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Details of the James Harwood investigation and records battle

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Chief Justice John D. Minton Jr. listens to UK's lawyer during oral arguments heard by the Kentucky Supreme Court in UK's lawsuit against the Kernel on Friday, Oct. 23, 2020, at the Kentucky Supreme Court in Frankfort, Kentucky. Photo by Michael Clubb | Staff.

Michael Clubb

James Harwood, at the time an associate professor of entomology at UK, resigned from his position in February 2016 after being accused of sexual harassment. The terms of his resignation agreement stated that he would receive pay and benefits until that August with no direct contact with UK faculty, staff or students.

Background

In 2016, the Kernel made an open records request to UK for documents pertaining to the case, which UK denied. The Kernel appealed to the Kentucky Attorney General, who ruled that UK had no legal right to withhold records under the Kentucky Open Records Act. UK announced it would sue the Kernel in an attempt to appeal the decision, a statement which, despite the Kernel already receiving 122 pages of redacted records, they followed through on in September 2016.

The lawsuit prompted wide responses both at UK and across the state. Though UK's Board of Trustees initially took no action in regard to the lawsuit, UK added a sexual misconduct history check to its hiring process.

At a later meeting in October 2016, the Board of Trustees mentioned that walk-ins to UK's Violence Intervention and Prevention center have decreased since the investigation was reported on by the Kernel. That November, a week after the Kernel reported that other Kentucky public universities had begun following UK's lead in denying records, the UK Feminist Alliance and others protested UK's handling of the case.

The case's legal history

In January 2017, a Fayette County Circuit Court judge ruled in favor of UK, citing the Family Educational Rights and Privacy Act. The Kernel brought the decision to the appeals court.

Oral arguments were heard in the appeal in September 2018, and in May 2019, the court ruled in favor of the Kernel, ordering UK once more to comply with the Open Records Act and give the Kernel more documents.

UK asked the Kentucky Supreme Court to reveal the appellate court's decision, a request that was granted in December 2019. However, the verdict did not come until March 28, 2021.

The Supreme Court decision

The court unanimously ruled in favor of the Kernel and ordered UK to turn over the documents by May 28, finding that “the University failed to comply with its obligations under the ORA [Open Records Act] and that the trial court clearly erred in finding the entire investigative file exempt from disclosure.”

“It's very unusual to get an opinion of that length which includes language so critical of one of the party's actions,” said Tom Miller, one of the Kernel's attorneys.

However, the Supreme Court's opinion appeared to significantly restrict the ability to obtain details of any alleged sexual misconduct — even, in this case, whether the misconduct was sexual harassment or sexual assault, a distinction that carries different levels of repercussions.

The court argued that these details should not be revealed since it was conceivable that victims could somehow be identified by this information, Miller said.

UK's refusal to follow the law came at a considerable price, Miller said. The university paid \$52,368.47 in outside counsel from 2016 to April 2021, UK spokesperson Jay Blanton said. Miller said that the university's total bill includes its payment of \$30,000 of the Kernel's legal fees and an estimated \$100,000 to its own attorneys.

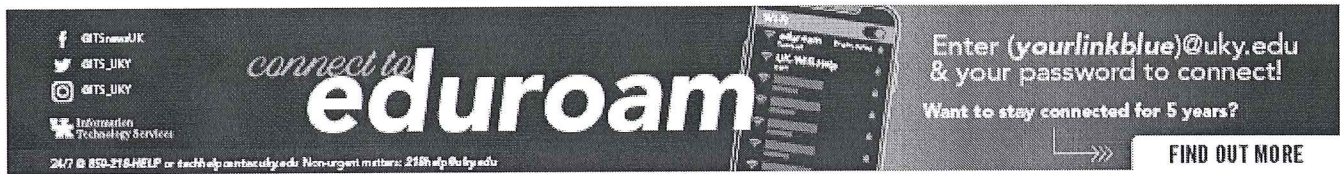
The documents

The Kernel received the documents on May 28, 2021, but after reviewing them, objected, stating they were overly redacted. It requested that UK reveal the details of Harwood's described misconduct, the locations where it took place and the “angry emails” Harwood allegedly sent to students involved with the investigation.

UK refused, saying this information could potentially identify the victims.

Rather than take UK back to court, the Kernel decided alongside its attorneys in August to not pursue any further litigation so as to not potentially reverse any progress made in the Kentucky Supreme Court win. If the Kernel had challenged the redactions and lost, the university may theoretically have been able to cite the court opinion as legal precedent to redact important investigation details in future open records requests.

Miller said his main concern was that the judge would disagree with the Kernel and “write an opinion that would somehow restrict the ability of the Kernel and the students to get information and documentation from UK going forward,” had the Kernel decided to challenge the redactions.



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Game over: UK can no longer hide behind its lawsuit

Editorial Board

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The Kentucky State Capitol on Friday, Jan. 29, 2021, in Frankfort, Kentucky. Photo by Michael Clubb | Staff.

Michael Clubb

You may or may not have heard of James Harwood, a former associate professor at the University of Kentucky who was allowed to resign in 2016 after he was accused of sexual harassment and sexual assault.

The reason you might not have heard of him is because for six years, UK fought and eventually lost a legal battle with the Kentucky Kernel over the investigation files dealing with Harwood.

Now, years later, here is what we know:

- UK used the Family Educational Rights and Privacy Act, a protection of students' educational records, as a reason to withhold the files from the Kentucky Kernel.
- The Kernel did not want the victims' names, and wanted the university to redact names and identifiers from the documents before turning them over. However, UK still refused to hand over the documents, rendering its FERPA argument invalid.
- The Kernel obtained the documents after then Attorney General Andy Beshear said they should be public.
- UK's President Eli Capilouto later said that by publishing an article about the investigation, the Kernel was releasing "Salacious details." After this statement, he refused to give formal investigation documents.
- The Kernel took UK to the Court of Appeals for violating the Open Records Act.
- The Supreme Court unanimously ruled in favor of the Kernel in *Kernel Press v. University of Kentucky*. The court decided that there may be redactions, but UK cannot exempt the entirety of the documents from disclosure.

Within the redacted investigation documents, the Title IX Coordinator and investigator Martha L. Alexander wrote, "Complainants presented witness and documentary evidence that was sufficient to support a finding that the alleged behavior more likely than not occurred."

The Kernel is unsure why Harwood was allowed to resign and keep his health benefits for four months after his resignation date. Harwood was also given confidentiality and non-disparagement disclosures in his resignation agreement.

UK spokesperson Jay Blanton told the Kernel that to fire him, the university would have to revoke his tenure. That process would take up to two years, which Blanton described as “lengthy,” before UK proceeded to join a six year legal battle with the Kernel over the records.

Blanton said that tenure revocation is too long of a process for UK because it wanted to get the threat off of campus as soon as possible.

However, because of its provisions, Harwood’s resignation agreement protected him from disclosing the allegations to any future employers, including universities.

So why did UK allow Harwood to resign? Why did it keep the documents private for so long?

Money was not an issue for UK, as Blanton said the university spent \$52,368.47 for its own outside counsel for the case, in addition to paying \$30,000 of the Kernel’s legal fees.

The answer: UK wanted to protect the brand of being a safe environment for students to live and learn. What good parent wants to send their child to a school with a sexual predator among its faculty? The university knows that a happy student becomes a happy alumnus, ready and willing to keep supporting their alma mater for years after walking across the stage at graduation.

UK tried to play the long game.

In reality, UK has only shown it’s willing to put the safety of its students at risk in order to maintain an appealing image.

But in the end, after six long years of fighting Kernel journalists, advisors and attorneys, UK has reached the same outcome it would have by following the law and turning investigation documents over to the Kernel.

Thanks for playing, UK. But when we lose sight of the truth, no one wins.