

IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE NORTHERN DISTRICT OF
FLORIDA

S B,

CASE NO: 4:16-cv-00613-MW-CAS

Plaintiff,

v.

FLORIDA AGRICULTURAL AND MECHANICAL
UNIVERSITY BOARD OF TRUSTEES,

Defendant.

**RESPONSE TO MOTION TO PRECLUDE THE WORDS "RAPE" AND "SEXUAL
ASSAULT" AT TRIAL (ECF 100)**

Plaintiff S.B., by and through undersigned counsel, hereby responds in opposition to Defendant's Motion to Preclude the words "Rape" and "Sexual Assault" at Trial Pursuant to Federal Rules of Evidence 403 and 701 (E.C.F 100), and states:

1. Defendant seeks to sanitize the Plaintiff's presentation of evidence in this case by precluding the use of the terms "rape" and "sexual assault." With all due respect, the effort is disingenuous; it defies the evidence and seeks to alter reality and the presentation of true evidence to the jury. Notably, Defendant provides no alternative terms that it would find acceptable to use in lieu of these words that are commonly used to describe exactly what Plaintiff complains she suffered three times.

2. In fact, if Defendant's motion is granted, it would be impossible to present all of the documentary evidence in the case without, oddly and conspicuously, reacting the words "rape" or "sexual assault" from those documents. Further, throughout this case, the lawyers and witnesses in depositions have routinely used the words "rape" and "sexual assault" to refer to the

facts of the case; use of the terms has certainly not been confined to Plaintiff's experts or witnesses. For example:

a. In his deposition testimony, defense expert, Professor Oren Griffin, used the word "rape" no less than seven times in his answers to questions, and "sexual assault" no less than 19 times.

b. In her deposition, Ms. Carrie Gavin, the Defendant's Title IX Coordinator, uses the word "rape" in at least two of her answers and "sexual assault" at least three times

c. In his deposition, FAMU on-campus mental health therapist, who treated Plaintiff, used the term "sexual assault" at least six times in deposition answers.

d. In his deposition, Tallahassee Police Detective Scott Angulo, who investigated one the three attacks at issue in this case, used the term "sexual assault" at least six times and "sexual battery" several additional times.

3. Throughout the deposition testimony in this case, witnesses have responded to numerous deposition questions (without objection) that use the terms "sexual assault" and "rape" (as well as similar terms such as "sexual violence" and "sexual misconduct.") These are terms the witnesses themselves routinely use in their professional lives; to expect them to avoid use at trial would be to defy their use of terms used by them daily. It would also render impeachment of any witnesses at trial based on their deposition testimony virtually impossible to accomplish, without literally altering questions already put to them under oath.

4. Key documents in this case, that will most certainly be exhibits at trial, including document created by FAMU officials themselves, use the terms “rape” and “sexual assault,” as well as the similar terms “sexual battery.” For example:

a. The FAMU campus police report which relates to Plaintiff’s first rape at issue, uses both the terms “rape” and “sexual battery” – terms written by the FAMU police officer, not Plaintiff. ECF 33-2 at 2.

b. FAMU issues in its Student Health Services a document entitled, “Sexual Assault Protocol.” ECF 79 at Tab D.

c. FAMU’s own published non-discrimination policy, the very policy that lies at the heart of this case, defines “sexual misconduct” by using the term “sexual assault.”

5. Defendant’s argument that use of the terms “sexual assault” and “rape” would somehow confuse the jurors by giving jurors the “false impression” that the three assailants were convicted of the crimes, or that the terms are “legal terms” that would improperly suggest something to the jury, is spurious at best. Jurors can readily understand, and testimony can make clear, that crimes occur for which arrests and conviction do not result. Such facts are within ordinary understanding.¹

¹ The converse of Defendant’s argument would also be true, in theory. One could equally suggest that by forcing Plaintiff to sanitize her claims and avoid using the terms “rape” or “sexual assault” would indicate to the jury that she was not actually so victimized. Furthermore, “rape” is not, in fact, a legal term. The functional equivalent under Florida law is “sexual battery.” Fla. Stat. § 794.011(h).

6. Moreover, defense witnesses have themselves used the excuse of inaction against the perpetrators that they could not act because the assailants were not arrested or convicted. See, e.g., Deposition of N. Rollins, E.C.F. 79-5 at 34 – 37.

7. Furthermore, Defendant’s argument that none of the three accused will have the opportunity to respond to Plaintiff’s claims at trial is simply incorrect. One of the three has testified in this case in deposition. Defendant is free to subpoena any of the three to appear at trial. And Defendant’s own campus police officer has stated his belief that at least one of the three name assailants is, in fact, guilty. E.C.F. 79-12 at 7.

8. It is equally spurious to suggest, as FAMU does, that it is unable to present “countervailing evidence” to disprove that Plaintiff was sexually assaulted. In fact, FAMU officials reached that very conclusion as to the third assailant, the only one it actually “investigated.” FAMU took no action beyond taking a campus police report on the first assailant, declined in writing to act on the second assailant (E.C.F. 79 at Tab K), and found the third assailant “not responsible” without even speaking to him (E.C.F. 79-17 at 31 – 32.)

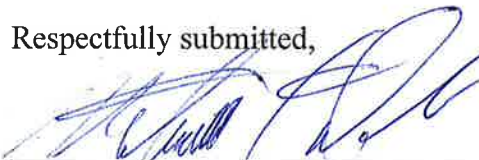
9. It is equally absurd, and arguably offensive, for the defense to suggest that Plaintiff cannot state that she was subjected to a “rape” or “sexual assault” because she would be “lay witness” rendering a legal opinion. People are capable of stating that they have been the victim of a crime. For example, a person who knows that their car is no longer in their driveway where they parked it can certainly state that their car was “stolen” without being a lawyer or law enforcement officer. It is offensive to suggest that a woman cannot testify that she was “raped” when a man, without obtaining her consent, forced himself onto her, against her verbal protests

and physical resistance, and shoved his sexual organ into her. She certainly understands what has happened to her and can testify to that, and this is precisely what she has testified to in her deposition and even recorded in her own handwriting on the very Title IX form that FAMU officials provided to her for that purpose. See, E.C.F. 79 at Tab K at 11 – 13 (“... I told him stop ... I was trying to slide away from him and he pulled me on my leg ... I told him to stop, but he didn’t ... I told him stop ... I was saying stop stop and he wouldn’t ... I felt his penis ... I yelled stop, get off me ...”)

10. Defendant’s reliance on *Ojeda v. Louisville Ladder, Inc.*, 410 F. App’x 213 (11th Cir. 2010), the only authority it cites, is inherently misplaced. There, a Plaintiff, a “handyman,” was prevented from offering, by affidavit, his own opinions about the defective design of a ladder in opposition to a defense motion for summary judgment. He lacked an affidavit from anyone with the necessary scientific expertise to so opine. In contrast, it does not require someone with expert insight to state that Plaintiff has described what was done to her as “rape.”

WHEREFORE, based on the foregoing, Plaintiff respectfully requests that all relief sought in Defendant’s motion be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2018, I electronically filed a true and correct copy of the foregoing via the Court's E-Filing Portal and served upon those listed below:

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