



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
MIDWESTERN DIVISION, CHICAGO OFFICE
111 NORTH CANAL STREET, SUITE 1053
CHICAGO, ILLINOIS 60606-7204

OFFICE OF THE
DIRECTOR

APR 26 1999

Dr. H. Victor Baldi, President
Fox Valley Technical College
1825 North Bluemound Drive
P.O. Box 2277
Appleton, Wisconsin 54913

Re: Complaint #05992007

Dear Dr. Baldi:

This letter is to notify you of the disposition of the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), against Fox Valley Technical College (FVTC). In the complaint, it was alleged that FVTC discriminated against a female student (the student) on the basis of sex and retaliated against her as follows:

1. On July 10, 1997, a Federal Aviation Administration (FAA) pilot examiner (Examiner), who has a relationship with FVTC, sexually harassed the student during an oral examination by making unwelcome sexual advances, and by making comments that demonstrated a bias against women;
2. On July 10, 1997, during the oral examination, FVTC treated the student differently on the basis of sex when the Examiner tested her on subject matter beyond what was required of male students, and;
3. FVTC retaliated against the student for complaining about the Examiner's behavior by (a) forcing her to repeat a course in Fall 1997 that she had already passed, (b) repeatedly denying her the opportunity to retake the oral examination, (c) giving her an unwarranted failing grade, and (d) failing to address her claims of sexual harassment and discrimination appropriately.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, and its implementing regulations at 34 C.F.R. Part 106, which prohibit recipients of Department funds from engaging in discrimination on the basis of sex or in retaliatory acts prohibited by the regulations. FVTC receives Federal financial assistance from the Department; accordingly, OCR has jurisdiction over this complaint.

Our mission is to ensure equal access to education and promote educational excellence throughout the nation

During its investigation, OCR interviewed the student, FVTC officials and students, the Examiner and a pilot instructor recommended by the student. OCR also reviewed documents provided by the student and FVTC.

Based on our investigation, we have concluded that the evidence is insufficient to support the complaint allegations. We are therefore closing our investigation of the allegations effective the date of this letter. The bases for OCR's determinations are summarized below.

I. Title IX Requirements

Under the Title IX regulation at 34 C.F.R. 106.31(a), a recipient may not, on the basis of sex, exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination in any education program or activity operated by a recipient. The regulation at 34 C.F.R. 106.31(b)(1)-(4) and (7) stipulates that a recipient may not, on the basis of sex, treat a person differently from others in determining whether the person meets any requirement or condition for the provision of aids, benefits or services or provide them in a different manner; deny the person aids, benefits, or services; subject the person to separate or different rules of behavior, sanctions or other treatment; or otherwise limit the person in the enjoyment of any right, privilege, or opportunity. The Title IX regulations cited prohibit sexual harassment. Sexual harassment occurs when unwelcome sexually harassing conduct is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

II. Background

FVTC is a two-year technical institution that offers an array of academic programs, including the two-year aeronautics pilot training program in which the student was enrolled. The pilot training program meets at FVTC's campus in Appleton for classroom sessions, and at an airport in Oshkosh for in-flight and simulator training.

According to FVTC's Chief Flight Instructor (CFI), FVTC accepts all students into the flight program who pass a basic skills test. Most applicants possess a private pilot's license. The CFI estimated that 60 students apply to the program each year, but fewer than 20 enroll due to the costly tuition. Approximately 20% of the students in the flight program are women, and the attrition rate of men and women is comparable. Many of the people OCR interviewed confirmed that students who drop out of the flight program usually do so because of the cost of tuition, which is approximately \$28,000 for the full two years, and not because of academic difficulty. The CFI also stated that women represent about 12% of all pilots in the industry.

Students in the flight program take, as one student described, two "final exams" at the end of the first year: an instrument rating test and a commercial rating test. Both tests have two subparts, an oral portion and an in-flight portion, and are administered by an FAA-approved examiner. For most of the ratings tests, and others required of second-

year students, FVTC contracts with the Examiner to conduct the evaluations. At times, when the Examiner is unavailable, FVTC uses other FAA-approved examiners.

III. Alleged Sexual Harassment

The student alleged that at her instrument flight-rating test on July 10, 1997, the Examiner sexually harassed her by standing behind her so he could look down the front of her blouse, massaging her shoulders, and offering to hug her. The student stated these acts occurred in a windowless room at FVTC in which no other person was present. The student also stated that, at times prior to her instrument flight-rating test, the Examiner made disparaging comments to her about the ability of women to become pilots.

The student was not given a rating test on July 10, 1997. She was scheduled to take her instrument flight rating test on July 1, 1997, and her commercial flight rating test on July 2, 1997, both with the Examiner. On July 1, the instrument flight-rating test began with an oral examination, which the student failed. The Examiner explained to OCR that much of the material a student must master to pass the instrument-rating test is identical to the material necessary to pass the commercial-rating test. The CFI, and the flight instructor who initially certified the student as ready to take the ratings tests, agreed that it was pointless for her to take the July 2 commercial rating test because she had failed the oral part of the July 1 instrument-rating test. FVTC had already agreed to pay the Examiner for the July 2 test, however, so the CFI asked him to work with the student on July 2 in the areas in which she was having difficulty.

When OCR interviewed the Examiner, he denied each of the student's allegations of sexual harassment. He also denied the allegations when questioned by FVTC about the internal grievance the student filed with the school.

OCR interviewed several students, staff, and administrators at FVTC, including some of the students whose names the student provided. Not one of the people OCR interviewed provided information that supported the student's allegations. Each spoke highly of the Examiner, and each student stated that none of what the student alleged happened to her/him. Although one female student said she and the Examiner hugged once, this student explained that the hug was consensual and congratulatory as she was thrilled for having just passed a test. The Dean informed OCR that no other female students have complained about the Examiner.

In short, there is insufficient evidence to support a conclusion that the Examiner engaged in the behavior the student said occurred during the ratings test in July 1997, and, therefore, that she was sexually harassed in violation of Title IX.

IV. Alleged Different Treatment On The Basis Of Sex

The student alleged that when the Examiner administered the instrument-rating test in July 1997, he tested her on subject matter that is not required of the male students who take the same examination.

When OCR interviewed the student on March 2, 1999, she explained that during the oral portion of the instrument-rating test, the Examiner questioned her answers, stated she had improperly calculated fuel computations, among other things, and ended the test after five minutes. The Examiner stated that the oral portion of the instrument-rating test lasted approximately 90 minutes. The Examiner and each of the FVTC flight instructors OCR interviewed stated that it was appropriate for the Examiner to test the student in these areas. Also, each of the students we interviewed, including several of those whose names the student suggested, confirmed that they had been required to demonstrate proficiency in these areas when they took the same test. Further, interviewees explained that the Examiner has the discretion to ask questions based on a variety of subjects related to the relevant Practical Test Standards, which are issued by the FAA.

In short, everyone whom OCR interviewed stated that the material on which the student was tested was appropriate and within the parameters of the examination, and was consistent with that required of all students taking the same examination. Therefore, the evidence is insufficient to support a finding that the student was treated differently, on the basis of sex, as alleged.

V. Alleged Retaliation

The Title IX regulations provide, in relevant part, that a recipient may not intimidate, threaten, coerce, or otherwise discriminate against any individual because the individual has complained, testified, assisted or otherwise participated in any aspect of an investigation, proceeding, or hearing conducted under Title IX.

A *prima facie* case of retaliation exists when each of the following is true: (1) the complainant engaged in a protected activity; (2) the recipient was aware of the protected activity; (3) the recipient took action adverse to the complainant; and, (4) there is an inferable causal connection between the protected activity in which the complainant was involved and the adverse action. If a *prima facie* case is established, then the recipient may rebut the inference of retaliation by presenting a nonretaliatory justification for its action. The proffered justification must then be evaluated to determine whether it is pretextual.

The student engaged in a protected activity when she filed a sexual harassment grievance against the Examiner with FVTC in July 1997. In the OCR complaint, the student alleged that after she filed the grievance with FVTC, and as a result, FVTC (a) forced her to repeat a course in Fall 1997 that she had already passed, (b) repeatedly denied her the opportunity to retake the instrument-rating examination, (c) gave her an unwarranted failing grade, and (d) failed to address her claims of sexual harassment and discrimination appropriately. We will address each of the student's allegations.

A. Course #402-195A

The student asserted that she was forced to repeat a course in the fall of 1997 that she had already passed (allegation 3(a)), and was then given a failing grade in the repeated course (allegation 3(c)). OCR's review of the student's transcript revealed that, in the spring of 1997, the student passed course #402-193 (Aeronautics Flight Instrument) with a C grade. The student's instructor then certified her to take the instrument-rating test. The student failed the test, prompting the CFI to evaluate her skills. Students who fail are not permitted to retake ratings tests without remedial instruction or training. The student's instructors determined, apparently with the student's approval, that she should receive significant additional training before retaking the instrument rating test and taking the commercial-rating test. The student agreed to enroll in course #402-195A, titled Aeronautics Flight CFI-ASI. As explained by FVTC officials, the student was to get more individualized instruction and practice in this "suffix" course, with the goal of preparing her to pass her ratings examinations. All students who enroll in a suffix course receive focused, one-on-one instruction to improve their chances for passing tests. Eight other students in the flight-training program took suffix classes over the last three years, all of whom are male.

According to the student's instructor, in the fall suffix course the student had difficulty demonstrating much of what she had been taught the previous spring. According to the instructor, during the fall, the student missed many of her scheduled classes and did not progress toward improving her skills. He thus gave the student a D grade in the suffix course, which is not a failing grade. The student asserted to OCR that students are dismissed from the flight-training program upon receipt of a grade less than C. Administrators and students, however, including students who received a grade of F, informed OCR that students can continue in the flight training program after failing a course. Neither FVTC's Student Handbook nor the flight training program's brochure indicate that students are dismissed after receiving a single grade less than C.

OCR has determined that the student was not forced to repeat a class, nor was the student given a failing grade. Therefore, a *prima facie* case of retaliation does not exist in that the student was not subjected to the adverse actions which she claimed occurred. In any event, OCR has concluded that the reasons provided by FVTC for requiring the student to take the suffix course and giving her the grade of D are not a pretext for retaliation. For these reasons there is insufficient evidence to conclude that the student was subjected to retaliation as alleged.

B. Re-taking the Instrument Exam

The student asserted that FVTC retaliated against her by not permitting her to retake the instrument-rating test that she failed in July 1997 (allegation 3(b)). As noted, the FAA requires instructors to provide additional training to students who have failed and then certify that the students have accomplished all the skills necessary to qualify for FAA-approval.

In June 1997 the student's instructor certified in the student's flight log that she was prepared to take the instrument-rating test. The student failed that test in July 1997, and the instructor then worked with the student in the suffix class in the fall of 1997 to prepare her to retake the examination. OCR asked the instructor how the student could have been prepared to take the test in June 1997, but not prepared to take the test at some later date. The instructor said he "signed [the student] off" in June 1997 because he wanted a second opinion of her skills, which the Examiner could provide. The instructor told OCR that he also believed that, because the student had completed the course material, she had "earned" the right to "try" to pass the test. He also told OCR that he regrets having certified the student, because doing so was inconsistent with FAA guidelines which counsel against certifying students who are not qualified. He stated that whenever the student mastered a new skill she forgot the skills she had learned earlier, and at no time did the student have all of the necessary skills to pass the test.

The CFI and the Examiner each was critical of the instructor's decision to certify the student in June 1997. Each said that instructors have a duty to the public to refrain from certifying unqualified students.

FVTC explained to OCR that the student was not permitted to retake the instrument ratings test because she was unqualified. Throughout OCR's investigation, the student asserted that she is an accomplished private pilot with skills superior to those of her classmates, some of whom excelled in the flight training program even as she was struggling. FVTC, on the other hand, has contended that the student is not proficient at piloting and that her deficiencies may create a flight safety hazard. In an attempt to address these contradictory views, OCR contacted another flight instructor at the student's suggestion. This instructor is a pilot with whom the student trained after the student left FVTC. She informed OCR that she too has the ability to permit the student to take the instrument flight-rating test. She explained that she has not granted the student the signoff to take the test because she is "not competent" yet. In fact, she questioned how the student demonstrated sufficient knowledge and ability to be cleared in 1997.

OCR has determined that while a *prima facie* case of retaliation exists with respect to this allegation, the explanations presented by FVTC for not allowing the student to retake the ratings tests are not a pretext for retaliation. Therefore, the evidence is insufficient to conclude that the student was subjected to the alleged retaliation.

C. Sexual Harassment Grievance

The student asserted that FVTC failed to appropriately address her internal sexual harassment grievance in retaliation for filing the grievance (allegation 3(d)).

The Title IX regulation at 34 C.F.R. 106.8(b) requires that all educational institutions have a grievance procedure providing for the prompt and equitable resolution of student complaints alleging sex discrimination. FVTC has a grievance procedure that is designed to ensure promptness and equity in the resolution of such complaints. However, FVTC

did not follow the procedure in addressing the student's complaint because it believed it could resolve the grievance through less-formal means. FVTC's Affirmative Action Officer explained that, over the last several years, he has never adhered to FVTC's published procedures for addressing and resolving claims of sex discrimination; however, he stated that claims which have been made have been resolved satisfactorily. As such, FVTC did not single the student out by failing to follow its own procedure in her case. In addition, although it did not follow the procedure in the student's case, the ultimate conclusion reached by FVTC was not inconsistent with OCR's own conclusion, which was explained earlier in this letter.

OCR has determined that while a *prima facie* case of retaliation exists with respect to this allegation, FVTC's justification for not handling the student's complaint in accordance with its procedure was not a pretext for retaliation. Based on the foregoing, the evidence is insufficient to conclude that the student was subjected to the alleged retaliation.

During the course of OCR's investigation, FVTC voluntarily agreed to implement the enclosed settlement agreement to ensure compliance with the requirements of 34 C.F.R. 106.8(b). OCR will monitor FVTC's implementation of this agreement.

I wish to thank you and your staff for the cooperation extended to OCR during the course of its investigation. If you have any questions about this letter, please feel free to contact me or Mr. Mark Erickson of my staff at (312) 886-8417.

Sincerely,



Algis Tamosiunas
Director
Compliance Programs

cc: Mr. Dennis Rader, Counsel
Enclosure

SETTLEMENT AGREEMENT

The Fox Valley Technical College (FVTC) submits the following settlement agreement to the U.S. Department of Education, Office for Civil rights (OCR), regarding complaint #05992007. This settlement agreement is submitted in order to resolve the complaint in accordance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682, and its implementing regulations at 34 C.F.R. Part 106.

- 1. FVTC will continue to publish and disseminate annually to all students its present Discrimination Grievance Procedure, which requires promptness and equity in the resolution of student complaints alleging sex discrimination, including sexual harassment. FVTC may disseminate this procedure to students as part of a student handbook or other document or booklet that is distributed annually to all students.
2. By May 1, 1999, and again at the beginning of each academic year, FVTC will issue a memorandum to all staff explaining their responsibility to immediately report to the Affirmative Action Officer any student complaints alleging sex discrimination, including sexual harassment.
3. Beginning immediately, FVTC will handle all grievances or complaints alleging sexual harassment or discrimination based on gender in accordance with FVTC's existing published procedure.
4. By December 1, 1999, the College will submit a status report to OCR documenting its implementation of Items 1-3 of this Settlement Agreement. With respect to its implementation of Item 3, FVTC will report to OCR each grievance or complaint, whether oral or written, made by a student alleging sex discrimination or harassment after April 1, 1999. FVTC will provide to OCR a copy of all written complaints, a statement explaining the nature and scope of the investigation and any meetings or hearings, the persons involved, and the conclusion if a final determination has been made.
5. By June 1, 2000, FVTC will submit a status report to OCR similar to the one described in the prior paragraph. With respect to Item 3, FVTC will provide updates as to any complaint or grievance that had not been resolved at the time of the earlier report, as well as documentation regarding new complaints or grievances that have been filed.
6. After receiving the status report due June 1, 2000, FVTC understands that OCR will evaluate whether further monitoring of FVTC by OCR is necessary. FVTC agrees, however, to submit further status reports on December 1, 2000, and on June 1, 2001, if OCR so requests by August 15, 2000.
7. FVTC will comply with OCR requests for additional documentation or information that will assist OCR in determining whether FVTC has complied with this agreement.

For Fox Valley Technical College:

Name: [Signature] Date: 9/19/99

Title: Director - Human Resources