



## **Kappa Kappa Gamma Sued Over Transgender Member**

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In late March of this year, seven Jane Does “on behalf of themselves and derivatively on behalf of Kappa Kappa Gamma Fraternity,”<sup>1</sup> filed suit in federal court in Wyoming against the Kappa Kappa Gamma Fraternity, the President of the Fraternity Council, the Kappa Kappa Gamma Building Co.—a Wyoming non-profit corporation—and Terry Smith (a pseudonym). The basis of the suit is that Smith is a transgender woman and the Plaintiffs refuse to accept that possibility, arguing that “a woman is an adult human female. An adult human male is not a woman, no matter how he chooses to describe himself.”

The 178-paragraph, 69-page Complaint, with numerous additional attachments, including copies of the Fraternity’s Bylaws, essentially argues that in admitting Smith to membership, Kappa Kappa Gamma has lost its status as a single-sex women’s organization. The suit has four causes of action. The first is a derivative claim, whereby the individual plaintiffs are actually bringing the suit on behalf of the Fraternity, claiming that “they are enforcing a corporate right just as shareholders may do in for-profit corporations.” The second cause of action alleges breach of contract, specifically referring to the individual plaintiffs’ housing contracts. The third cause of action is a tortious interference with a contract claim arguing that Kappa Kappa Gamma interfered with the plaintiffs’ contracts with the house corporation that owned the house where the plaintiffs

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<sup>1</sup> *Westenbroek v. Kappa Kappa Gamma Fraternity*, No. 23-cv-51-ABJ (D. Wy. Mar. 27, 2023).

were to live in. The fourth cause of action is labeled “direct cause of action” claiming the plaintiffs experienced a “loss of privacy, frustration of contractual expectations, and emotional distress” as a result of the Fraternity’s alleged conduct.

As to the Plaintiffs’ right to proceed anonymously as “Jane Does 1 through Jane Does 7,” the judge made short work of that, ruling within ten (10) days of the Complaint being filed that plaintiffs were required to file an amended complaint, substituting their real names for the Jane Does. In a 10-page order, Judge Alan B. Johnson of the U.S. District Court concluded that “Plaintiffs do not meet the high pseudonymity bar reserved for exceptional cases.” The Court quotes a U.S. First Circuit Court of Appeals decision to help explain his decision:

Litigation by pseudonym should occur only in “exceptional cases.” Lawsuits in federal court frequently invade customary notions of privacy and—in the bargain—threaten parties’ reputation. The allegations are often serious (at least to the parties) and motivated adversaries do not lack for procedural weapons. Facing the court of public opinion under these conditions is sometimes stressful—*but that is the nature of adversarial litigation.*<sup>2</sup>

The Plaintiffs have since filed their Amended Complaint, revealing both their own identities and that of the transgender woman whose membership is at the center of this lawsuit.

On Tuesday, June 22, 2023, the Defendants filed their Motions to Dismiss, moves that came as no surprise to many in this industry. The grounds for seeking dismissal include lack of (personal and subject matter) jurisdiction, as well as a failure to state a claim upon which relief can be granted. The Sorority Defendants’ Motion to Dismiss describes Plaintiffs’ Amended Complaint as “rife with false, inflammatory allegations that do not relate to the claims plaintiffs’ assert,”<sup>3</sup> and further states that, putting aside the plaintiffs’ statements of “opinion and irrelevant

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<sup>2</sup> *Order Denying Plaintiffs’ Motion to Proceed Anonymously, Westenbroek*, April 6, 2023 (ECF 3).

<sup>3</sup> *Motion to Dismiss of Kappa Kappa Gamma et al, Westenbroek*, June 20, 2023 (ECF 20).

allegations,” there is no viable claim set forth. Instead, as the individual member Defendant’s separate Motion to Dismiss asserts, Plaintiffs “bring college gossip before [the] Court and rehash stale boogeyman stories used to vilify the LGBTQ+ community for ages.”<sup>4</sup>

Additionally, the Motions to Dismiss points out that no Kappa Kappa Gamma bylaw defines who qualifies as a “woman,” and the Sorority has allowed transgender women to qualify for membership since 2015, long before these particular Plaintiffs ever sought membership.

Kappa Kappa Gamma is far from the only organization of women that now accept, as candidates for membership or admission, transgender women who may have been assigned male at birth but now identify as female. That includes prominent women’s universities who emphasize that in doing so they remain women’s universities. That is also the case of other National Panhellenic Conference (NPC) members who remain women’s fraternities or sororities.

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<sup>4</sup> *Motion to Dismiss of Artemis Langford, Westenbroek*, June 20, 2023 (ECF 23).

## Washington Passes the “Sam Martinez Stop Hazing Law”

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On May 1, 2023, the state of Washington passed the “Sam Martinez Stop Hazing Law,” making hazing a felony.

This newly enacted law adds to Washington’s comprehensive anti-hazing legislation known as “Sam’s Law” enacted in 2021. “Sam’s Law” was previously discussed in the June 2022 and November 2022 editions of this Newsletter.<sup>2</sup>

The “Sam Martinez Stop Hazing Law” reclassifies hazing under the state’s criminal law. Washington law now proscribes any person at any university or other post-secondary educational institution in the state from intentionally hazing another.<sup>3</sup> When hazing occurs that does not result in substantial bodily harm, violators will be charged with a gross misdemeanor.<sup>4</sup> A gross misdemeanor is punishable by less than one-year imprisonment and a fine not to exceed five thousand (\$5,000.00) dollars.<sup>5</sup> By contrast, any hazing that results in substantial bodily harm is a “Class C-felony” punishable by up to five years’ imprisonment or a fine not to exceed ten thousand (\$10,000.00) dollars, or both.<sup>6</sup>

Moreover, the law makes comprehensive changes to other portions of the state’s legislative code. Hazing will soon be considered harassment, which, for example, allows a judge to enter a

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<sup>2</sup> Stephen R. Bernstein, *Sam Martinez Hazing Death: Sam’s Law and its Impact on Greek Organizations*, 177 FRATERNAL L. 3 (Nov. 2022); Timothy M. Burke, *Hazing Legislation and Case Updates*, 175 FRATERNAL L. 1 (June 2022).

<sup>3</sup> Wash. Rev. Code §§ 28B.10.901(1); 28B.10.900 (defining hazing).

<sup>4</sup> Wash. Rev. Code § 28B.10.901(2)(a).

<sup>5</sup> See Wash. Rev. Code § 9A.20.021(2).

<sup>6</sup> See Wash. Rev. Code §§ 28B.10.901(2)(b) (noting punishment for hazing resulting in substantial bodily harm); 9A.20.020(c) (defining punishment for a class c felony). See Wash. Rev. Code § 9A.42.010(3)(b) (defining substantial bodily harm).

no-contact or restraining order.<sup>7</sup> Additionally, hazing is also considered a crime against a person, which subjects the crime to different guidelines such as when prosecution should be pursued and elevated requirements for victim notification.

As many readers will recall, Sam Martinez attended Washington State University where he began the new member process with the former Alpha Tau Omega Chapter of Washington State. Sam died from alcohol poisoning after being hazed during a “big brother” event. Several members of the chapter were indicted and charged in Martinez’s death primarily for furnishing liquor to a minor.

However, only one of the members involved in Martinez’s death faced any jail time, and that sentence was just nineteen (19) days long. Further, the county prosecutor was unable to charge anyone with simple misdemeanor hazing because the one-year statute of limitations had expired. Thus, this newly enacted law’s heightened punishments serve two functions. First, the newly enacted law increases the penalty for hazing to a gross misdemeanor, which has a two-year statute of limitations.<sup>8</sup> Second, the law creates a new felony that allows a judge to sentence violators to significant jail time when their hazing results in substantial bodily harm.

Washington joins the majority of states that have enacted legislation defining, criminalizing, or heightening hazing punishments.<sup>9</sup> Specifically, Ohio, New Jersey, Pennsylvania, Texas, Florida, Louisiana, and Virginia have all passed legislation enhancing criminal

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<sup>7</sup> See Wash. Rev. Code § 9A.46.060(39) (noting hazing, among other crimes, will be considered harassment).

<sup>8</sup> See Wash. Rev. Code § 9A.04.080(j) (establishing the statute of limitations for gross misdemeanors).

<sup>9</sup> *States with Anti-Hazing Laws*, StopHazing.org, <https://stophazing.org/policy/state-laws/> (last visited Jun. 20, 2023).

consequences for hazing.<sup>10</sup> Washington's new law is more limited than others, as the law only criminalizes *intentional* hazing, rather than a person's *reckless* conduct resulting in hazing.<sup>11</sup>

While it is important to note that hazing is not exclusive to fraternities and sororities, hazing continues to be the greatest threat to the existence of all fraternal organizations. Washington's new law intends to deter students from participating in hazing activities and severely punish those who choose to haze. The fraternity and sorority industry at large continues to support laws such as this, which work to fully eradicate hazing from the Greek system.

### **University of Cincinnati Sued by Title IX Respondent**

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The University of Cincinnati (the "University") has been named as a defendant in a lawsuit alleging inadequacies in its Title IX investigation procedures. John Noakes (an alias), a student at the University, was accused of sexually assaulting another student, Jane Roe, in September 2021 at a fraternity party. He was found responsible for violating the University's Title IX policies, but was never criminally charged for the incident.<sup>2</sup>

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<sup>10</sup> See Tim Burke, *NIC Responds to 60 MINUTES Story*, 172 FRATERNAL L. 1 (Nov. 2021).

<sup>11</sup> See Ohio Rev. Code § 2903.31 (requiring at least reckless conduct resulting in hazing to violate); N.J.S.A. 2C:40-3(b) (necessitating at least reckless conduct resulting in hazing to violate); Tex. Code Ann. Edu. § 37.151 (requiring reckless conduct and making hazing resulting in death a felony); F.S.A. § 1006.63; 18 Pa. C.S. § 2802; La. Rev. Stat. § 14:40.8 (requiring at least reckless conduct for a hazing act). Virginia recently passed S.B. 440, which requires at least reckless conduct and makes hazing resulting in substantial bodily harm a Class 5 felony.

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<sup>2</sup> Complaint at ¶ 54, *Noakes v. Univ. of Cincinnati*, No. 1:23-cv-00284 (S.D. Ohio, May 15, 2023).

In the lawsuit, Noakes asserts violations of Title IX, stating the University “has adopted practices that reinforce and rely upon gender stereotypes,” and violations of the Due Process Clause in the handling of his case.<sup>3</sup> Specifically, the Complaint alleges: Noakes was denied access to information regarding the substance of the claim both before the formal Title IX complaint was filed and after he was notified of the charges; requests and comments made by Noakes regarding the incident were omitted from the investigation report or were misstated therein; participation of biased hearing panel members who were paid consultants; and an overall lack of respect from the University regarding students’ due process rights.<sup>4</sup>

Being subject to this sort of litigation is not new to the University, as it is currently being sued by two female ballet students for mishandling their Title IX complaints about a classmate engaging in inappropriate physical contact during dance rehearsals and performances.<sup>5</sup> Additionally, the University has been reported to have paid out almost two million dollars more in lawsuit settlements in a variety of claims including investigations, Title IX claims, and civil rights violations, than five other universities in the area, and the University is the subject of five open Title IX investigations by the U.S. Department of Education.<sup>6</sup>

This is not unique to the University of Cincinnati either, as cases of this nature continue to arise around the country as more students claim violations of their rights by their university’s procedures in addressing sexual misconduct claims. *Fraternal Law* previously reported on a lawsuit filed against the University of Southern California (USC) claiming similar deficiencies in their

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<sup>3</sup> *Id.* at ¶ 2.

<sup>4</sup> *See generally, id.* at ¶¶ 3, 24, 65, 96.

<sup>5</sup> Paula Christian, *Ballet Dancers Sue University of Cincinnati in Sexual Misconduct Case*, JOURNAL NEWS (Aug. 25, 2022), <https://www.journal-news.com/news/ballet-dancers-sue-university-of-cincinnati-in-sexual-misconduct-case/7WJPBRALVRCARFTPPDMHS2CRCA/>.

<sup>6</sup> Paula Christian, *Data: UC Pays Out More Settlements Than Five Other Universities Combined*, WCPO (June 1, 2023, 5:40 PM), <https://www.wcpo.com/news/local-news/i-team/data-uc-pays-out-more-settlements-than-five-other-universities-combined>.

procedures, asserting USC failed to follow their own codified procedures, failings in the consideration of evidence, and succumbing to pressures from the media.<sup>7</sup> However, circuit courts across the country are struggling to determine exactly what the Title IX process requirements are. A new Supreme Court amicus brief filed in the case of *Van Overdam v. Texas A&M University* describes the patchwork of circuit holdings.<sup>8</sup> The Second Circuit requires “extratextual doctrinal elements” not within the federal statute in the initial complaint, the Seventh Circuit requires a simple allegation of sex-based discrimination, and the Eleventh Circuit requires the plaintiff to “disprove other potential non-discriminatory causes of discipline.”<sup>9</sup>

This lack of uniformity has led to confusion among students and administrators on how to properly handle claims of this nature, and the stakes are high. There is the potential that accused individuals will be wrongfully expelled from campus, and contrarily, the potential that victim complaints will not be properly investigated and adjudicated to protect them from harmful individuals. On top of that, universities deserve clarity on how they should approach these issues to best strike the balance between the two parties and avoid the litigation that many are consumed in now. While it may seem that all groups interests are divergent from each other, that is not the case. Every party involved is pushing for more definite standards on how to address this growing problem. Everybody wants their side to be heard and feel as though their rights are respected throughout the process.

There continues to be a larger, more political issue looming over these cases—the promises from the Biden Administration to revise the Title IX Regulations so as to fundamentally alter

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<sup>7</sup> Ilana Linder, *New Suit Alleging Procedural Deficiencies Filed Against USC*, 178 Fraternal L. 5 (Jan. 2023).

<sup>8</sup> *Amicus Brief*, *Van Overdam v. Texas A&M University, et al*, 2023 U.S. S. Ct. Briefs Lexis 1486 (2023).

<sup>9</sup> *Id.* at 9.



procedural requirements for universities.<sup>10</sup> Noakes Complaint contends that these potential changes, along with pressure from the federal government urging universities to comply with these standards, contributed to the denial of is procedural due process rights during the University of Cincinnati's adjudication of his alleged misconduct.<sup>11</sup>

Josh Engel, attorney for John Noakes and the two ballet students from the University of Cincinnati, emphasized that no one, victims nor the accused, is happy with the procedures being used by the University. This is a sentiment across the country and one that is deserving of a clear answer for individuals and universities moving forward. Hopefully, the Supreme Court will step in and provide guidance on these issues moving forward.

### **Chef Serves Up Lawsuit for Racial Discrimination in the Sorority House**

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The Delta Zeta Sorority and its Sigma Chapter of Delta Zeta House Corporation in Baton Rouge, Louisiana have found themselves among many named defendants in an employment discrimination suit arising from events taking place at Louisiana State University's campus during late 2021 and into 2022.

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<sup>10</sup> Tim Burke previously wrote about the 2017 revocation of the 2011 "Dear Colleague" letter and the proposed changes from the Biden Administration that would revise the live hearing and cross-examination requirements and procedures. See Tim Burke, *Biden Administration Issues Q and A and Responds to Court Decision of Title IX Regulations That May Predict New Regulations*, 171 Fraternal L. 8 (Sept. 2021).

<sup>11</sup> Complaint at ¶¶ 18, 21.

<sup>1</sup> Hanna Putoff is a is a law clerk at Manley Burke and rising second year law student at NKU's Chase College of Law.

Bernadine Williams was a Black chef with over twenty-six (26) years of experience in the industry when she began working as a House Chef for College Fresh, Inc. (“College Fresh”) at the Delta Zeta Chapter at LSU. A few months after taking on the role at the Delta Zeta house, Suzette Says took over as the Food Coordinator for the Chapter. Williams is now suing Says, the Delta Zeta Sorority, the national and local house corporations, and College Fresh, alleging that she experienced a hostile work environment, mostly due to how she was treated by Says.<sup>62</sup>

Williams’ Complaint asserts that Says was difficult to work with, going as far as ignoring Williams, communicating to her only through third parties, and refusing to refer to Williams by Williams’ name. Perhaps most egregious is the allegation that, at a chapter meeting with over one hundred (100) attendees, including student members, Williams asserts that Says stated, “I would prefer if we had a white chef.”

Further, the Complaint claims that Says retaliated against Williams for filing three formal grievances about Says to both Delta Zeta and College Fresh by demoting Williams’ title, which resulted in reduced hours and pay to Williams. However, the Complaint acknowledges that Says believed that working with Williams was like “walking on eggshells.”

Williams also seeks to hold the corporate defendants—Delta Zeta, the national and local house corporations, and College Fresh—liable for failing to adequately address the issues Williams was experiencing. To this end, the Complaint asserts that all named defendants “created and maintained a hostile environment on the basis of race...by not stopping the racially discriminatory harassment of Williams...removing [her] as head chef...and thereafter reassigning and demoting [her].”

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<sup>2</sup> See Williams v. Delta Zeta Sorority, No. 23-268 (D. La. Apr. 11, 2023).

Delta Zeta representatives have already responded publicly, stating that they would “never discriminate against anyone based on protected characteristics.”<sup>3</sup> Meanwhile, College Fresh has responded to the Complaint by filing a motion to dismiss on the basis that Williams filed her Complaint too late, as it was filed more than ninety (90) days after the Equal Employment Opportunity Commission (EEOC) issued “Notice of Right to Sue” letters to Williams.<sup>7</sup> We anticipate that the Delta Zeta defendants will respond similarly, moving to dismiss the complaint on account of the untimeliness of the Complaint.

Regardless of what happens with this lawsuit, which may be decided not on its merits but on a technical issue, fraternities and sororities across the nation continue to be expected to enact various DEI policies and procedures. But there must also be a commitment to actually implementing and applying those policies if the policies are going to serve any real purpose. Further, whenever complaints are received suggesting potential impropriety, particularly as it relates to hostile work environments, these matters must be properly investigated to prevent further exacerbations of underlying issues.

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<sup>3</sup> Matt Bruce, *Former Chef Sues LSU Sorority, Claims Food Coordinator Wanted a ‘White Chef,’* ADVOCATE (April 28, 2023), [https://www.theadvocate.com/baton\\_rouge/news/courts/ex-lsu-sorority-house-chef-files-racial-discrimination-suit/article\\_1cdf4476-e466-11ed-8765-4f426ab7559b.html](https://www.theadvocate.com/baton_rouge/news/courts/ex-lsu-sorority-house-chef-files-racial-discrimination-suit/article_1cdf4476-e466-11ed-8765-4f426ab7559b.html).

<sup>7</sup> As explained in College Fresh’s pending Motion to Dismiss, “Title VII claims must be filed within 90 days of the plaintiff’s receipt of the right to sue notice provided by the EEOC. The 90-day period is strictly construed and a court may dismiss a lawsuit filed after the period expires.” Here, Williams filed her Complaint ninety-eight (98) days after the EEOC issued the right to sue letters, meaning the Complaint was filed outside the timeframe for doing so.

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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