**Kilborn v. UIC Case Analysis (by Jason Kilborn)**

**INTRODUCTION**

In its zeal to protect students from speech that made them feel uncomfortable, the University of Illinois Chicago (“UIC”) has violated a school of law faculty member’s rights to freedom of speech, academic freedom, and due process. It denied him an across-the-board merit raise and suspended him from teaching twice—in the spring semesters of 2021 and 2022—with neither notice nor hearing. It is requiring him to undergo 8 weeks of racial sensitivity training before resuming teaching in fall 2022.

**FACTS**

This case arose from a single final examination question, which gave rise to student protests and a UIC Office for Access and Equity (“OAE”) investigation of the exam question, remarks by Prof. Kilborn to two individual students related to the protest over that exam question, and an unrelated set of in-class remarks by Prof. Kilborn in a single class session a year earlier.

**Final exam question and resulting student protest, December 2020**

In December 2020, Prof. Kilborn included on the final exam for his Civil Procedure II course a hypothetical employment discrimination scenario in which a woman sued because she suspected she had been fired on the basis of her race and gender. One question asked students to analyze a devastating piece of evidence, an account from a former manager that she had “quit her job at Employer after she attended a meeting in which other managers expressed their anger at Plaintiff, calling her a ‘n\_\_\_\_’ and ‘b\_\_\_\_’ (profane expressions for African Americans and women) and vowed to get rid of her.” The question appeared exactly like this, with respectfully expurgated references to the racial and gender slurs to make the point clear but to avoid disruption and anxiety. The question had appeared on this exam in exactly this way for the previous ten years, administered to at least a dozen classes that included numerous Black and other non-white students. No one had ever suggested the question was objectionable.

On December 21, 2020, the law school dean summoned Prof. Kilborn to an electronic meeting (due to COVID restrictions, all meetings at this time were held by remote, electronic means) during which the dean revealed that she had been told Prof. Kilborn had “used a racial slur” on his exam, upsetting some students. Prof. Kilborn explained that he had not “used” the word, but had simply included the respectfully expurgated references in the relevant context of an employment discrimination litigation hypothetical. Prof. Kilborn offered to send a note of regret to his class if those oblique references had caused anyone any distress. The dean agreed.

**First Summary Suspension and Medical Exam, January 2021**

On January 12, 2021, the law school dean summarily announced that Prof. Kilborn was being placed on “indefinite administrative leave,” all of his classes were cancelled for the entire semester, and he was forbidden from coming onto campus or from engaging in any university activity. Not until two-and-a-half days later, on Friday afternoon, January 14, 2021, did OAE reveal to Prof. Kilborn the purported reason for this surprise suspension.

A Black male colleague of Prof. Kilborn’s had suggested that Prof. Kilborn speak with a member of the Black Law Students Association about the exam controversy. The student, who had not been in Prof. Kilborn’s class, arranged a remote electronic conversation at 5:00 p.m. on Thursday, January 7, 2021. The conversation eventually lasted 4 hours, until 9:00 p.m., and was generally cordial and constructive, but at one point about an hour into the conversation, the student asked why the law school dean had not shown Prof. Kilborn a student petition criticizing his exam question. Prof. Kilborn responded, using the same common metaphorical expression he had used in a similar conversation with his dean, that perhaps she had not shared the petition with him because she feared that if Prof. Kilborn saw the hateful things said about him in that petition, he might “become homicidal.” The conversation continued after that for several more hours with no indication that the student felt in any way distressed or threatened.

Three days later, the following Monday, January 11, 2021, when several students met (electronically) with the law school dean and other UIC administrators, the student with whom Prof. Kilborn had spoken reported the “become homicidal” comment as a threat. In light of the politically charged situation, the dean and university officials purported to invoke UIC’s Violence Prevention Plan in response to this purported threat.

In a meeting with OAE a week later, after Prof. Kilborn readily admitted the remark but insisted it was an obvious metaphorical expression, he was told he had been placed on leave due to this “threat.” To be cleared of this “indefinite administrative leave,” Prof. Kilborn was required to meet physically, on campus, with university health officials, submit to drug testing, and sit for two hours of examination with a nurse, a social worker, and a doctor, after which Prof. Kilborn was released to full duties without restrictions (though his classes remained cancelled).

**OAE Investigation and Findings, February-May 2021**

On February 17, 2021, OAE notified Prof. Kilborn that it had commenced an investigation into “allegations of race based discrimination and harassment” in that Prof. Kilborn had allegedly “created a racially hostile environment for … non-White students between January 2020 and January 2021, particularly during your Civil Procedure II course.” It indicated a short list of allegations from unidentified sources, offering little factual detail or context. Prof. Kilborn objected to the due process violations in expecting him to respond to such vague allegations from unknown sources, but he attempted as best he could to respond in writing and at an electronic “investigative interview” on February 26, 2021.

Three months later, on May 28, 2021, with no further attempt at clarification with Prof. Kilborn, OAE delivered its “findings letter.” After concluding that allegations of racial discrimination had not been substantiated, OAE concluded that Prof. Kilborn had violated the “harassment” aspect of UIC’s policy because his final exam question and his “responses to criticism of the final exam question” had “interfered with Black students’ participation in the University’s academic program and therefore constituted harassing conduct that violates the Policy.”

OAE never cited any policy language, as the cited policy contains no language that might indicate its scope. UIC’s Nondiscrimination Policy Statement 1100-004 reads in its material entirety as follows: “The University of Illinois System will not engage in … harassment against any person ….” Neither the Statement nor any other public source defines “harassment.”

OAE ascribes a secret gloss to this single word “harassment,” however. OAE asserts the substantive standard to be “conduct … [that] unreasonably interferes with a student’s participation in an academic program.” OAE found this secret standard had been violated on two sets of facts: (1) the exam question from December 2020, along with Prof. Kilborn’s private remarks to two different students in January 2021 concerning the outcry over that exam question; and (2) comments made during a single session of a different Civil Procedure II course, for the first time assigned a specific date a year earlier, 23 January 2020.

The details of OAE’s findings remained unclear until six months later, after a reporter directed a FOIA request to UIC, prompting the release of a previously secret 24-page OAE investigation report. The investigation report revealed substantial new information but still concealed key facts and context that were apparent only upon review of the relevant recordings and documents.

OAE’s fact conclusions were patently misunderstood and misconstrued, divorced from their appropriate context, and misreported by OAE. The investigator selectively quoted single words from email correspondence and audio recordings of a single class session, ignoring immediately adjacent context that reveals her conclusions to be clearly and demonstrably false. The speech involved, and OAE’s demonstrably false conclusions, are set forth in Appendix A, below.

**School of Law Settlement, Subsequent Punishment, Second Summary Suspension**

On June 18, 2021, Prof. Kilborn met with the law school Interim Dean to discuss this hotly disputed case, which Prof. Kilborn warned would lead to litigation if they could not agree on a compromise resolution. The interim dean presented Prof. Kilborn with her tentative “recommendations and requirements” and heard Prof. Kilborn’s counterproposals.

Prof. Kilborn agreed to all but one of the proposed conditions (including class recording and prior notice to the dean before commenting on racial issues to students). He strenuously objected to required participation in sensitivity training on Prof. Kilborn’s supposed “white privilege” and engagement with diverse students. He asserted that such training was both unwarranted and unconstructive, as multiple studies had recently demonstrated.

On July 2, 2021, the interim dean delivered her final resolution, in which she accepted Prof. Kilborn’s proposed compromise on sensitivity training. Training might be mandated only if four semesters of review of class recordings revealed that Prof. Kilborn had failed to maintain a non-harassing classroom environment. Prof. Kilborn accepted this resolution to avoid a lawsuit.

Reneging on this agreed settlement arrangement, the interim dean subsequently imposed surprise punishments on Prof. Kilborn. Despite Prof. Kilborn’s glowing and exceptional performance review, and without warning of any kind, the interim dean informed Prof. Kilborn on September 6, 2021, that he was “ineligible” for an announced across-the-board 2% “merit raise.” The sole basis for this punishment was OAE’s finding of a policy violation. The interim dean claimed—for the first time, and contrary to Prof. Kilborn’s glowing performance evaluation—that he had failed to meet “General Teaching Expectations” requiring all faculty to “act in a collegial manner toward each other, and act with appropriate dignity and respect toward … students.”

Prof. Kilborn immediately informed his lawyer, who sent a demand letter to the school on September 16, 2021. The letter was acknowledged by university counsel on September 22, 2021, and the parties have been in settlement negotiations since then. Shortly thereafter, the Black Law Students Association discovered that Prof. Kilborn was scheduled to return to class in the spring, and they launched a series of protests and a media campaign disseminating false statements about Prof. Kilborn’s speech and demanding his termination. UIC administration bent to this public pressure, publicly denounced Prof. Kilborn, and began to further distance itself from the earlier settlement.

Further reneging on the very terms of their earlier arrangement, on Friday, November 12, 2021, the interim dean notified Prof. Kilborn that he would be required to attend the sensitivity training described in her July letter. This was to occur immediately, before December 10, and as a prerequisite to Prof. Kilborn being allowed to return to teach his assigned spring classes. Nonetheless, UIC officials proceeded to ignore their own arbitrary deadline, delaying for more than a month while purporting to decide what sort of training to impose on Prof. Kilborn.

On Friday, December 17, Prof. Kilborn was finally informed that he was to be summarily suspended from teaching for the entire spring 2022 semester—again with no hearing or prior notice of any kind. His Bankruptcy class was cancelled, and his Secured Transactions class was reassigned to another professor with no experience teaching the course.

UIC officials declared that Prof. Kilborn would be subjected to an 8-week diversity course—20 hours of coursework, required “self-reflection” papers for each of 5 modules, plus weekly 90-minute sessions with a trainer followed by three more weeks of vaguely described supplemental meetings with this trainer. The trainer would provide “feedback regarding Professor Kilborn’s engagement and commitment to the goals of the program.” Only upon satisfactory completion of this program would Prof. Kilborn be allowed to return to class in fall 2022.

**APPENDIX A—Instances of Challenged Speech in Context**

**In-Class Comments, One Year Prior (January 23, 2020)**

OAE’s findings letter makes very brief reference to four “inappropriate, racially-charged comments” in Prof. Kilborn’s Civil Procedure II course 16 months earlier, on January 23, 2020.

**i. Cockroaches**

In its initial notice and findings letter, OAE never offered any hint of the basis for an inflammatory assertion that Prof. Kilborn had “referred to racial minorities as cockroaches.” In its secret investigation report, however, OAE concedes that “Professor Kilborn did not explicitly call a racial minority a ‘cockroach.’” Nonetheless, it stretches to preserve its preconceived notion of a racial slight by asserting that “he referred to plaintiffs who file egregious claims as ‘cockroaches’ in the context of discussing a legal case that involved a racial minority plaintiff.”

The audio recording of that class session clearly reveals OAE’s description of the comment to be false. The discussion related to company directors making a cost-benefit assessment of settling what they considered frivolous litigation. A student asked if it wouldn’t *generally* be more cost effective, over time, to maintain litigation teams to defend, and wouldn’t plaintiffs with frivolous cases be deterred if *any given* defendant-company racked up a sufficient number of wins. Prof. Kilborn’s response, placing the “cockroaches” remark in its proper context, was as follows:

The fact that other plaintiffs see that one other plaintiff lost isn’t a disincentive. If it were, frivolous litigation would have ended long ago, because lots of plaintiffs have been pushed to the wall and lost. You don’t hear about those stories in the media. You hear about idiot people winning $1 million verdict against Subway for having 11.5”-long sandwiches. That’s what makes the press, right, that Subway lost. Not that they win against this ridiculously frivolous case. That wasn’t in the media, only in the legal media, maybe, if you were paying attention. And that’s the problem. If they win, no one hears about this. They only hear about it if they lose, and God forbid that, then all the cockroaches come out of the walls, they’re thinking, right?

The term thus arose in reference to the infamous Subway litigation, not a case involving a minority plaintiff. Moreover, Prof. Kilborn did not characterize *any* person as a cockroach; rather, he was simply using a colorful expression to describe the mindset ofa company like Subway facing frivolous litigation, suggesting that “they’re thinking” (i.e., Subway is thinking) of the terrible parade of horribles that might flow from losing a frivolous case.

**ii. Lynching**

In his written response to OAE’s vague allegation of “making reference … to ‘lynching,’” Prof. Kilborn recalled a discussion in the Spring 2020 class of how an executive at a large bank would likely strategize about a case of racial discrimination in lending. Prof. Kilborn challenging the class to put themselves in the shoes of a bank executive considering settlement. He suggested that the executive might be concerned about biased media reporting, which if the story were not true and the bank had done nothing wrong might be resented by the executive as the bank’s “being lynched” in the public media.

Prof. Kilborn immediately retracted the remark, noted that using that phrase in this context was a poor choice of words, and apologized. OAE noted but did not credit this retraction and apology.

**iii. African American Vernacular English**

In its findings letter, OAE for the first time mentioned Prof. Kilborn’s “using African American Vernacular English (‘AAVE’) accent when referencing a Black artist’s lyrics.” In its investigation report, OAE elaborates that Prof. Kilborn quoted one line from a famous song, “you was doin’ 55 in a 54,” pronouncing the word “fifty-four” as the artist did, “fifty-fo.”

No student had ever raised this issue. It was harvested *sua sponte* by OAE from the audio recording of the class, with no attempt to appreciate the context plainly revealed by the audio recording. Prof. Kilborn was distinguishing the unique facts of a discrimination case under discussion, comparing it to racial profiling by police of young Black men. Prof. Kilborn had heard a particularly apt line in a song on his run music mix that morning, in which Jay-Z describes just such an abusive pretextual racial profile stop, and in explaining to the young Black man why he stopped him, the police officer says, “You was doin’ 55 in a 54.” Recalling this line, in class, Prof. Kilborn pronounced 54 as Jay-Z does in the song, in order to faithfully convey the sound of the song that Prof. Kilborn surmised the class would recognize.

OAE made no attempt to understand any of this. OAE plucked this innocuous phrase from a 90-minute class session for the first time, with no student complaint or even notice to Prof. Kilborn.

**iv. Overgeneralizing references to minorities and implicit bias**

In the final cited comment from that January 23, 2020, class, OAE’s findings letter noted cryptically “when confronted by a Black student during the class because the student viewed these comments as overgeneralizing references to minorities, you referenced your own ‘implicit bias’ as some type of justification.” This allegation differed from the original one in the notice of investigation, which had even more cryptically claimed that Prof. Kilborn had “denounced racial minorities’ participation in civil rights claims,” to which OAE added for the first time in its ultimate findings letter “as part of discussion of modern day extortion theory.”

Prof. Kilborn could only speculate about what this could possibly mean, so after meeting with the OAE in February 2021, he sent OAE an email exchange he had had with a Black female student that seemed relevant to this allegation. He surmised that this again related to discussion of the discriminatory lendingcase mentioned above, and the bank’s management’s settlement strategy in light of their view of this unmeritorious case. There is no such thing as “modern extortion theory,” and the class recording makes no such reference. Rather, Judge Posner used the word “extortion” repeatedly in his dissent in the case to describe the pursuit of what he considered the patently unmeritorious case. Prof. Kilborn referenced this.

As is plainly heard in the audio recording, Prof. Kilborn was generalizing about the mindset of bank directors charged with assessing settlement offers in cases like this. As the earlier portion of the class recording indicates, the idea of “implicit bias” had been introduced as a jargon term for what we would more commonly call simply personal experience, as everyone evaluates the world according to their personal experience, or “implicit bias.” Prof. Kilborn’s reference to “implicit bias” is thus plainly connected to that earlier reference, to indicate that his assessment of a bank director’s mindset is based not on baseless speculation, but personal experience.

In the email Prof. Kilborn provided to OAE, the student initiated the exchange to thank Prof. Kilborn for a “Great discussion in class today” and concluded that his “practical and scholastic approach to instruction of Civil Procedure is well balanced.” OAE mentions none of this.

**Exam Hypothetical and Related Communication**

OAE purported to find a policy violation on three additional related points. The first is the expurgated reference to a racial slur in the December 2020 exam, discussed above. The second and third points involve two private communications with two individual students relating to criticism of that exam. OAE ultimately concluded that these communications violated the harassment policy because they express “anger, dissatisfaction, and disappointment related to issues of race” and they “demonstrate racial insensitivity and even hostility to those voicing concerns about a racially-charged topic.”

**i. “Become Homicidal”**

OAE notes Prof. Kilborn’s assertion that he did not say he might become homicidal, but rather he was describing someone *else’s* state of mind; i.e., that his dean might have feared that he might become homicidal if he were to see the petition. OAE also notes Prof. Kilborn’s immediate and open acknowledgment that he said this, and that it was a metaphorical expression, that could not reasonably have been perceived as a threat. OAE “viewed [this] as unpersuasive.”

OAE concedes that the conversation was with a single student, but it goes on to assert that comments in that private conversation “became known by and affected a group of Black students who learned about them.” OAE does not recognize that Prof. Kilborn played no role in disseminating this information and had no expectation that his private conversation would be so misconstrued and then spread to third parties with whom Prof. Kilborn had no relationship. It also does not acknowledge that the student did not report the conversation until four days later in a Black Law Students Association meeting with university officials.

OAE buttresses its conclusion of harassment by claiming that the student also alluded to a few other words that allegedly occurred during that four-hour conversation, such as referring to students expressing dissent as “enemies,” suggesting that the student was calling Prof. Kilborn a “‘liar,” and “articulated [a] desire to go after people who ‘come at me.’” OAE never mentioned these comments to Prof. Kilborn and never attempted to get Prof. Kilborn’s side of the story.

**ii. Expression of pain to white female former student**

OAE’s final basis for its finding of harassment was that Prof. Kilborn “responded in early January expressing anger and displeasure with students’ objections in a manner that created retaliation concerns for Black students with a January 4, 2021 email that verbally chastised a student for signing the BLSA letter that you referred to as a ‘horrible, horrible letter,’ and ‘attack letter,’ that was ‘vicious’ and ‘cruel,’ and that led you to feel and to write that your ‘hand of help had been bitten off.”

Prof. Kilborn provided this email to OAE on his own initiative after their meeting in February 2021, again on the basis of his speculation that this might correct their misunderstandings. OAE selectively quoted from this single email to a white female former student (a fact that OAE chose not to reveal). In early January 2021, someone had shown Prof. Kilborn the signature page—and only the signature page—of the Black Law Students Association’s petition, and he was surprised to see the name of this white female former student for whom he had written letters of recommendation on short notice.

The email expresses no “anger.” Rather, it opens by expressing how “painful” it was to see the former student’s name on the petition, and the immediately following paragraph, which OAE ignored, continues reassuringly, “I’m not criticizing you, and it hurts that anyone would even dream that I would seek retribution against anyone about all of this—all of these people are and will always be welcome in my classes. But a few of the familiar names on that letter—with not one person ever, ever reaching out to me—is painful beyond description.” This is not language of anger or intimidation; this is language of pain, reassurance, and attempted reconciliation. This first email concludes, “My heart is absolutely broken by all of this.” OAE ignored all of this.

OAE also disregarded a responsive email, the first in the email chain Prof. Kilborn gave to OAE. This email was sent after the student responded, “I’m sorry that you feel betrayed, that wasn't my intention and it is heartbreaking to think that I caused anyone such pain.” Prof. Kilborn replied, “I admire your support of your colleagues. I support them too.” OAE’s mischaracterizations are plainly contradicted by this supportive language, which OAE ignored.

OAE asserted that this heartfelt email was “intimidating and threatening given Prof. Kilborn’s position of authority” over the BLSA students. OAE never asked Prof. Kilborn about this, but Prof. Kilborn had no position of authority of any kind over these students. OAE fails to identify any way in which Prof. Kilborn could have retaliated against any of these students even if he were so inclined, which his email clearly indicated he was not.