preventing or reporting sexual assaults.

Doe is also suing the landlord who owns the house, Jennette Hunicutt, who she claims knew the house was being used as a fraternity house- something Baylor does not allow.

Fraternal Law will continue to monitor and report on this case as it further develops.

FRATERNAL LAW™
A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Male Assailants Claim Victimization Against Their Universities

By Ilana Linder (Fraternal Law)

Over the last few years, there has been an increase in the number of lawsuits filed by male students against their universities in which a claim of gender bias in the school's handling of sexual assault allegations has been asserted. These suits are typically filed after the male students were found responsible for sexually assaulting females on campus. More specifically, the accused men posit that their universities not only failed to properly investigate their own allegations of sexual assault committed by females (e.g. the males are also victims of sexual assault), but also that the schools were under pressure to aggressively prosecute sexual assaults due to ongoing federal investigations of Title IX non-compliance.
For example, in 2016, after a former resident assistant at Indiana University Purdue University Indianapolis (IUPUI) was accused of sexual misconduct by another (female) student, the University decided to suspend the student and evict him from his student housing.[1] While suspended, the male student informed the University that a (female) student had assaulted him. No investigation into the male student's allegations was conducted by the University. A hearing panel ultimately found the student responsible for sexual misconduct, and he was therefore expelled and banned from the University.

When IUPUI denied the student's appeal of the expulsion and ban, the student brought suit against the University and several administrators, asserting several claims. Although the court granted IUPUI's motion to dismiss all of the students' procedural due process claims, it did find that the student's Title IX claim against the University was sufficient to survive dismissal. Here, the student maintained that the University engaged in selective, gender-based enforcement of Title IX against him when it failed to properly investigate the misconduct claims he raised about another student. The student pointed to the fact that Indiana University was under ongoing federal investigation for how it handled sexual violence cases at the time that he was being investigated.

A nearly identical claim was made by a different male student in a recent complaint filed against Michigan State University (MSU). In this case, the student was also found responsible for sexually assaulting a female student and was subsequently suspended by MSU. Unlike the IUPUI student, however, this male student did not formally report to MSU administrators that he had been the victim of unwanted sexual assault. Yet this second Complaint includes references to the fact that his accuser never obtained his consent before she performed sexual acts on him. In other words, the Complaint notes that MSU was not concerned enough with his potential victimization to conduct an investigation, yet the University actively investigated him as an alleged assailant.

Additionally, and more importantly, the MSU student's complaint repeatedly asserts the notion that MSU was under "extraordinarily intense pressure to convict men accused by female students of sexual assault" due to threats from the U.S. Department of Education, Office of Civil Rights (OCR) to withhold federal funding on account of MSU's failure to "vigorously prosecute, convict, and punish alleged sexual assailants."[2] MSU's position as the subject of significant media attention concerning the sexual assaults committed by Dr. Larry Nassar, a former MSU employee, also contributed to MSU's heightened desire to aggressively prosecute female students' claims, the Complaint states.

Several schools have been the subject of recent investigation for alleged gender discrimination against males when they have offered scholarships for women, women's studies programs, or women's empowerment programs/organizations.[3] Therefore, in light of these various legal challenges, coupled with other colleges' efforts to eliminate single-sex organizations such as those at Harvard, universities must be more conscious of how their actions and responses to situations may be interpreted or understood by different members of the community.

[1] Marshall v. Indiana University, 170 F. Supp. 3d 1201 (S.D. Ind. 2016).
[2] Complaint at 2, Doe v. Mich. State Univ. et al, No. 18-cv-1413 (W.D. Mich. Dec. 20, 2018).
[3] See Maria Danilova, Education Department Investigates Claims Against Women's Programs, BDN Nation, Nov. 18, 2018, https://bangordailynews.com/2018/11/18/news/nation/education-department-investigates-claims-against-womens-programs/.

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Were Single Sex Fraternities Bullied Off Campus at UMW?

Authored by: Susan C. Stone & Kristina W. Supler
(Student & Athlete Defense/Title IX Practice Group
Kohrman Jackson & Krantz, LLP
scs@kjk.com; kws@kjk.com)

College campuses have long been known as incubators for political values. From 1960s sit-ins against the Vietnam War to high-profile rape culture debates on campus, the world of higher education is often home to activism. Like-minded students have a way of finding each other and creating ways to champion their shared beliefs. Whether it's through social interest groups, athletic teams, or Greek organizations, students should be free to explore and cultivate interests and hobbies, while also respecting those with different viewpoints.

Recently, the case Feminist Majority Foundation v. University of Mary Washington ("UMW") sparked national debate about the scope of First Amendment protections on college campuses when UMW was asked to quash speech to uphold its Title IX obligations. Egregious facts punctuate the UMW case -- beginning because one student organization wanted to prevent the lawful formation of single-sex social fraternities.

In 2014, the school's student senate voted to allow male-only fraternities on campus. Amid this decision, the student group Feminists United allied against Greek life coming to campus, argued that fraternities would bring about an increase in campus sexual assault. Heated deliberation among the student body unfolded on the now-defunct social media app Yik Yak. The debate spiraled and members of Feminists United found themselves subject to vulgar and sexist threats by anonymous students. Members of the school's rugby team went so far as to create a video in which they chanted in favor of sexual violence against Feminists United. Instead of pointing out the flaws and factual inaccuracies posed by Feminists United members, the rugby players advocated for sexual brutality, eventually losing their own right to remain on campus.

Feminists United repeatedly communicated with UMW's Title IX office to express their growing concerns about their safety following the number of threatening Yik Yak messages. A debate ensued concerning whether UMW did enough to protect the members of Feminists United. The Title IX coordinator was maligned for indicating that the University was powerless to address the offending conduct and the school's president, Richard Hurley, was similarly criticized for being ineffective at managing the situation. However, at some point, UMW disbanded the rugby team and required all members to submit to sexual assault training. Notwithstanding, the crisis kept escalating on campus.

The UMW case is noteworthy not just for its Title IX analysis, but for its discussion about what schools must do to address offensive speech. The case has significant implications for the First Amendment on college campuses and, not surprisingly, there is intense debate about how far colleges should go to limit online speech. Many argue that the Yik Yak messages in question were protected under the First Amendment, and thus, the school was not obligated to take action against the so-called cyber-bullying. Others point out that universities can and should respond to reported threatening speech because "true threats" are not constitutionally protected speech.

Ironically, while the issue of single-sex fraternities sparked the debate, Greek members were not implicated in the untoward behavior by members of the rugby team or in the Yik Yak postings. However, single-sex Greek social fraternities became the sacrificial lamb during the ordeal between Feminists United, rugby team, and UMW. In 2014, when the controversy was at its peak, President Hurley placed a hold on having the traditional Greek system on campus. Single-sex Greek life does not exist at UMW to this very day. One must question whether single-sex fraternities were bullied off campus to appease a relentlessly vociferous group on campus.

A lesson lost in the UMW opinion is freedom of association, which is the right to join and form groups. Perhaps this calamity could have been avoided had UMW done more to encourage its students to respect the rights of fellow students to associate. Instead, Feminists United assumed that the introduction of Greek life meant UMW was ignoring the heightened risk for sexual assault on campus. The cognitive leap was overbroad and unfounded. While Feminists United members might not like fraternities, trying to block their ability to form on campus based on an assumption that single-sex fraternities were the cause of sexual violence was extreme and misguided. The right to voice an opinion was not met with respectful debate but with requests to stifle free speech and quash freedom of association. The ensuing events forced extreme intervention that weakened the ability of students to coexist despite competing views

JAN. 2019 | VOL. 158

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Two Lawsuits Filed Against Harvard

By Tim Burke (Fraternal Law)

On December 3, 2018, two separate lawsuits, one in federal court and one in state court, were filed against Harvard by several Fraternities and Sororities. The suits challenge Harvard's controversial decision to penalize students who chose to be members of single- sex organizations, whether they are men's or women's Greek social groups or unique Finals Clubs composed of Harvard students. Harvard's position is that the students who choose to belong to single sex organizations, effective with the class of 2021, will be prohibited from holding leadership positions in many University Supported Organizations including being captains of athletic teams or from receiving critical University support for certain fellowships such as Fulbright and Rhodes scholarships.

While initially these penalties were explained by the University as a way of addressing sexual assaults it alleged to have occurred at Finals Clubs events[1], over the 2 years of controversy before the final decision to impose these penalties, Harvard's justification changed. Instead, it became Harvard's position that single-sex organizations were inconsistent with the goals of the University "to improve the sense of inclusion among our diverse community members."[2]

Facing threats of discipline by the University, some Finals Clubs became co-ed, and some Greek organizations simply closed their chapters. While the initial justification for the University position was to address assaults against women, the effect of the policy was that the safe spaces many women found in single sex Greek organizations were eliminated. The lawsuits are a direct challenge to the University position on multiple fronts and allege a variety of illegalities by Harvard.

The state court case[3] alleges that the University has violated the Constitutional rights of its students and their single sex fraternal organizations. At first blush, that might seem like a strange claim because Harvard is a private school. In most cases, private schools are not required to comply with the U.S. Constitution in its dealings with its students. However, the 38 page 147 paragraph state court complaint bases the argument that Harvard's student are entitled to the rights protected in the Constitution of the United States because the Massachusetts Declaration of Rights, set forth in the Massachusetts Civil Rights Act[4], provides those protections by reference, stating:

Any person whose exercise or enjoyment of rights secured by the Constitution or Laws of the United States, or of rights secured by the Constitution or Laws of the Commonwealth, has been interfered with, or attempted to be interfered with, . . . may institute and prosecute in his own name on his own behalf a civil action for injunctive and other appropriate injunctive relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable amount of attorney's fees in an amount to be fixed by the court.

In using a state law to attempt to enforce constitutional rights against a private school this effort is similar to that in the lawsuit currently pending in a California Court of Appeals[5] against the University of Southern California's (USC) imposition of deferred recruitment.

The first two of the three causes of action in the state court case are based on the Massachusetts Civil Rights Act. Count one argues that Harvard has interfered with the Freedom of Association Rights protected by the Constitution, specifically including the right to enjoy intimate association with other people who identify as women; the right to associate with individuals in a private organization without interference in the inner workings of that organization, and the right to express a common interest and message of sisterhood by associating together with other people who identify as women. The Plaintiffs in the state court action, Alpha Phi International and its local Chapter and the Delta Gamma Management Corporation, are all organizations of women.

The second count of the state complaint alleges sex-based discrimination.

Count three of the complaint was specifically brought by Delta Gamma's Fraternity Management Corporation and claims that Harvard has tortuously interfered with the advantageous business relationships of the organization. Specifically, Delta Gamma Fraternity Management Corporation had entered into an expensive lease running through January 31, 2020 to provide space for its Harvard Chapter where women could gather. The arguments made in this cause of action are similar to those successfully made by Delta Kappa Epsilon against Wesleyan University in Middleton, CT. In that case Wesleyan was found by a jury to be in violation of the Connecticut Unfair Trade Practices Act and DKE obtained both injunctive relief and an award of damages in amount of $386,000 to which the trial judge later added the recovery of attorney's fees and costs of another $411,363.44.[6] The state court lawsuit against Harvard is being handled by the Boston law firm of Zalkind Duncan & Bernstein LLP.

The federal case [7] was filed against Harvard on behalf of Kappa Alpha Theta, Kappa Kappa Gamma, Sigma Chi, Sigma Alpha Epsilon, and the Sigma Alpha Epsilon Massachusetts Gamma Chapter as well as several John Doe's. The 73 page 222 paragraph complaint was filed by attorney's from Arnold & Porter Kaye Scholer LLP law firm. Four of the five causes of action in the federal complaint are based on Title IX of the Higher Education Act. 20 U.S.C. Section 1681.

The first count argues that Harvard's actions constitute per se disparate treatment because it prohibits individuals from joining organizations that do not include members of the opposite sex. It argues that "just as it would be per se sex discrimination for Harvard to mandate that students only marry people of the opposite sex, it is per se discrimination to instruct them only to join clubs that include members of the opposite sex."

Count two argues that Title IX is violated by Harvard's associational discrimination on the basis of sex. That is "Harvard's sanctions policy punishes students because they associate with individuals of a particular sex."

Count three alleges "Harvard's sanctions policy violates Title IX because it impermissibly discriminates against men and women on the basis of stereotypes about how men and women intrinsically behave and how men and women ought to behave."

Count four specifically claims a violation of the rights of male students, arguing that "Harvard's sanction policy violates Title IX because it was intended to disproportionately negatively effect certain male students in the Harvard University Community for no other reason than because they are men who chose to socialize with men."

The fifth and final count of the federal complaint relies on the court's supplemental jurisdiction to allege that Harvard has violated the United States Constitution's Equal Protection Clause as applicable to Harvard through the Massachusetts Civil Rights Act (the same law that much of the state court case is based on).

There can be little doubt that these two cases are of major importance and their outcomes may well impact far beyond how Harvard attempts to regulate Greek Organizations. The massive amount of national publicity these cases have already received is a strong indication of that.

[1] Fraternal Law, May 2016 "Harvard Ignores Title IX Exemption"
[2] Fraternal Law, March 2017 "Are You Now or Have You Ever Been A Member Of…?"
[3] Alpha Phi International Fraternity et. al. v. President and Fellows of Harvard College, Commonwealth of Massachusetts, Suffolk Superior Court, Civil Action No. 1884cv03729
[4] G.L.C 12, Section 111
[5] Fraternal Law, June 2018 "New Lawsuit Challenges Deferred Recruitment" and September 2018 "USC Deferred Recruitment Case Now In Court of Appeals"
[6] Wesleyan's appeal is pending.
[7] Kappa Alpha Theta Fraternity Inc. et al. v. Harvard University et al. Case 1:18-cv-12485, now pending in the United States District Court for the District of Massachusetts

FRATERNAL LAW™

A Fraternity Law Periodical Published by
Fraternal Partners, a Division of Manley Burke,
a Legal Professional Association

Who is Discriminating Against Whom?

By Ilana Linder (Fraternal Law)

Over a year ago, a small student group that was deregistered by its university filed a lawsuit against the school. Just last month, the U.S. Department of Justice intervened, filing a brief in support of the student group.

The group, Business Leaders in Christ, claims that the University of Iowa violated its First and Fourteenth Amendment rights when it withheld university recognition to the group on account of the group's belief statement all members must subscribe to. Specifically, the belief statement, which the University deems "unwelcoming" and therefore impermissible, contains language explicitly supporting heterosexual relationships. Importantly, however, the group does not limit its membership to individuals who identify as heterosexual. Indeed, homosexual individuals—so long as they also agree to subscribe to the group's statement—could theoretically be members of the group. As such, the group is not engaging in any status-based discrimination.

In fervently supporting the student group's position, the Department of Justice highlights the University's inconsistent regulation of different student groups, which, according to the DOJ, has resulted in a disparate treatment of similarly-situated student groups. Specifically, the DOJ criticizes the University for cherry-picking which groups' beliefs it wishes to allow and which it seeks to condemn. Such viewpoint discrimination not only runs contrary to the law, but also to the very notion of our schools serving as the primary exposure of young minds to the marketplace of ideas.

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Are Mandatory Study Tables Considered Hazing?

By Ilana Linder (Fraternal Law)

A federal Complaint was recently filed by Sigma Lambda Upsilon (SLU) against the University of Virginia (UVA) that begs the question of whether requiring pledges to study at least twenty-five (25) hours per week constitutes "hazing." UVA and the individual administrators named in SLU's suit answered this question affirmatively when it decided to suspend SLU from participating in fraternal activities on campus. The suspension followed what the Complaint deems to be a "sham investigation" by UVA after one student told a professor about the burdens of adjusting to college life and trying to pledge a sorority. Importantly, this student never indicated that she was being hazed, abused, assaulted, or otherwise mistreated by SLU.

The predominately-Latina sorority asserts multiple claims against UVA and the individual defendants, including deprivation of free speech and association rights under the First Amendment, denial of equal protection rights under the Fourteenth Amendment, conspiracy to deprive SLU of civil rights, disparate treatment discrimination, and negligence. SLU's Complaint points to multiple instances in which all-male student groups or organizations—such as the profitable sports teams—engaged in similar behaviors that required participants to commit a certain number of hours each week, yet those groups were not similarly sanctioned by UVA. The sorority also challenges UVA's hazing policy as not being clearly written so as to put groups on proper notice of what sort of conduct violates it. UVA's hazing policy currently prohibits action that is "designed to or produces mental or physical harassment, discomfort, or ridicule."

Fraternal Law will continue to follow this case and provide future updates.

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Lawsuit Filed After Tragic Death of Northwestern Student

By Ilana Linder (Fraternal Law)

The mother of Jordan Hankins, a Northwestern University basketball player and Alpha Kappa Alpha (AKA) pledge who committed suicide, has filed suit against AKA National, the local chapters, and several individuals, seeking to hold the defendants responsible for her daughter's death. According to the Complaint filed earlier this month, Jordan was subjected to severe hazing by AKA that triggered her PTSD and caused her severe anxiety and depression, despite the existence of AKA's anti-hazing policy. Moreover, the Complaint alleges that Jordan notified members of the sorority that the hazing activities were triggering her mental distress, she was having suicidal thoughts, and had a plan to commit suicide, but the hazing did not cease.

This case is particularly interesting because it involves a plaintiff's attempt to hold the sorority wholly responsible for Jordan's mental health issues that drove her to commit suicide. It is unclear from the Complaint whether the hazing alone triggered Jordan's issues or whether there were pre-existing conditions, or other contributing factors (such as stress from being a collegiate athlete) at play. Moreover, aside from the claim that Jordan informed AKA about how the hazing was affecting her mental health, it is unclear whether Jordan's suicide was truly foreseeable by any of the defendants.

Fraternal Law will continue to monitor this case as it proceeds.