No. 19-

IN THE

Supreme Court of the United States

WAYNE M. KLOCKE,
INDEPENDENT ADMINISTRATOR OF
THE ESTATE OF THOMAS KLOCKE,

Petitioner,

v.

THE UNIVERSITY OF TEXAS AT ARLINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress passed Title IX of the Education Amendments of 1972 ("Title IX") to provide a remedy to students attending publicly funded educational institutions who suffer gender-motivated discrimination in the form of exclusion from, participation in, denial of the benefits of, or discrimination under any education program or activity.

In conflict with the defined framework of a Title IX enforcement claim that uniformly has been approved by each of the First, Second, Sixth, Seventh and Eleventh Circuits, the Fifth Circuit becomes the first court of appeals to hold that where a student suffers disciplinary action that indisputably includes an exclusion of the student from educational programming, a Title IX enforcement action is unavailable if the claimant does not prove the exclusion complained of was "clearly unreasonable in light of the known circumstances." The Fifth Circuit compounded its conflict with the other Circuits by holding that a court is authorized to determine that an exclusion from educational programming as a disciplinary sanction, is "not clearly unreasonable as a matter of law" because the university has offered reasons for it other than sex or gender discrimination.

The question presented is whether the Fifth Circuit incorrectly implemented Title IX in a case arising from university discipline by imposing upon a Title IX plaintiff a burden to prove the exclusion from educational programming was clearly unreasonable in light of the known circumstances; and, holding that a non-discriminatory reason for the exclusion of a student from educational programming allows a court to find the

exclusion not clearly unreasonable as a matter of law, thereby exempting the university from a Title IX claim exposure.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke, the appellant below and plaintiff in the district court.

Respondent is the University of Texas at Arlington, the appellee below and defendant in the district court.

Nicholas Matthew Watson was a defendant in the district court proceeding but was dismissed with prejudice before entry of the final judgment now at issue. He was not a party to the proceedings in the court of appeals that are at issue now.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

> *Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke v. The University of Texas at Arlington*, No. 4:17-CV-00285-A (June 8, 2018 memorandum opinion and order granting The University of Texas at Arlington's motion for summary judgment and final judgment dismissing Petitioner's action against The University of Texas at Arlington).

United States Court of Appeals (5th Circuit):

> *Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke, Appellant v. The University of Texas at Arlington, Appellee,* No. 18-10857 (September 10, 2019 decision and opinion affirming summary judgment dismissal of Petitioner's action against The University of Texas at Arlington).

United States District Court (N.D. Tex.):

> *Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke v. The University of Texas at Arlington and Nicholas Matthew Watson*, No. 4:17-CV-00285-A (July 25, 2017 order granting Defendant Nicholas Matthew Watson's motion to dismiss).

United States Court of Appeals (5th Circuit):

> *Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke, Appellant v. Nicholas Matthew Watson, Appellee,* No. 17-11320 (August 23, 2019 decision and opinion reversing dismissal of claims against Nicholas Matthew Watson, and remanding for further proceedings).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

STATUTES AND OTHER AUTHORITIES

Cited Authorities

PETITION FOR A WRIT OF CERTIORARI

Wayne M. Klocke respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 938 F.3d 204. The district court's order and opinion granting summary judgment (App. 17a) is not reported, but available at 2018 WL 2744972.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2019. A petition for rehearing was denied on October 21, 2019. (App. 38a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C, Section 1681(a), provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that[1]:

1. The nine (9) expressly enumerated exceptions are not applicable in this case, or to the issues presented. (Pub.L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub.L. 93-568, § 3(a),

. . .

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

INTRODUCTION AND STATEMENT OF THE CASE

A. This case presents an exceptionally important, recurring legal issue involving the deprivation of a liberty interest and the limits, if any, of Congress' intent to allow broad judicial remediation under Title IX.

Accusations of threat, harassment or sexual misconduct on university campuses are serious, and the ramifications of disciplinary action arising from these kinds of allegations are long-lasting and stigmatizing. Students' interests in preserving their educational status and reputations in the face of such serious misconduct allegations are compelling, as are the interests of

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Dec. 31, 1974, 88 Stat. 1862; Pub.L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

universities in responding to legitimate complaints of serious misconduct. The tension between these competing interests is the subject of commentator and court decisions nationally, but most often in the context of evaluating whether or not due process has been sufficiently accorded to accused students, and their accusers.[2]

In what has become an avalanche of litigation calling for its correct application, Title IX has been recognized by the First, Second, Fifth, Sixth, Seventh, and Eleventh Circuits as the available enforcement action when disciplinary action results in an exclusion from educational programming or a deprivation of the benefits of such programming, and the exclusion or deprivation is motivated by gender; *i.e.,* there is a plausible inference of gender motivation. These Circuits, excluding the Fifth, apply a uniform framework for analyzing such a claim, and a uniform claimant's burden of proof. The Fifth Circuit stands alone in imposing a new burden of proof and judicially creating a limitation on a defendant's Title IX claim exposure that no other court has adopted or recognized.

B. Summary of the pertinent case facts.

The legal significance and seriousness of this case is difficult to overstate. This case stems from a brief, non-

2. E.g., *Marie T. Reilly,* Due Process in University of Discipline Cases, 120 Penn. St. L. Rev. 1001 (2016); American College of Trial Lawyers Position Statement Regarding Campus Sexual Assault Investigations, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-whitepapers/task force_ allegations_of_sexual_violence_white_paper_final.pdf (March 2017).

violent encounter between Petitioner's son, Thomas, and another male student at the beginning of a class session in a course they both needed to complete to graduate that summer. The only other witness to any aspect of the encounter neither saw nor reported anything to indicate that something threatening or harassing had taken place between the two students.

After the four-hour class the other student complained to a university official about Thomas. Calling Thomas an aggressor, the complaining student alleged that "out of the blue" near the start of the class Thomas typed anti-gay comments on his laptop computer and showed them to him, which upset the student because he is gay. He further alleged that after he spoke up by telling Thomas he was gay, Thomas used a defamatory term for gays and told him he should consider killing himself. No one witnessed any of the written or verbal communications between them.

Upon receipt of the complaint allegations the university official receiving it immediately excluded Thomas from the class. Thomas was never interviewed or afforded an opportunity to be heard before the exclusion was implemented. He was never allowed to return to the class.

When confronted with the complaint against him Thomas denied the allegations; in fact, he reported that the complaining student, who he did not know, had initiated the communication that morning by flirtatiously telling Thomas he was beautiful and refusing to stop when Thomas asked him to. Thomas denied making any statements about homosexuality during the encounter and he denied saying the other student should consider killing

himself. And from the commencement of the putative investigation, Thomas was very focused on his urgent need to return to class because class participation was an essential component of the grade to be received and was necessary to earn a successful course grade.

The university official who received the complaint viewed it as invoking the university's Title IX investigation procedures, but the matter was not investigated or handled pursuant to those procedures. Instead, a single administrator acted as investigator, prosecutor, and final decision-maker. He concluded there was no evidence of a threat of any kind and confirmed in an email at the end of his investigation that he: a) could find no corroboration of the complaining student's allegations or corroboration of the complaint's alleged facts; and, b) did not think he had enough to keep Thomas from attending the class. Despite these findings, the administrator nevertheless kept Thomas's class exclusion sanction in effect through the duration of the class term.

On the final day of the term after attempting a portion of the final exam for the course, Thomas died by suicide.

In a representative capacity Petitioner filed a Title IX enforcement action against the university alleging Thomas's disciplinary exclusion from educational programming was motivated by his gender. Petitioner alleged a causal connection between the class exclusion and the mental anguish it caused Thomas that was so severe, he chose to end his life.

C. Summary of the proceedings.

Finding that Petitioner stated a claim upon which relief can be granted the district court denied the university's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. After discovery, the university and Petitioner filed cross motions for summary judgment. The district court granted the university's motion. Regarding whether there was a plausible inference of gender motivation, the court recognized that "[a]t best, sex played a tangential role in the university's disciplinary decision excluding Thomas from the course." (App. 30a). Petitioner's motion was denied, and he appealed the dismissal of the case to the Fifth Circuit Court of Appeals.

With regard to the exclusion from educational programming complained of, the court of appeals confirmed as a threshold matter "these facts indicate that Klocke experienced a 'concrete negative effect' on his 'ability to receive an education,'" explicitly rejecting the university's argument that as a matter of law Klocke was never deprived of an educational opportunity or benefit under Title IX. (App. 7a). The court further observed that Petitioner presented a Title IX claim within the framework recognized by other circuits, asserting an erroneous outcome and selective enforcement claim, but waived any deliberate indifference or archaic assumption arguments. (App. 8a).

In affirming the dismissal the court concluded that a Title IX plaintiff must show the school's response was "clearly unreasonable in light of the known circumstances" and concluded further that a court is authorized to identify such a response as not "clearly unreasonable," as a matter of law. (App.7a-8a). The court held that because the

university had reasonable, non-discriminatory reasons for excluding Thomas from class, an inference of gender bias in these circumstances would necessarily be speculative. (App. 14a).

REASONS FOR GRANTING THIS PETITION

In accordance with this Court's Rule 10(a) this case is a perfect vehicle for resolving a clear conflict among the Circuits regarding the correct framework for analyzing a Title IX enforcement action arising from a disciplinary sanction that involves an exclusion from educational programming. The proper construction and interpretation of Title IX is a recurring question that has divided the lower courts. Given the prevalence of Title IX cases arising out of disciplinary decisions, guidance from this Court is necessary and warranted.

In addition, the novel decision of the Fifth Circuit significantly limits or narrows Title IX claim relief[3] by judicially creating a previously unrecognized burden of proof and a standard for dismissing a case as a matter of law that is not encompassed within any of the nine (9) expressly enumerated exceptions to Title IX liability intended by Congress, or recognized by any other court. This limitation or exclusion from liability renders ineffective, a Title IX claim.[4]

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3. The court expressly recognized, however, that the Supreme Court has "consistently interpreted Title IX's private cause of action broadly, to encompass diverse forms of intentional sex discrimination", citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183, (2005). (App. 8a).

4. Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal

Title IX enforcement claims arise from the deprivation of liberty interests. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that a public high school student subject to a ten-day suspension had a property and liberty interest in education protected by the Fourteenth Amendment and was entitled to notice and an opportunity to be heard before imposition of the sanction.

Across the country, scores of federal courts are being called upon to adjudicate cases arising out of university disciplinary sanctions that implicate Title IX. Most cases challenging university disciplinary action address whether pre-discipline minimum due process standards have been met, in the face of rampant confusion among universities, the Department of Education and courts about what level of due process is required within university disciplinary proceedings. Post discipline, the Circuits uniformly hold that disciplined students have a right to judicially enforce Title IX when the discipline rises to the level of a Title IX exclusion from educational programming, or deprivation of the benefits of such programming.

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courts may use any available remedy to make good the wrong done. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992). In *Franklin*, this Court expressed that after *Cannon v. Univ. of Chicago,* 441 U.S. 677 (1979) (Title IX is enforceable through an implied right of action) a more traditional method of statutory analysis is possible, because Congress was legislating with full cognizance of that decision, explaining further, "[o]ur reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies in a suit brought under Title IX." *Franklin*, supra. at 1036. The Court also observed "[t]he power *to enforce* implies the power to make effective the right of recovery afforded by the Act. *Id.* at 1034 (emphasis in opinion, citations omitted).

The issue, however, is that the courts do not have a uniform framework for addressing such Title IX enforcement claims. As observed recently by the Eleventh Circuit, "[n]either the Supreme Court or this Court has established a framework for analyzing Title IX challenges to university discipline proceedings." *Doe v. Valencia College,* 903 F.3d 1220, 1236 (11th Cir. 2018). This case underscores the need for a level playing field in all Circuits. The Court should provide a uniform and certain framework for analyzing Title IX claims arising in this important context.

A. *The Fifth Circuit's decision creates a clear conflict among the Circuits regarding the framework for analyzing a Title IX enforcement action arising from university disciplinary action.*

In 1994, the Second Circuit held, looking at analogous Titles VI and VII, "we may safely say that Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Yusuf v. Vassar College*, 35 F.3d 709, 715 - 16 (2nd Cir. 1994) (citations omitted). The *Yusuf* court explained:

> [P]laintiffs attacking a university disciplinary proceeding on grounds of gender bias (under Title IX), can be expected to fall within two categories. In the first category, the claim is that the Plaintiff was innocent and wrongfully found to have committed an offense. In the second category, the Plaintiff alleges selective enforcement. Such a claim asserts that regardless of the student's guilt or innocence, the severity of the penalty and/or the decision

> to initiate the proceeding was affected by the student's gender.

Id.

The Second Circuit has since re-confirmed the existence of a Title IX enforcement claim arising out of university discipline and has been joined by the First, Sixth and Eleventh Circuits in uniformly recognizing erroneous outcome or selective enforcement claim theories. *See*, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019); *Doe v. Columbia University,* 831 F.3d 46, 55 (2nd Cir. 2016); *Doe v. Colgate Univ. Bd. of Trs.*, 760 F. App'x 22, 25 (2nd Cir. 2019); *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum,* 903 F.3d 575, 578 (6th Cir. 2018); and *Valencia College,* supra., 903 F.3d at 1236.

In each of the above-cited cases these courts agree that to establish erroneous outcome, a plaintiff must show a causal connection between the outcome and gender, and point to particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding. *ibid.* And they uniformly agree that to show selective enforcement a plaintiff must show that regardless of culpability, the severity of the penalty or the decision to initiate proceedings was affected by the excluded student's gender. *ibid.*

In contrast, in *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019) the Seventh Circuit confirmed the existence of a Title IX claim arising from a disciplinary action but explained: "we see no need to superimpose doctrinal tests on the statute", explaining further "we prefer to ask the question more directly: do the alleged facts, if true, raise

a plausible inference that the university discriminated against John "on the basis of sex."

In all of the cited cases the courts also confirm, uniformly, that the test for whether Title IX discrimination has occurred is whether the facts taken as a whole, create a plausible inference of discrimination based on sex. *See id.*

None of these cited cases or any other Petitioner can find require proof by a Title IX plaintiff that gender bias or gender was the sole cause or sole motivation for the exclusionary disciplinary sanction. None require a plaintiff to prove that the exclusion from educational programming was clearly unreasonable under the circumstances. None excuse or exempt a university from Title IX liability when they have excluded, deprived or discriminated in violation of Title IX, but offered a plausible non-discriminatory reason. None authorize a court to accordingly conclude that as a matter of law, the sanction (even if it is Title IX exclusion or deprivation), is not clearly unreasonable.

B. *The decision below establishes a judicially created exemption from Title IX liability that no other court has adopted, based upon a claim analysis standard that applies only in a deliberate indifference context.*

Petitioner waived any deliberate indifference arguments, so the case was not decided under that liability theory. *(*App. 8a). The court of appeals recognized that there was some evidence of articulable doubt on the part of the university investigator — calling them express reservations—about the disciplinary sanction that was imposed upon Thomas in the form of an exclusion from educational programming. (App. 9a). Rather than crediting that evidence in favor of Petitioner in its *de novo* review of

a summary judgment dismissal of the erroneous outcome claim, the court discredited that evidence, essentially finding it irrelevant because the investigator's ultimate punishment decision was not "clearly unreasonable." (App. 11a-12a). "In sum, UTA's disciplinary decisions were reasonable and justifiable on non-discriminatory grounds. And inference of gender bias in these circumstances would necessarily be speculative." (App. 13a- 14a).

The court's decision to affirm or reverse the district court dismissal of Petitioner's Title IX enforcement claim clearly turned on the court's mistaken conclusion and novel theory that there is no reason why a court adjudicating a Title IX case, on a summary dismissal motion, could not identify a response as not "clearly unreasonable" as a matter of law. (App. 7a-8a). Citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642 (1999) the court stated "[t]he plaintiff must show that the school's response was 'clearly unreasonable' in light of the known circumstances," finding as a matter of law, the university had reasonable and non-discriminatory reasons to exclude Petitioner's son. (App. 12a). The court's application of a clearly unreasonable claim analysis drove its related conclusion that because the disciplinary decision (an acknowledged exclusion from the course) was reasonable and justifiable on non-discriminatory grounds, an inference of gender bias in these circumstances would necessarily be speculative. (App. 14a). But the proper inquiry adopted by *all* other Circuits is whether there is a plausible inference of gender bias, not whether non-discriminatory explanations absolve the university from Title IX liability.

The "clearly unreasonable" standard applied by the court in reliance upon *Davis* does not and should not apply

except in a case of alleged deliberate indifference by a school to the harassment by one student of another, and corresponding allegation that such deliberate indifference amounts to an exclusion from educational programming or its benefits. *Davis* confirms only that the question of whether deliberate indifference is "clearly unreasonable" is a question of law, concluding that if deliberate indifference is not shown to be clearly unreasonable, the effective exclusion arising from it is not an intentional act for purposes of Title IX liability. *See, id.* (holding federal fund recipient may be liable in damages under Title IX only for its own misconduct, and the recipient must exclude person from participation or deny the benefits of or subject the person to discrimination in order to be liable under Title IX).

This case is not about an *effective* exclusion arising from inaction in responding to alleged student misconduct. It is a case alleging an *actual* exclusion, arising from the *affirmative actions* of the university to punish alleged misconduct by intentionally excluding the disciplined student from educational programming.

Petitioner is not aware of any federal case imposing the deliberate indifference-based "clearly unreasonable" standard of review or burden of proof outside of the context of a deliberate indifference claim. Petitioner is unaware of any case imposing a burden by the plaintiff to prove that the school's exclusion decision was "clearly unreasonable." This includes *any* of the cases recognizing the erroneous outcome or selective enforcement Title IX claim theories. *See*, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019); *Doe v. Columbia University,* 831 F.3d 46, 55 (2nd Cir. 2016); *Doe v. Colgate Univ. Bd. of Trs.*, 760 F. App'x 22, 25 (2nd Cir. 2019); *Doe v. Miami*

University, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum,* 903 F.3d 575, 578 (6th Cir. 2018); and *Valencia College,* supra., 903 F.3d at 1236.

On its face Title IX does not limit a claim to those circumstances where the university has acted unreasonably. Title IX does not provide an exception or exemption from liability or an exclusion of the Act's application in cases where the alleged exclusionary sanction imposed upon a student has been justified by the university's citation to non-discriminatory reasons for imposing the particular disciplinary sanction of an exclusion from school.

No court other than the court of appeals in this case, has adopted a sole cause or sole factor requirement in articulating the standards for finding Title IX discrimination. Likewise, the language of Title IX does not provide an applicable exclusion or exemption from liability where there is both a plausible inference of gender motivation for the decision and non-discriminatory reasons for excluding a student from educational program.

C. *If this Court imposes a burden upon Title IX claimants to prove that a disciplinary sanction in the form of being excluded from educational programming was "clearly unreasonable under the circumstances", it should find that whether the decision was "clearly unreasonable" or not, is a question of fact, rejecting the Fifth Circuit's holding that it is a question of law.*

Reasonableness is generally a question of fact for the trier of fact. *E.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 697 (1999) (holding in a civil rights

action within the meaning of the Seventh Amendment, sounding in tort, question of whether complained of action bore a reasonable relationship to its proffered justification were fact bound, for a jury to decide).

Petitioner questions how the "clearly unreasonable" test imposed by the Fifth Circuit, if applicable, can correctly be framed as a question of law when the overall framework of a Title IX enforcement action is firmly grounded in subjective questions of plausible inferences, articulable doubts, and severity of sanction. If a plaintiff alleging a Title IX claim arising from university discipline that excludes him or her from educational programming must show that the exclusion was clearly unreasonable under the circumstances, a jury should be permitted to evaluate those circumstances to determine the reasonableness of this particular form of punishment. Imposing such a punishment upon a student is conduct that Congress and this Court deem severe enough to warrant remediation via a Title IX enforcement claim, if there is a plausible inference of gender motivation for the punishment decision.

CONCLUSION

If the decision below is allowed to stand, students in the Fifth Circuit who experience discipline in the form of an exclusion from educational programming where gender motivation is a factor in the disciplinary decision, will be unable to maintain a viable Title IX enforcement claim if a court finds the disciplinary decision was not clearly unreasonable, as a matter of law. Unlike their counterparts in the Circuits that do not impose the burden of proof or drastic limitation upon or exemption from Title IX liability imposed by the Fifth Circuit, they will

not be able to secure the remediation that is specifically contemplated by Congress in passing Title IX and its amendments, and that this Court has said is broad when there is a plausible inference of gender discrimination.

If Title IX provides a remedy arising out of university disciplinary sanctions that exclude students from educational programming, as the Circuits agree, the statute should be uniformly applied. The Court should resolve the conflict among the Circuits created by the decision below and provide a certain and uniform framework for analyzing Title IX enforcement claims in this context. Accordingly, this Petition should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 10, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10857

WAYNE M. KLOCKE, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF THOMAS KLOCKE,

Plaintiff - Appellant

v.

THE UNIVERSITY OF TEXAS AT ARLINGTON,

Defendant - Appellee

September 10, 2019, Filed

Appeal from the United States District Court
for the Northern District of Texas.

Before OWEN, SOUTHWICK, and HIGGINSON, Circuit Judges

STEPHEN A. HIGGINSON, Circuit Judge:

This appeal arises out of a Title IX suit for damages alleging that the University of Texas at Arlington ("UTA")

discriminated on the basis of sex in disciplining student Thomas Klocke. The district court granted summary judgment to UTA. We affirm.

I.

In May 2016, Thomas Klocke and Nicholas Watson were enrolled in an accelerated two-week summer class at UTA. On Thursday, May 19, Watson reported to UTA administrators that he felt threatened by Klocke and would not return to class if Klocke were present. Watson gave the following account. Watson and Klocke were sitting next to each other in class when Klocke typed "gays should die" on his computer and showed it to Watson. Watson typed back, "I'm gay." Klocke verbally called Watson a "faggot." Watson told Klocke, "I think you should leave." Klocke replied, "You should consider killing yourself." Klocke changed seats about an hour later.

Dean of Students Heather Snow referred the matter to Student Conduct Officer Dan Moore. On May 19, Moore emailed Klocke to inform him that Moore was investigating whether Klocke had violated UTA's Student Code of Conduct. Moore barred Klocke from attending or contacting anyone in the class pending further notice. Klocke responded to Moore denying that he had violated UTA policy, requesting further information, and asking to be allowed to attend class. On Friday, May 20, Moore and Klocke spoke by phone. Over the phone, Klocke did not provide a counter-narrative or otherwise dispute the allegations.

Moore met in person with Watson on Friday, May 20. Moore thought that Watson came across as "genuinely scared and worried" and "fearful of Klocke." Watson mentioned that shortly after the confrontation, while class was still in session, Watson had emailed the professor Dwight Long and passed a note to his adjacent classmate. Moore later confirmed that Watson had relayed the same version of events to both Long and the classmate.

Moore then met in person with Klocke on Monday, May 23. Klocke denied making homophobic comments. According to Klocke, Watson had flirtatiously called Klocke "beautiful," and Klocke responded by typing, "Stop—I'm straight." Watson continued glancing over at Klocke until Klocke told him a second time to stop. Klocke agreed that Watson had told him to leave. He explained that he later changed seats because Watson was creating a distraction by laughing and using his phone.

Throughout the May 23 conversation, Moore noticed that Klocke continually referred to a piece of paper that "appeared to be a script or outline." When Moore asked Klocke follow-up questions, he observed that Klocke "would consult his script/outline and there were often long pauses before he would say anything." Klocke's responses, when he gave them, seemed to Moore to "lack[] any substance." For instance, Moore recalled that "at one point Klocke said that he was scared of his accuser. [Moore] asked why he was scared, and he wasn't able to tell me why. He just said he was scared."

At the end of their conversation, Moore told Klocke that Klocke could work with classmates on a group project but that Klocke would remain barred from attending class. Moore also arranged for Klocke to take an upcoming May 24 exam in a separate space.

On Tuesday, May 24, Moore interviewed the classmate who had been sitting closest to Watson and Klocke. The classmate had not overheard the conversation and had only noticed that "both students looked really tense." Contrary to Klocke's version of events, the classmate had not noticed Watson laughing or otherwise causing a distraction. After Klocke left, the classmate had asked Watson what happened, and Watson had passed over a note saying, "That guy called me a faggot, told me gays should die and [illegible] I should kill myself. am [sic] actually scared."

Based on these interviews, Moore found Watson "more believable" and concluded Klocke should be held responsible for harassment, but not for making threats. Because Watson was "still very uncomfortable" with being in class with Klocke, Moore hoped to find a solution where Klocke could finish the course without attending. Moore contacted Long, who assured Moore that he could work one-on-one with Klocke outside of class and adjust Klocke's assignments as needed.

On Wednesday, May 25, Moore and Klocke had a final meeting. Moore explained that he had concluded his investigation and was holding Klocke responsible for harassment. Klocke would be placed on disciplinary

probation and would not be allowed to attend class, though he would be able to complete the course with Long's support. He and Watson would be mutually prohibited from contacting each other. The sanction would appear on Klocke's disciplinary record but not on his transcript. Klocke would have two weeks to appeal the sanction. When Klocke expressed concern that Watson might "look up where he live[d]," Moore told Klocke to contact Moore if he felt he was being harassed or stalked.

For the next week, Klocke continued to do coursework, albeit without attending class. He completed portions of the five-part, self-paced final exam, worked on a group project with classmates, and met one-on-one with Long.

On the evening of June 2, 2016, Klocke killed himself by shooting himself with a gun he had purchased on May 20.

II.

In April 2017, Wayne Klocke as administrator of Klocke's estate filed suit against UTA.[1] The estate alleged that UTA's disciplinary actions were motivated by gender bias, in that, for instance, UTA pre-judged Klocke guilty of harassment based on his gender and sexual orientation. The estate sought damages for Klocke's "suffering and anguish prior to his death."

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1. The estate also filed a defamation claim against Watson, which is not at issue in this appeal. *See Klocke v. Watson*, No. 17-11320, 936 F.3d 240, 2019 U.S. App. LEXIS 25343, 2019 WL 3977545, at *1 (5th Cir. Aug. 23, 2019).

In April 2018, UTA moved for summary judgment. The district court granted the motion, concluding that the estate had failed to identify any evidence supporting an inference of intentional discrimination necessary to sustain a private Title IX claim for damages. The district court entered final judgment in favor of UTA, and the estate timely filed a notice of appeal.

III.

We review de novo the district court's grant of summary judgment. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "When the nonmovant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018) (quotation omitted). "All reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment, and any doubt must be resolved in favor of the non-moving party." *Id.* (quotation omitted). "A non-movant will not avoid summary judgment by presenting speculation, improbable inferences, or unsubstantiated assertions." *Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 673 (5th Cir. 2015) (quotation omitted).

Title IX provides that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance."[2] 20 U.S.C. § 1681(a). Title IX is "enforceable through an implied private right of action," and "monetary damages are available in the implied private action." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998). A plaintiff may obtain damages under Title IX "where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). The plaintiff must show that the school's response was "clearly unreasonable in light of the known circumstances." *Id.* at 648. "In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could

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2. As a threshold matter, UTA argues that Klocke, as a matter of law, was never deprived of an educational opportunity or benefit under Title IX. We reject that view. A student barred from attending class is literally "excluded from participation in" an "education program." 20 U.S.C. § 1681. Here, it is undisputed that Klocke was not allowed to attend 9 out of 11 class sessions. The record does not indicate that class recordings were ever made available or even offered to Klocke. The record does show that although Long offered to meet Klocke one-on-one to discuss class material, Long had limited availability over the short summer intercession period. These facts indicate that Klocke experienced a "concrete, negative effect" on his "ability to receive an education." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

UTA cites *Doe v. Valencia College*, 903 F.3d 1220, 1227 (11th Cir. 2018), for the proposition that "unenrolling a student from a class is not a Title IX violation." That is not what the Eleventh Circuit held. Rather, the Eleventh Circuit concluded that a student's Title IX claim failed because there was no genuine issue of fact about the correctness of the challenged disciplinary proceeding.

not identify a response as not 'clearly unreasonable' as a matter of law." *Id.* at 649.

The Supreme Court has "consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). Thus, a school's "deliberate indifference" to a student's claims of sexual harassment by a classmate may amount to an intentional violation of Title IX. *Davis*, 526 U.S. at 643-46. "[R]etaliation against individuals because they complain of sex discrimination" is also "intentional conduct that violates the clear terms of the statute." *Jackson*, 544 U.S. at 183 (citing *Davis*, 526 U.S. at 642).

The Second Circuit has further observed that "[p]laintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). Those in the first category argue that the disciplinary proceeding had an "erroneous outcome" and that "gender bias was a motivating factor behind the erroneous finding." *Id.* Those in the second allege "selective enforcement," i.e., that "regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Id.* Both parties embrace this framework, and on appeal, the estate relies on erroneous outcome, selective enforcement, and retaliation.[3]

3. The estate's opening brief did not discuss its theories of deliberate indifference or archaic assumptions. Those arguments are waived. *See, e.g., Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004).

Appendix A

A. Erroneous Outcome

A plaintiff alleging an erroneous outcome must point to "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding"—for instance, "a motive to lie on the part of a complainant or witnesses, [or] particularized strengths of the [disciplined student's] defense." *Yusuf*, 35 F.3d at 715. "If no such doubt exists based *on the record before the disciplinary tribunal*, the claim must fail." *Id.* (emphasis added). The plaintiff must also demonstrate a "causal connection between the flawed outcome and gender bias." *Id.*

i. Erroneous outcome

The estate argues that Moore's disciplinary decision was based on an "acknowledged lack of evidence." The estate relies on Moore's statements in May 24 emails to Snow that (1) the adjacent classmate "just heard the same line, 'I think you should leave' but nothing else. I'm not sure I have enough here to keep [Klocke] out of class"; and (2) "Bottom line is both are giving very different accounts. I find [Watson's] account more believable, but I do not have anything to corroborate it."

Viewed in the light most favorable to the estate, Moore's May 24 statements do express reservations about finding Klocke responsible and further restricting him from class. But the statements are insufficient to raise a triable issue as to erroneous outcome, because it is uncontradicted that Moore considered the following

in his decision.[4] First, Moore knew that Watson told the same, consistent story in a contemporaneous in-class email to Long, also a contemporaneous note passed to a classmate, and then again in after-class emails and in-person discussions with Long, Snow, and Moore. Second, Moore perceived Watson to be credibly fearful of Klocke at their May 20 meeting.[5] Third, when Moore met Klocke on May 23, he saw that Klocke relied on a written script and was unable to meaningfully answer follow-up questions. Fourth, Moore was told by the adjacent classmate that the classmate did not notice Watson behaving in a distracting manner as Klocke had alleged.[6] Fifth, Moore's common

4. The estate makes a sweeping attack on Moore's litigation declaration for providing "after-the-fact explanations about what [he] supposedly felt or understood." But the estate does not identify any material contradictions or inconsistencies in Moore's sworn statements. The estate cannot avoid summary judgment by making speculative attacks on Moore's credibility. *Lawrence*, 808 F.3d at 673. Rule 56(d) allows a nonmovant to show that "it cannot present facts essential to justify its opposition," and a district court may then allow the nonmovant "time to obtain affidavits or declarations or to take discovery," however, the estate did not seek additional time to obtain further discovery. Fed. R. Civ. P. 56(d). Instead, the day after UTA filed its motion for summary judgment, the estate filed its own motion for partial summary judgment on Title IX liability.

5. Long and Moore also found Watson to be credible. Long, for instance, noticed that after the incident, Watson was "pacing and trying to get my attention," and "sensed that whatever [Watson] had to say was urgent" due to his "large eyes and stiff body language." Snow also recalled that Watson "appeared visibly upset, nervous, and shaken" and was "talking fast."

6. The estate attacks this evidence as hearsay, since the classmate did not himself submit a declaration to support UTA's

sense suggested to him that a person whose flirtation is rejected would not tell the other person to leave and then fabricate and widely circulate a story about being threatened by that person. Sixth, Moore's investigation uncovered nothing supportive of Klocke's account, and the estate in this litigation does not identify any leads that Moore should have or could have pursued. These facts show, contrary to the estate's interpretation of Moore's May 24 statements, that Moore made a finding of responsibility after developing a meaningful record.

ii. Gender bias motivating erroneous outcome

Even if Moore erred in finding Klocke responsible for harassment, the estate has not identified evidence that that gender bias affected Moore's investigation and conclusion. The estate argues that gender bias can be inferred because Watson, who is gay, received preferential treatment over Klocke, who was straight. We need not resolve whether under Title IX, discrimination on the basis of sexual orientation counts as discrimination on the basis of sex, because no such bias can be inferred. *See Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019) (affirming grant of summary judgment to employer based on transgender employee's failure to establish a prima facie case of discrimination under Title VII).

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summary judgment motion. But Moore's recollection of the classmate's statement was not offered to prove the truth of the matter asserted. Rather, the statement was offered as proof of Moore's due diligence before concluding that Klocke was responsible for harassment.

First, UTA had reasonable and non-discriminatory reasons to exclude Klocke, rather than Watson, from class. *See Davis*, 526 U.S. at 649 (conduct in Title IX suit for damages must be "clearly unreasonable"). Klocke's alleged conduct was derogatory and physically threatening; Watson's alleged conduct was not, even if it made Klocke uncomfortable.

The same goes for Moore's decision to not initiate misconduct proceedings against Watson. The estate suggests that Watson sexually harassed Klocke by making "unwelcome sexual advances," but per UTA policy, conduct "intentionally directed towards a specific individual" is not considered sexual harassment unless it "unreasonably interfer[es] with that individual's education . . . or participation in University activities, or creat[es] an intimidating, hostile, or offensive environment." Moore reasonably concluded that a single comment that someone was "beautiful," accompanied by glancing, would not amount to sexual harassment.

Finally, the estate takes issue with Moore's decision to treat Watson's allegations as allegations of harassment, rather than sexual harassment. According to the estate, by declining to investigate Klocke for sexual harassment, UTA deprived Klocke of valuable procedural protections such as a hearing before a neutral decisionmaker. This is not persuasive, because Moore reasonably concluded that Watson alleged only harassment. Insults like "faggot" and comments like "gays should die" squarely fit within UTA's definition of harassment, defined in relevant part as "hostile or offensive speech" such as "threats, insults,

epithets, ridicule, [or] personal attacks" "often based on the victim's appearance, personal characteristics or group membership." UTA defined sexual harassment as "[u] nwelcome conduct of a sexual nature," and it defined verbal sexual harassment to include "propositions to engage in sexual activity," "gratuitous comments . . . of a sexual nature about clothing or bodies," "gratuitous remarks about sexual activities," "persistent, unwanted sexual or romantic attention," "subtle or overt pressure for sexual favors," "exposure to sexually suggestive visual displays," or "deliberate, repeated humiliation or intimidation based upon sex." It was reasonable for Moore to decide that sexual harassment was not at issue, in part because most of UTA's examples focused on conduct that was explicitly romantic or sexually suggestive.[7]

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7. The estate makes much of Snow's pre-suit deposition statement that Klocke's alleged comments constituted "sexual harassment" as defined in the Department of Education's 2011 "Dear Colleague" Letter. *See* United States Department of Education, Office of the Assistant Secretary for Civil Rights, Dear Colleague Letter, (2011), available at http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html . Snow's deposition statement has little bearing on whether Moore reasonably declined to investigate Klocke for sexual harassment under UTA policy. First, the "Dear Colleague" letter's definition of sexual harassment is not identical to UTA's definition. The estate never discusses the overlap between the two definitions—in fact, the estate does not refer to the "Dear Colleague" letter anywhere in its briefs. Second, the estate does not dispute that under UTA policy, it is not Snow's job to assess what charges should be brought, nor did Snow offer such an assessment to Moore here. Snow left Moore free to conduct his own investigation, and Moore independently concluded that the allegations were potentially threats or harassment, but not sexual harassment under UTA policy.

In sum, UTA's disciplinary decisions were reasonable and justifiable on non-discriminatory grounds. An inference of gender bias in these circumstances would necessarily be speculative.[8]

B. Selective Enforcement

A selective enforcement claim needs to allege that either punishment or the decision to initiate enforcement proceedings was motivated by gender bias. In support of a selective enforcement claim, the estate has identified nine female students who were investigated for misconduct but not prohibited from attending a class, either on an interim or a permanent basis. Considering these cases in the light most favorable to the estate, none permits the inference that similarly situated female students were treated more favorably than Klocke. *See Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 345 (5th Cir. 2005) (affirming grant of summary judgment in Title VII case based on failure to identify sufficiently similar comparators). In seven cases, nothing indicated that the complainant shared a class with the accused. For one of the remaining two cases, UTA's investigation began after the shared class had already concluded. In the last case, the accused student called her professor a "bitch," and when the professor asked UTA to

8. Relatedly, in the Title VII context, once a defendant provides a "legitimate, nondiscriminatory reason for its decision," the burden shifts to the plaintiff to show that the reason is pretextual. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994). Our court has not yet settled whether Title VII frameworks of proof are directly applicable to Title IX claims of gender bias. *See Arceneaux v. Assumption Par. Sch. Bd.*, 733 F. App'x 175, 178-79 (5th Cir. 2018).

investigate, the professor had already barred the accused from returning to class.

Significantly, the estate does not dispute UTA's statistics about the rate at which UTA holds men and women responsible for threat or harassment. Those statistics do not show disparities between accused men and women. In the three years preceding Klocke's and Watson's confrontation, UTA investigated 32 harassment complaints, 7 against women and 25 against men. 5 out of 7 women were found responsible (71%) and 15 out of 25 men were found responsible (60%). UTA also investigated 17 threat complaints, 5 against women and 12 against men. 3 out of 5 women were found responsible (60%) and 8 out of 12 men (67%) were found responsible. As to Moore himself, Moore had previously investigated 24 students, 12 men and 12 women, for non-academic offenses. He found 9 out of 12 women responsible (75%) and 10 out of 12 men responsible (83%). Nothing about this data suggests systemic gender bias; indeed, men and women at UTA are found responsible for threat or harassment at remarkably similar rates.

C. Retaliation

The estate argues that UTA held Klocke responsible for harassment in retaliation for Klocke's allegation that he was sexually harassed by Watson. However, the estate cites no additional evidence to support a retaliation claim, beyond the evidence already discussed above.

IV.

For the foregoing reasons, the district court's judgment is AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JUNE 7, 2018

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. 4:17-CV-285-A

WAYNE M. KLOCKE, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF THOMAS KLOCKE,

Plaintiff,

v.

THE UNIVERSITY OF TEXAS AT ARLINGTON, *et al.*,

Defendants.

June 7, 2018, Decided;
June 7, 2018, Filed

MEMORANDUM OPINION AND ORDER

Came on for consideration the motion of plaintiff, Wayne M. Klocke, Independent Administrator of the Estate of Thomas Klocke, for partial summary judgment and the cross-motion of defendant University of Texas at Arlington ("UTA") for summary judgment. The court,

having considered the motions, the responses, the replies, the record, including the summary judgment evidence, and applicable authorities, finds that defendant's motion should be granted and that plaintiff's motion should be denied.

I.

Plaintiff's Claims

Wayne M. Klocke ("Wayne") is the father of Thomas Klocke ("Thomas"), who was a student at UTA. The operative pleading is plaintiff's amended complaint filed April 11, 2018. Doc.[1] 117. In it, plaintiff alleges:

On or about May 19, 2016, during a class at UTA, Nicholas Watson ("Watson"), a gay male student, made unwelcome sexual advances and overtures to Thomas, a heterosexual male student. Disappointed by the rejection, or perhaps fearing that Thomas might complain to UTA about Watson's behavior, Watson contacted Heather Snow ("Snow"), associate vice president of student affairs and dean of students, who helped him draft a complaint against Thomas. Doc. 117 ¶ 3. Snow, aided by Daniel Moore ("Moore"), selectively implemented and enforced an alternate grievance resolution process that was deliberately indifferent to UTA's Title IX obligations and Thomas's rights thereunder. Id. ¶ 4. Thomas's rights to attend class, to communicate with anyone in class, and to enter UTA's business building were suspended. *Id.* ¶ 5.

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1. The "Doe. " reference is to the number of the item on the docket in this action.

From May 19, 2016, through June 2, 2016, Thomas suffered the denial of benefits and privileges of an educational opportunity, program and activity that he was eligible to receive. UTA's misconduct caused harm so severe that it led to Thomas's death by suicide on June 2, 2016. *Id.* ¶ 7.

Plaintiff asserts a cause of action for violation of Title IX, which provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a). Doc. 117 ¶¶ 85-100.

II.

Grounds of the Motions

Plaintiff seeks judgment that UTA violated Thomas's rights under Title IX as a matter of law and leaves for trial the issues of causation and damages. Doc. 122. UTA, in turn, seeks judgment that plaintiff is not entitled to any relief. Doc. 118.

By order signed May 18, 2018, the court, consistent with the authorization contained in Fed. R. Civ. P. 56(f)(2), notified the parties that it was considering granting UTA's motion for summary judgment on the ground that

the summary judgment record as a whole could not lead a rational trier of fact to find that the conduct of UTA about which plaintiff complains caused, or was a significant factor in causing, the death of Thomas. Doc. 133. The court gave each party an opportunity to respond to the order and to the response of the other party. The responses and supporting materials have been filed, Docs. 140-43, and, for reasons discussed hereinafter, there is no need for the filing of replies.

III.

Applicable Summary Judgment Principles

Rule 56(a) of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment on a claim or defense if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The movant bears the initial burden of pointing out to the court that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant can discharge this burden by pointing out the absence of evidence supporting one or more essential elements of the nonmoving party's claim, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. Once the movant has carried its burden under Rule 56(a), the nonmoving party must identify evidence in the record that creates a genuine dispute as to each of the

challenged elements of its case. *Id.* at 324; *see also* Fed. R. Civ. P. 56(c) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . ."). If the evidence identified could not lead a rational trier of fact to find in favor of the nonmoving party as to each essential element of the nonmoving party's case, there is no genuine dispute for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 597, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten,* the Fifth Circuit explained:

> Where the record, including affidavits, interrogatories, admissions, and depositions could not, as a whole, lead a rational trier of fact to find for the nonmoving party, there is no issue for trial.

929 F.2d 1054, 1058 (5th Cir. 1991).

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law.[2] *Celotex Corp.,* 477 U.S. at 323. if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita,* 475 U.S. at 597; *see also Mississippi Prot. & Advocacy Sys.,* 929 F.2d at 1058.

2. In *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (en bane), the Fifth Circuit explained the standard to be applied in determining whether the court should enter judgment on motions for directed verdict or for judgment notwithstanding the verdict.

Appendix B

IV.

Facts Established by Summary Judgment Evidence[3]

Watson and Thomas were students in a class that met from 8:00 a.m. to 11:45 a.m., Monday through Friday, from May 18 to June 2, 2016. On May 19, the second day of class, the two sat next to each other in an auditorium-style lecture hall. During class, Watson posted to Facebook: "The guy sitting next to me just typed into his computer 'ga;ys should die.' Then told me I was a 'fa**ot' and that I should 'kill myself.'" Doc. 124 at 182. At 8:53 a.m., Watson emailed the professor who was teaching the class, saying (in pertinent part):

> During the course of this morning's class, I sat next to a student who made me feel massively uncomfortable. He typed into his computer search bar "gays should die" and then proceeded to call me a "fa**ot" and that I "should consider killing myself." I do not feel safe in the class at this given time given the threatening presence this student has provided.

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3. The court notes that the final pages of plaintiffs brief in response to UTA's motion for summary judgment are devoted to a series of conclusory objections regarding UTA's summary judgment evidence. Doc. 131 at 48-49. As is its custom, the court is giving the summary judgment evidence the weight it deserves. In this regard, the court notes that plaintiff's own list of undisputed facts contains many erroneous citations, as well as misleading and unsupported statements. Doc. 123 at 5-24.

Doc. 129 at 108. Watson approached the professor, Professor Dwight Long ("Long"), after class and Long perceived that whatever Watson had to say was urgent. *Id.* at 95. Long read the email when he returned to his office and reported the comments Watson had made in person and through the email to Jean Hood, the Title IX coordinator for UTA. *Id.*

Watson went to see Snow around lunchtime on May 19. He appeared visibly upset, nervous, and shaken and talked very fast. He said that he feared for his safety and did not want to be in class with Thomas. Doc. 129 at 115-16, ¶ 10. At Snow's request, Watson typed an email addressed to her explaining what had happened. *Id.* at 116, ¶ 11; 165. Snow forwarded the email to Moore. *Id,* at 5, ¶ 7. Snow advised that it would be appropriate as an interim measure to forbid Thomas from attending class and asked Moore to draft a letter to that effect. *Id.* at 6, ¶ 9. Moore sent Thomas a letter stating that he must cease all contact and communications with students in the class and that Thomas was prohibited from attending class and being in the business building until further notice. *Id.* at 22. Moore also sent a letter to Watson, telling him not to contact Thomas. *Id.* at 6, 10. Moore did not consider that the statements Thomas allegedly made fit within UTA's definition of sexual harassment. He considered them to be in the nature of threats or harassment generally. *Id.* at 6-7, ¶¶ 13-17.

At 3:56 p.m. on May 19, 2016, Thomas sent an email that Moore received the next morning. *Id.* at 6, ¶ 12. In the email, Thomas stated that he had received a letter

saying he was involved in an alleged violation; that he was confused by the allegations because he did not violate the Student Code of Conduct; and that he was requesting further information. *Id.* at 48.

On May 20, Moore spoke with Thomas by phone. *Id.* at 7-8, ¶ 18. Thomas stated that he "knew what this was in reference to" and he did not dispute the allegations. Thomas's demeanor was stoic and unemotional; nothing about the call made Moore think Thomas was a victim or was being framed by Watson. Thomas did not protest being out of class and said that they could talk more at a meeting scheduled for the following Monday. *Id.*

At 1021 a.m. on May 20, 2016, Thomas bought a handgun at Academy Sports & Outdoors in Grapevine. Doc. 124 at 239.

On May 20, Moore met with Watson, who explained that he had made a comment about privilege in class and that Thomas had typed "gays should die" on his web browser and showed it to Watson. Watson wrote in his own search bar, "I'm gay." Thomas then acted like he was yawning with his hand over his mouth and said, "Well, then, you're a faggot." Watson told Thomas he should leave. Thomas replied, "You should consider killing yourself." Thomas packed up and left the room, returning about 15 minutes later and taking a different seat. Watson said he passed his notebook to Blake Lankford ("Blake"), a student seated next to Thomas's empty seat with notes regarding what happened. Doc. 129 at 8, ¶ 21. After class, Watson told Long what had happened. *Id.* ¶ 22. Watson

made very clear that he was scared of Thomas and did not feel comfortable being in class with him. Watson seemed genuinely worried and scared and Moore found him to be credible. *Id.* Moore spoke to Long, who verified what Watson had reported. *Id.* at 9, ¶ 24.

On May 23, Moore met with Thomas. Wayne came with Thomas and spoke with Moore, expressing concern that Thomas be allowed back into the class given that it was a short semester. Wayne left and Moore spoke with Thomas alone. *Id.* ¶¶ 25-26. Moore advised that Wayne could meet with them but Thomas would have to sign a release, which Thomas acknowledged but did not request. *Id.* ¶ 27. Thomas told Moore he did not know who made the accusations against him, but that the student sitting next to him had said Thomas was "beautiful." Thomas responded on his web browser, "Stop--I'm straight." The student typed into his own web browser, "I'm gay." Thomas said the student kept glancing at him and Thomas told him to stop. Thomas denied saying, "gays should die," "you're a faggot," or "you should kill yourself." Thomas said the other student was typing into his phone and laughing and Thomas moved across the room because of the distraction. *Id.* at 9-10, ¶ 28. Moore asked Thomas a number of questions, but Thomas kept referring to a sheet of paper he had with him, which appeared to be a script or outline. There were often long pauses before Thomas responded and when he did, the responses were without substance. Moore found Thomas's version of events suspect. *Id.* at 10, ¶ 32. In every conversation with Moore, Thomas's tone was matter-of-fact and calm, lacking any emotion, even when he said he was scared of his accuser. *Id.* at 11, ¶ 33.

On May 24, Moore met with Blake, who said that he heard Watson tell Thomas that he should leave. Blake looked over and saw that Watson and Thomas looked really tense. After about 30 minutes, Thomas left. *Id.* ¶ 37. Blake leaned over and asked Watson what had happened. Watson slid over his calendar with a note of what Thomas allegedly said to Watson. Blake did not observe Watson laughing or causing a distraction. *Id.* ¶ 38. Thomas returned to the classroom about ten minutes later and took a seat on the other side of the room. After class, when Watson approached Long, Thomas was looking at Watson. *Id.* ¶ 37.

On the evening of May 24, Thomas emailed Moore, saying that he felt victimized, but also stating, "I am the one who moved to alleviate any tension." *Id.* at 12, ¶ 40; 90. Moore considered the statement to be inconsistent with Thomas's claim that he had moved because Watson was laughing and causing a distraction. *Id.* at 12, ¶ 40. Moore responded to the email that evening asking Thomas to meet with him the next day and telling Thomas that he had spoken to Long and Long would meet with Thomas one-on-one for any instruction for the class and that Thomas would still work with his group to complete projects. *Id.* at 90. Thomas responded, "Thanks for your work and talking to professor Long. I really appreciate it." *Id.*

On May 25, Moore met with Thomas to explain his findings and discipline. He reiterated that Watson and Thomas were to have no contact. Thomas could meet one-on-one with Long and continue working with his class group on their project. At no time did Thomas protest the decision or ask any questions as to how Moore arrived

at his decision. *Id.* at 13, ¶ 45. Moore explained that the decision could be appealed and the appeal process and that Thomas had 14 days to appeal. *Id.* at 14, ¶ 46. Thomas asked whether the disciplinary record would be available to employers, graduate schools, or law schools. Moore told him that it was not on an academic transcript and that few employers would request it. In any event, Thomas would have to sign a release before the disciplinary record could be provided. *Id.*

Moore and Long sought to make arrangements so that Thomas could still obtain the benefits of the course and obtain course credit despite not being allowed in the classroom. *Id.* at 96, ¶ 17. Thomas took the first exam in the business office on May 24 and received a grade of 66. *Id.;* at 112; Doc. 124 at 117. Thomas took the second exam on or around June 1 and received a grade of 74. Doc. 129 at 96, ¶ 17; 112. On May 31, Long met with Thomas and Long assured Thomas that he was part of the class even though he could not attend; that Long had Thomas "covered"; and that Thomas would get the same grade as every other member of his team on class participation, team presentation, and simulation. *Id.* at 96, ¶ 18. The meeting lasted approximately fifteen minutes. *Id.* ¶ 19. Long kept trying to explain the final exam to Thomas, who cut him off, saying something to the effect of "I got this." *Id.* at 97, ¶¶ 21-22. Thomas finished only the first two of five parts of the final exam, but Long gave him a grade of 75. *Id.* ¶¶ 23, 25. Thomas submitted the last of his answers at 2:14 p.m. on June 2. *Id.* ¶ 25. At approximately 5:20 on June 2, Thomas committed suicide by shooting himself with the gun he had purchased on May 20. Doc. 124 at 279, 281, 239.

Moore made the decision as to the potential policy violations he would investigate. No one told him what he should investigate. He was the sole decision-maker. He determined that Thomas was responsible for harassment but not making a threat. He did not feel pressure from the government or any administrators at UTA in making his decision. Doc. 129 at 15, ¶ 50. He investigated the case in the same manner he investigates all cases. He met with witnesses, reviewed documents, weighed the credibility of the witnesses, and reached a conclusion. *Id.* ¶ 51.

V.

Analysis

In this day and age, it should go without saying that when one student says to another, "people like you should die" or "you should kill yourself," the school must take such statements seriously.[4] It is not the role of the court to second-guess the decisions of school administrators. *Plummer v. Univ. of Houston,* 860 F.3d 767, 772-73 (5th Cir. 2017)(citing *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.,* 526 U.S. 629, 648, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)); *Doe v. Univ. of St. Thomas,* 240 F. Supp. 3d 984, 989-90 (D. Minn. 2017).

As stated, *supra,* Title IX provides that no person

4. That one student bought a gun the day after the incident underscores the seriousness of the situation. Although there is no evidence that UTA had knowledge of the purchase or that Thomas ever considered harming Watson, the fact is that the weapon was obtained and could have been used against a fellow student.

shall, on the basis of sex, be excluded from or denied the benefits of any education program receiving federal financial assistance. The Supreme Court has recognized an implied private right of action for violation of Title IX. *Cannon v. Univ. of Chicago,* 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) . To establish a claim under Title IX, a plaintiff must establish that an educational institution receiving federal assistance intentionally discriminated on the basis of the plaintiff's sex. *Fort v. Dallas Indep. Sch. Dist.,* 82 F.3d 414, 1996 WL 167072, at *3 (5th Cir. 1996).

As another district court has noted, private challenges to disciplinary proceedings under Title IX generally manifest themselves under four broad theories: (1) plaintiffs claiming an erroneous outcome of a disciplinary proceeding; (2) plaintiffs claiming selective enforcement of university procedures to students of different sexes; (3) plaintiffs claiming deliberate indifference to sexual harassment or assault on campus; and (4) plaintiffs claiming a university's actions were based on archaic assumptions about the roles and behavior of men and women.[5] *Pacheco v. St. Mary's Univ.,* No. 15-CV-1131 (RCL), 2017 U.S. Dist. LEXIS 94510, 2017 WL 2670758, at *11 (5th Cir. June 20, 2017). And, retaliation against a person who has complained of sex discrimination is another form of intentional discrimination encompassed by

5. Although UTA seeks judgment on the archaic assumptions theory, Doe. 119 at 44-46, and plaintiff makes a response thereto, Doc. 131 at 38-39, it is clear that plaintiff is not asserting that theory as a basis for recovery. *See* Does. 117 & 123. The court is satisfied that the theory simply does not apply to the facts of this case. *See Pederson v. Louisiana State Univ.,* 213 F.3d 858 (5th Cir. 2000).

Title IX's private cause of action. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 173, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).

In this case, no matter the theory, the evidence simply does not support a finding that defendant intentionally discriminated against Thomas on the basis of his sex. At best, sex played a tangential role. *See Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 165 (5th Cir. 2011). The undisputed facts are that one student made comments that another perceived as threatening. The threatened student cried out immediately via social media to his friends and by email to his professor during the middle of class. After class, the threatened student spoke to the professor, who perceived that the threatened student was genuinely upset. The threatened student met with Snow, who also perceived that he was genuinely upset and afraid. Although Snow may have perceived that the comments were of a sexual nature, she did not impose her view on Moore, who was asked to investigate the matter. Moore recognized that the perceived threat should be immediately addressed and issued the letters forbidding the student who allegedly made the comments from attending class. He then undertook an investigation that led him to conclude that the comments had actually been made. The only other witness to the exchange corroborated that the threatened student told the other he should leave, which he did; when the witness asked what had happened, the threatened student showed him his notes; the student who allegedly made the threat watched as the threatened student spoke with the professor after class; and, the witness did not see the threatened student

laughing or causing a distraction. Moore did not believe the student who allegedly made the threat when he said that the threatened student had propositioned him. And, the statements of that student were inconsistent with his claim of innocence, i.e., that he knew what the meeting was about (that is, why he had been notified to meet with Moore) and that he had moved to avoid the tense situation. Moore made arrangements for the student who made the threat to be able to complete the class. That student did not protest or demand a hearing or appeal from the decision. He expressed gratitude for Moore's help; he met with the professor (whose help he acted like he was not interested in obtaining) and received assurance that he would not be penalized for being unable to attend class; he took the tests and continued to work with his group. Ultimately, for no known reason, the student committed suicide.

To establish an erroneous outcome theory, plaintiff must show that Thomas was innocent and wrongly found to have committed the offense and that gender bias was a motivating factor behind the erroneous finding. *Yusuf v. Vassar College,* 35 F.3d 709, 715 (2d Cir. 1994). Here, although plaintiff repeatedly argues that Thomas was punished based solely on Watson's uncorroborated account, the evidence does not support the argument. Rather, the only reasonable conclusion to be drawn from the evidence is that Watson's account is corroborated. Plaintiff simply disagrees, which is not enough to show actual innocence. *See Haidak v. Univ. of Mass. at Amherst,* No. 14-CV-30049-MAP, 299 F. Supp. 3d 242, 2018 U.S. Dist. LEXIS 38695, 2018 WL 1243956 (D. Mass. Mar. 9, 2018); *Pacheco v. St. Mary's Univ.,* No. 15-CV-1131 (RCL), 2017 U.S. Dist.

LEXIS 94510, 2017 WL 2670758 (W.D. Tex. June 20, 2017); *Doe v. Purdue Univ.,* 281 F. Supp. 3d 754 (N.D. Ind. 2017). Moreover, he has no evidence to raise a genuine issue of material fact as to gender bias. *See Yusuf,* 35 F.3d at 715.

In a selective enforcement claim, a plaintiff alleges that, regardless of guilt or innocence, the decision to initiate proceedings[6] or the penalty imposed was affected by plaintiff's gender. *Yusuf,* 35 F.3d at 715; *Pacheco,* 2017 WL 2670758, at *18. In other words, the plaintiff must show that a person of the opposite sex was in circumstances sufficiently similar to plaintiff's and was treated more favorably by defendant. *Doe v. Univ. of the South,* 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009).

UTA has provided evidence of other student misconduct investigations from 2013 to 2016. Doc. 120, Ex. 15. Plaintiff has not shown that any female in circumstances similar to Thomas's was treated more favorably. *See Gudgel v. Del Mar College,* No. 2:16-CV-513, 2018 U.S. Dist. LEXIS 8130, 2018 WL 472829, at *2 (S.D. Tex. Jan. 17, 2018). In fact plaintiff has not pointed to any comparator in nearly identical circumstances. *See Lee v. Kansas City S. Ry.,* 574 F.3d 253, 259-60 (5th Cir. 2009). And, even if he had identified such a comparator, he has not shown that the same decision-maker was involved. *Lopez v. Kempthorne,* 684 F. Supp. 2d 827, 857 (S.D. Tex. 2010)(comparators are rarely similarly-situated where different decision-makers are involved).

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6. Here the complaint was initiated by Watson; thus, there is no selective enforcement claim based on initiation of the investigation. *Doe v. Purdue Univ.,* 281 F. Supp. 3d 754, 784 (N.D. Ind. 2017).

Appendix B

With regard to deliberate indifference, plaintiff asserts two different theories. First, he says that UTA failed to follow its own policies and procedures in investigating Watson's complaint. Second, he says that UTA was deliberately indifferent to Thomas's claim of harassment by Watson. Doc. 131 at 19. Doc. 117 at 33-35, ¶¶ 92-94; 35, ¶ 97. Neither is supported.

The Supreme Court has never held that there is an implied right of action under Title IX for violation of administrative requirements. *K.S. v. Northwest Indep. Sch. Dist.,* 689 F. App'x 780, 784 (5th Cir. 2017); *Sanches,* 647 F.3d at 169. But even if there is such a right, mere failure to follow policy does not establish deliberate indifference. *Sanches,* 647 F.3d at 169. Rather, the school's response, or lack thereof, to the harassment must be clearly unreasonable in light of the known circumstances. *Id.* at 167. The bar is high and neither negligence nor mere unreasonableness is enough. *Id.* A defendant is not deliberately indifferent where it takes some action. *K.S.,* 689 F. App'x at 794.

Although plaintiff disagrees with the outcome, the record reflects that UTA did consider Thomas's allegations against Watson and determine them to be incredible. And, even if UTA ignored Thomas's allegations, UTA is not liable for damages unless its deliberate indifference subjected Thomas to harassment. "That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 644-45, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). There

is no evidence that UTA's actions caused Thomas to be subjected to harassment by Watson. Rather, UTA directed Watson to have no contact with Thomas and cautioned him that failure to abide by the restriction could result in disciplinary action against him. Doc. 120 at 480.

Further, and in any event, Thomas's allegations against Watson were insufficient to amount to a sexual harassment complaint meriting investigation under Title IX. Specifically, the alleged harassment was not "so severe, pervasive, and objectively offensive that it effectively barred [Thomas's] access to an educational opportunity or benefit." *Sanches,* 647 F.3d at 165. Only claims involving pervasive and widespread conduct are actionable; a single incident is not enough. *Carmichael v. Galbraith,* 574 F. App'x 286, 289-90 (5th Cir. 2014). *See also Doe v. Miami Univ.,* 882 F.3d 579, 591 (6th Cir. 2018); *Haidak v. Univ. of Mass.,* 2018 U.S. Dist. LEXIS 38695, 2018 WL 1243956, at *21.

Finally, plaintiff maintains that UTA retaliated against Thomas because he complained of sex discrimination. The Supreme Court has recognized that retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. *Jackson,* 544 U.S. at 173. "[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional discrimination' on the basis of sex,' in violation of Title IX." *Id.* at 174. Here, the facts do not fit the cause of action.

First, Thomas did not complain of sex discrimination. At most, he reported one minor incident of harassment.[7] Further, Thomas was already under investigation for allegedly having threatened Watson and discipline had already been imposed before Thomas ever mentioned that Watson had propositioned him. Thus, there is no causal connection between Thomas's report and the adverse action. *See Gudgel,* 2018 U.S. Dist. LEXIS 8130, 2018 WL 472829 (summary judgment granted where discipline had been imposed before the plaintiff filed his Title IX complaint). And, as UTA notes, after Thomas made the allegations about Watson, the sanction against Thomas was actually modified in his favor to allow him to work with his group and be in the business school building and take exams. While not dispositive, this tends to show that UTA did not retaliate against Thomas for his report. *Doe v. Salisbury Univ.,* 123 F. Supp. 3d 748, 769-70 (D. Md. 2015).

Plaintiff has not shown that UTA's actions were clearly unreasonable in light of the known circumstances. *Sanches,* 647 F.3d at 167. UTA is entitled to judgment as a matter of law.

7. Despite plaintiff's characterization, it is clear that Thomas did not independently complain about Watson's actions, but rather made the allegations in defense to the accusations made by Watson.

VI.

Supplemental Filings[8]

Upon reading the May 31, 2018 briefs filed by plaintiff, Doc. 142, and UTA, Doc. 140, the court realized that it had been hasty in issuing the May 18, 2018 order raising under the authority of Fed. R. Civ. P. 56(f)(2) of the Federal Rules of Civil Procedure an issue as to causation of Thomas's death. As plaintiff pointed out in his brief, he "does not seek a finding in this case by the trier of fact that the conduct of UTA about which he complains caused or was a significant factor in causing the death of Thomas." Doc. 142 at 1. Thus, there is no need for the briefing on that issue and the court has not considered any of the documents filed in response to the May 18 order in reaching the conclusions expressed in this memorandum opinion and order. For that reason, the court is ordering that such documents be unfiled and stricken from the record of this action.

VII.

Order

The court ORDERS that the court's May 18, 2018 order be, and is hereby, vacated and set aside, and that the May 31, 2018, briefs and appendices, Docs. 140-43,

8. The court notes that the parties have also filed a number of motions to exclude expert testimony. Does. 145-58. These motions are moot in light of the rulings made herein.

be, and are hereby, unfiled and stricken from the record of this action.

The court further ORDERS that plaintiff's motion for partial summary judgment be, and is hereby, denied.

The court further ORDERS that UTA's motion for summary judgment be, and is hereby, granted; that plaintiff take nothing on his claims against UTA; and that such claims be, and are hereby, dismissed.

SIGNED June 7, 2018.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 20, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10857

WAYNE M. KLOCKE,
INDEPENDENT ADMINISTRATOR
OF THE ESTATE OF THOMAS KLOCKE,

Plaintiff- Appellant,

v.

THE UNIVERSITY OF TEXAS AT ARLINGTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before OWEN, SOUTHWICK, and HIGGINSON, Circuit Judges.

Appendix C

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE