



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS -- REGION VII

October 17, 2014

XXXX XXXX XXXX
XXXX XXXX XXXX, XXXX
XXXX XXXX XXXX
XXXX XXXX, XXXX XXXX

Re: OCR Docket # 07142200

Dear XXXX XXXX:

On April 21, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Garden City Community College (College), Garden City, Kansas, alleging discrimination on the basis of disability and retaliation. This letter is to confirm the College has voluntarily submitted a Resolution Agreement (Agreement) to resolve allegations 1 and 2. For the reasons set out below, we have determined there is insufficient evidence to conclude that the College retaliated against the Complainant as alleged in allegation 3 of the complaint.

Specifically, the Complainant alleged the College:

1. discriminates against individuals on the basis of disability by failing to make the College's website accessible to individuals with visual impairments, resulting in communications with persons with disabilities that are not as effective as communications with persons without disabilities;
2. discriminates against individuals on the basis of disability by failing to comply with the 2010 Americans with Disabilities Act Standards for Accessible Design (2010 Standards) in the Arts Center parking lot and adjoining sidewalks; in the Athletic Department parking lot and adjoining sidewalks; and in the Vocational Technology parking lot and adjoining sidewalks; and
3. retaliated against him after he complained about the College's website and parking lots by restricting his communication with College employees, as stated in a letter dated September 20, 2013.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.

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- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.
- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits recipients of Federal financial assistance from the Department from discriminating on the basis of race, color, or national origin. The Title VI regulation at 34 C.F.R. § 100.7(e) also prohibits retaliation. The Title VI regulation prohibiting retaliation is incorporated, by reference, into the regulation implementing Section 504 at 34 C.F.R. § 104.61. The Title II regulation at 28 C.F.R. § 35.134 contains a similar retaliation prohibition.

As a recipient of Federal financial assistance from the Department and a public entity, the College is subject to Section 504, Title II, and the regulations prohibiting retaliation. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR applies a preponderance-of-the-evidence standard to determine whether evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

OCR investigated the Complainant's allegations against the College. OCR considered information the Complainant provided in his complaint and conducted telephone interviews with the Complainant on April 23 and May 13, 2014, and received documents from the Complainant on April 25, 2014. OCR received documents and information from the College on July 1, 2014, and conducted a site visit and interviews with the College's attorney and College administrators on August 27, 2014. OCR carefully considered all of the information obtained. OCR's determination regarding the applicable legal standards, findings of fact, and the analysis and conclusion regarding allegation 3 are set forth in this letter.

Allegation 1

The Complainant alleged the College discriminates against individuals on the basis of disability by failing to make the College's website accessible to individuals with visual impairments, resulting in communications with persons with disabilities that are not as effective as communications with persons without disabilities.

The Complainant told OCR that he conducted a test on the College's website during a fall 2012 course and the website failed to comply with the Section 508 Standards for Electronic and Information Technology. He said he sent the results to the College, but he does not believe any changes were made to the website.

A Department Assistive Technology Testing Engineer (testing engineer) conducted a test of the College's website and provided a report dated August 8, 2014. The testing engineer did not conduct a page by page review of the College's website; the report identifies a sample of compliance concerns:

- Images lack alternative text;
- Security puzzles not tagged to be read by assistive technology;
- PDFs, including the application for admission, the accommodations handbook and the student handbook, are not tagged to enable a screen reader to view them;
- Videos lack captions and audio descriptions and transcripts are not accessible to keyboard users;
- Pages are dependent on style sheet to maintain format and be fully understood by a user;
- The HTML markup does not provide information for a screen reader to navigate through tables;
- The "Dropdown Menu" on the home pages cannot be read by assistive technology and cannot be accessed by keyboard users;
- The controls on the Home Page Carousel are not available to assistive technology users;
- Pop-up windows to contact the College cannot be accessed by the keyboard;
- Online forms cannot be completed by users of assistive technology because the fields are not labeled properly.

Prior to the completion of OCR's investigation, the College submitted a signed Agreement (copy enclosed) on October 16, 2014, that, when fully implemented, will address allegation 1 of the complaint, and specifically the issues identified through the testing engineer's review. The Agreement requires the College to develop and implement a Website Accessibility Corrective Action Strategy that will allow a person with a visual impairment or other print-related disability to use the College's website in an equally effective and equally integrated manner as someone without a disability; develop and publish a Website Accessibility Policy; and review and revise its grievance procedure and specifically state the grievance procedure may be sued by a student, faculty member, staff member, or member of the public to file a grievance regarding a website accessibility barrier. Please consult the Agreement for further details.

OCR considers allegation 1 resolved effective the date of this letter and will monitor the College's implementation of the Agreement. When OCR concludes the College has fully implemented the terms of the Agreement, OCR will close the complaint. If the College fails to carry out the Agreement, OCR may resume the investigation.

Allegation 2

The Complainant alleged the College discriminates against individuals on the basis of disability by failing to comply with the 2010 Americans with Disabilities Act Standards for Accessible Design (2010 Standards) in three parking lots on campus and on the adjoining sidewalks.

OCR conducted a site visit to the College on August 27, 2014, and inspected the fine arts parking lot, the VoTec/library parking lot and the DEPAC parking lot. OCR inspected the parking lots for compliance with the 2010 Americans with Disabilities Act Standards for Accessible Design (2010 Standards).¹

The College reported that renovations for all three parking lots are currently projected. Bids for construction on the fine arts parking lot went out in the spring of 2014 and construction on the parking lot is to begin in the fall semester of 2014. The College is planning to request bids for renovations to the VoTec/library parking lot in the spring 2015. Construction is projected to begin after graduation in the spring 2015. Finally, renovations are scheduled to start and be completed in 2016 for the DEPAC parking lot. The renovation may be a two-year project because of the size of the lot.

During OCR's site visit, OCR inspected the parking lots for compliance with the sections of the 2010 Standards applicable to the number and size of designated accessible parking spaces and the accompanying signage, the access aisles for designated parking spaces and the curb ramps and ramps on the accessible routes from the parking lots to the building entrances.

Prior to the completion of OCR's investigation, the College submitted a signed Agreement (copy enclosed) on October 16, 2014, that, when fully implemented, will address allegation 2 of the complaint. The Agreement requires the College to create a plan for renovating the

¹ The 2010 Standards were adopted by the Department of Justice (DOJ) in September 2010. The 2010 Standards took effect on March 15, 2012 and replace DOJ's original ADA standards. The 2010 Standards were immediately available for use as an alternative to the original 1991 standards. Between September 15, 2010 and before March 15, 2012, educational institutions could choose between the 1991 Standards and the 2010 Standards. Facilities constructed or altered on or after March 15, 2012, must comply with the 2010 ADAAG Standards. According to the College, there have been no alterations to the fine arts parking lot or the VoTec/library parking lot since 1985 and 1974, respectively. Concrete islands and light poles were added to the DEPAC parking lot in 2002. Although the College reported that alterations had not been made to two of the parking lots since the date of construction, it advised OCR that it was planning to renovate all three parking lots. As the renovations must comply with the 2010 Standards, OCR inspected the parking lots according to those standards.

three parking lots, and assures the renovations will adhere to the 2010 Standards. Please consult the Agreement for further details.

OCR considers allegation 2 resolved effective the date of this letter and will monitor the College's implementation of the Agreement. When OCR concludes the College has fully implemented the terms of the Agreement, OCR will close the complaint. If the College fails to carry out the Agreement, OCR may resume the investigation.

Allegation 3

The Complainant alleged the College retaliated against him after he complained about the College's website and parking lots by restricting his communication with College employees, as stated in a letter dated September 20, 2013.

Legal Standard

The regulation implementing Title VI at 34 C.F.R. § 100.7(e) states no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. The Title VI regulation prohibiting retaliation is incorporated, by reference, into the regulation implementing Section 504 at 34 C.F.R. § 104.61. The Title II regulation at 28 C.F.R § 35.134 contains a similar retaliation prohibition.

When OCR investigates retaliation allegations, it uses a four-part *prima facie* analysis. A *prima facie* case of retaliation is established by showing: 1) an individual engaged in a protected activity, such as participating as a witness in a protected activity or filing a complaint; 2) the recipient was aware of, or had knowledge of, the protected activity; 3) the recipient took adverse action against the individual contemporaneously with or subsequent to the individual's participation in the protected activity; and 4) there was an inferable causal relationship between the adverse action and the individual's participation in the protected activity. OCR presumes a causal connection exists between an individual's protected activity and a recipient's adverse action when there is a close proximity in time between the protected activity and adverse action. Once OCR has established a *prima facie* case of retaliation, OCR exams whether the recipient can articulate a legitimate, non-discriminatory reason for its action. If the recipient asserts a reason for its actions, OCR analyzes whether the reason articulated by the recipient is a pretext, or cover-up, for retaliation.

Findings of Fact

The Complainant began classes at the College in January of 2012 when he took a Web Design course in the fall 2012 and enrolled in additional Computer Information Systems (CIS) classes in the spring 2013. The Complainant told OCR he had several complaints

about his classes, including network errors, access to student folders and loss of instructional time due to technical issues with the computers.

The Complainant emailed the College's board of trustees on January 17, 2013, to share his complaints about his fall 2012 and spring 2013 classes. The January 17, 2013 letter did not include any complaints regarding the accessibility of the parking lots or website. The Complainant told OCR he expressed his concerns about the accessibility of the parking lots and website in April 2013 by including these complaints in communications to the administration. OCR did not obtain written confirmation of the Complainant's complaint about the accessibility of the College's website, but the College's executive vice president confirmed the Complainant had communicated concerns about the accessibility of the College's website.

OCR reviewed copies of communications from the Complainant to the College from January through September 2013. The Complainant sent several emails to the College administrators that included complaints about the CIS program, among other general complaints about the College and including complainants about the condition of the College's parking lots.

On May 5, 2013, the Complainant emailed the president and vice president of instructional services, notifying them that the computer issues had not been remedied; specifically that computers would not boot up, computers would not authenticate to the server and students were having issues logging on to student folders to save their work. He sent another email on May 7, 2013, reiterating his complaints and notifying the president and the vice president of instructional services that he had sent his complaints to the Board of Regents, Senator Powell, and the accreditation board.

The Complainant submitted a Kansas Open Records Act (KORA) request on May 21, 2013, requesting financial records pertaining to the CIS department and CIS personnel certifications and qualifications.

On June 4, 2013, the Complainant sent a letter to the board of trustees, identifying several concerns, including the following: qualifications of the information technology director, expenditures for information technology training without accompanying certification, installation of cables, security and use of student computer folders, and maintenance of campus parking lots. On June 23, 2013, the Complainant sent an email to the president, the executive vice president and vice president of instructional services with links to pictures of parking lots on campus. The Complainant also sent an August 26, 2013 letter to the board of trustees stating:

the parking lots are still neglected, the uneven sidewalks which were identified as ADA problems are still unfixed.

The Complainant sent a letter to the vice president of instructional services in September 2013, stating the following:

If you wish a public spectacle with legal action then go for it. Even if I don't get support from ACLU and other public legal entities I am willing to foot the bill myself. I think a public spectacle subpoenaing students, staff, and "informal satisfaction surveys" would be quite entertaining for the community.

The Complainant also sent an email to the executive vice president on September 13, 2013, stating the following:

I am glad to see that some issues are being slowly addressed. I really would hate to see this situation end up in a public litigation which would be embarrassing to the college. Information that you hold dear could be subpoenaed into evidence. Wrongly accusing faculty and staff could end up there. I am in communication with the American Civil Liberties Union over this whole issue concerning student rights.

On September 20, 2013, the president of the College sent the Complainant a letter (communications letter), stating the following:

Since May 2013, Garden City Community College, primarily, Dee Wigner, Executive Vice President, has been receiving emails from you, and responding when appropriate, to those emails.

Since the initial records requests in May, the subject and tone of your emails have changed. Several of your observations and criticisms of GCCC led to reviews by administration of the areas of concern involved, and when appropriate, changes were made. For that, GCCC is appreciative. However, your emails have become increasingly adversarial, and at times, they have contained unwarranted personal attacks on GCCC staff. Certainly, as you have informed us many times, you have rights as a citizen of Garden City and Finney County, as a taxpayer, and as a GCCC student, to voice your opinions and concerns, and take those opinions and concerns to whomever you so choose.

*Several of your emails have contained threats that you will pursue legal action against GCCC. At this point, because you have repeatedly threatened to bring in third parties to pursue legal action against GCCC, or in the alternative, that you might pursue independent legal action, you are instructed that all future correspondence and emails, other than KORA requests which comply with statutory requirements, are to be forwarded to counsel for GCCC and the Board of Trustees, Randall G. Grisell. His contact information is as follows:
[Contact information]*

You certainly have a right to forward correspondence and emails to the Board of Trustees as a group, or to individual members of the Board of Trustees, since they are elected officials.

However, it would be my expectation that they will notify Mr. Grisell of the receipt of any document from you since you have threatened litigation against GCCC.

The Complainant told OCR the communications letter violated his rights and impaired his ability to take and receive a quality education. The Complainant told OCR he received the communications letter because of the complaints he had raised about the security of the computers in the computer lab, about the qualifications of the information technology director and because of the open records requests he made to gather information about these issues. The Complainant told OCR he believes the College sent him the communications letter to compel him to stop pursuing all of his complaints, including the web accessibility and parking lots complaints. He said the communications letter impaired his ability to receive an education because after receiving the letter, he did not feel comfortable going to the College.

The Complainant withdrew from his classes two weeks after receiving the communications letter. The Complainant said he withdrew from the College on the advice of legal counsel who advised him to distance himself from the College.

OCR interviewed the College's attorney (attorney) and the president and executive vice president (vice-president) of the College regarding the decision to direct the Complainant to communicate with the attorney. The attorney said that the Complainant had threatened legal action in the two communications quoted above and that when someone threatens legal action, or says they have consulted an attorney, he advises the College that communications should be directed to him.

The attorney and president were aware of the Complainant's communications that threatened legal action. The attorney said he received copies of the communications in which the Complainant threatened legal action, as well as previous communications from the Complainant to the College. The vice president said she consulted the attorney soon after the Complainant's initial communications to ensure that she was responding to his requests appropriately. The attorney was involved at the outset with the Complainant's KORA requests. The attorney said he advised the vice president how to respond to the KORA requests. The vice president said when she received an email from the Complainant, she forwarded it to the attorney and the president, including the email communication sent to her that includes the Complainant's threat of legal action. The president told OCR he became aware of the Complainant's threats to pursue legal action through the Complainant's correspondence with the College. The president confirmed that he had seen both of the communications above which threaten legal action.

The president said it is protocol to refer individuals to communicate with the attorney when the College senses a pattern of allegations and concerns against the College. He said it is prudent and in the best interest of the College for people in this situation to communicate with the attorney. The president said he would be derelict in his responsibility to the College if he did not refer threats of litigation to the attorney. The vice president also said when

someone says they have an attorney or are going to take legal action against the College, she involves the attorney.

The attorney said he and the president decided in September 2013 that future correspondence from the Complainant should be directed to the attorney. The communications letter to the Complainant was drafted by the attorney and signed by the president. The vice president said she was consulted on the decision to direct the Complainant to communicate with the attorney. She said she had a telephone conference with the president and the attorney between September 13 and 20, 2013. She said the three discussed how the College should react to the Complainant's communications; she said the attorney advised that communication with the Complainant should go through him.

The attorney, president, and vice president told OCR the communications letter was not meant to impede the Complainant's ability to communicate his concerns about the College or to compel him to cease communication with the College. The attorney said the College did not send the letter to the Complainant because of his previous requests or complaints.

OCR asked if other students in the past have been instructed to direct communications to the attorney. The attorney said the College has never had a legal issue with a student. The College acquired a manufactured home park south of the College which the attorney described as confrontational. When some of the tenants who did not want to move threatened legal action in 2013, the president ceased communications with the tenants and the attorney communicated with the tenants through their spokesperson.

Analysis and Conclusion

In determining whether the College retaliated against the Complainant, OCR must first determine whether the Complainant engaged in a protected activity. A protected activity involves making a complaint, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under the regulations enforced by OCR, or similar such activities, such as advocating for rights guaranteed by these regulations. Because the Complainant raised concerns about the accessibility of the College's website and the condition of the parking lots, including whether the parking lots comply with federal accessibility requirements, including Section 504 and Title II, OCR has determined the Complainant engaged in a protected activity.

To establish the next element of a *prima facie* case of retaliation, OCR must determine the recipient was aware of, or had knowledge of, the protected activity. This is an essential element of a *prima facie* case of retaliation because even if adverse action is taken against an individual, if the person or entity responsible for the adverse action had no knowledge of the protected activity, then OCR cannot conclude that the adverse action was taken as result of the protected activity. The evidence here demonstrates the Complainant began raising complaints about the College, including the accessibility of the parking lots and website, in January of 2013 and both documentation and interviews with College administrators support

the conclusion that the College was aware of the Complainant's protected activity. The College attorney, president and vice-president confirmed they were aware of the Complainant's protected activity.

The next step in determining whether a *prima facie* case of retaliation exists is to determine whether the College engaged in adverse action to the Complainant. In order to determine whether an action is adverse, OCR must determine whether the College's action significantly disadvantaged the Complainant in his ability to gain the benefits of the College's program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further the protected activity, or if the individual was, because of the challenged action, precluded from pursuing discrimination claims. To make this determination, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had or could reasonably have a deterrent effect. Merely unpleasant, transient, or inconvenient incidents usually are not considered adverse. OCR makes this determination on a case-by-case basis and in light of all the facts and circumstances of the case.

The Complainant alleged the College engaged in adverse action by requiring him to communicate with the College's attorney after September 20, 2013. Based on a preponderance of the evidence, OCR concludes the College's September 20, 2013 directive to the Complainant that future complaints be directed to the College's attorney was not an adverse action against the Complainant. Although the Complainant told OCR he did not feel comfortable going to the College after receiving the communications letter, the communications letter did not prohibit the Complainant from raising future complaints with the College. In fact, the communications letter advised him that he was free to communicate with the board of trustees individually or as a group. It also advised him that the instruction to direct communications to the attorney did not apply to any future KORA requests. Based on its review of the letter, OCR has determined the directive to communicate with the attorney in the communications letter did not objectively or substantially restrict the Complainant's access to the College's educational opportunities.

Although OCR has determined the College did not engage in an adverse action against the Complainant, even if the action was sufficiently impactful to be considered adverse, the College provided a legitimate nondiscriminatory reason for directing the Complainant to communicate with the attorney. The president said it is protocol to refer individuals to communicate with the attorney when the College senses a pattern of allegations and concerns against the College. He said it is prudent and in the best interest of the College for people in this situation to communicate with the attorney. The president and attorney's decision to advise the Complainant to communicate with the attorney after receiving two communications that included threats of legal action was reasonable and is reinforced by the timing of the letter to the Complainant. Based on interviews and reviews of communications, at the time of the September 20, 2013 letter, the Complainant had been raising concerns and complaints about the College since January of 2013. It was not until

the College received communications threatening legal action that the College directed the Complainant's future communications to the attorney. This sequence of events further supports the College's legitimate nondiscriminatory reason for issuing the directive.

OCR concludes that a preponderance of the evidence does not support a finding that the College retaliated against the Complainant because of his complaints against the College. Consequently, OCR is closing allegation 3 as of the date of this letter.

As noted above, OCR considers allegations 1 and 2 resolved effective the date of this letter and will monitor the College's implementation of the Agreement. When OCR concludes the College has fully implemented the terms of the Agreement, OCR will close the complaint. If the College fails to carry out the Agreement, OCR may resume the investigation.

The determinations discussed in this letter are not intended and should not be construed to pertain to any compliance issues under the regulations implementing Section 504, Title II, or any other statute enforced by OCR that may exist but are not specifically addressed herein.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXXX@ed.gov.

Sincerely,
/s/ Joshua Douglass
Joshua Douglass
Supervisory Attorney

Enclosure