

Gebser, Davis Decisions Beginning to Provide Guidance in Harassment Cases Instituted Under Title IX.

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By: Ken Kozlowski, JD.

In this article we will look at recent decisions handed down by various federal courts subsequent to the United States Supreme Court decisions of *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 119 S.Ct 1661 (1999). Before proceeding to the cases, a synopsis of the latter two decisions may be helpful.

Gebser, a high school student, had a sexual relationship with one of her teachers. She did not report the relationship to school officials. The couple was discovered having sex, the teacher was arrested and his employment was terminated. The school district had not distributed an official grievance procedure for lodging sexual harassment complaints or a formal antiharassment policy as required by federal regulations. *Gebser* filed suit against the district and sought damages under Title IX of the Education Amendments of 1972. *Lago Vista* was granted a summary judgment. The Fifth Circuit affirmed, holding that school districts were not liable under Title IX for teacher-student sexual harassment unless an "employee with supervisory power" over the offending employee actually knew of the abuse, had the power to end it, and failed to do so. The Supreme Court affirmed the Fifth Circuit and held that damages could not be recovered unless a school district official who "at a minimum" had authority to institute corrective measures on the district's behalf had actual notice of, and was deliberately indifferent to the misconduct. Any type of recovery based on the principles of either respondeat superior or constructive notice were at odds with Congress' basic objective of providing an opportunity for voluntary resolution of any harassment problems.

A year later in *Davis*, the Supreme Court was called upon to decide a case dealing with peer-to-peer harassment that included sexual advances. The District Court held that peer harassment provided no ground for a Title IX private cause of action for damages. That decision was affirmed by the Eleventh Circuit. In reversing the decision, the Supreme Court reiterated its holding in *Gebser* of requiring deliberate indifference and actual knowledge on the part of school authorities. The Court also went further and added that the harassment had to be so severe, persuasive, and objectively offensive that it could be said to deprive the victim of access to the educational opportunities or benefits provided by the school. Thus, peer-on-peer harassment was added to the protective umbrella of Title IX.

The following cases have been decided using the principles originated within the Gebser and Davis decisions:

Reese v. Jefferson School District No. 14J, 208 F.3d 736 (9th Cir. 2000)

In this case, the school district excluded four female students from their commencement ceremony for throwing water balloons at boys in a boys' restroom. The female students claimed they were retaliating for alleged harassment committed by male students. The females had never reported any harassment prior to the water balloon incident, and the males did not admit to any misconduct. The Title IX action alleged that the district was liable for the harassment allegedly committed by the boys during the school year. The court, relying on Gebser and Davis, found the school district not liable because the plaintiffs had failed to show the district was deliberately indifferent to sexual harassment of which it had actual knowledge.

Murrell v. School Dist. No. 1, Denver, Co., 186 F.3d 1238 (10th Cir. 1999)

A Mother, as guardian ad litem for her daughter, brought suit against a school district for alleged knowledge of and failure to remedy sustained sexual harassment, including assault and battery of a developmentally and physically disabled student. The district court had held that Title IX provided no cause of action against a school district for student-on-student sexual harassment. The appeals court, after oral argument, abated the case pending the Davis decision. After Davis was handed down, the appeals court analyzed the case in light of that decision. The court held that there was actual knowledge and deliberate indifference on the part of requisite personnel within the school district. The school principal herself was aware of the harassment and the court imputed her knowledge to the school district. The case was reversed and remanded to the district court.

Wills v. Brown University, 184 F.3d 20 (1st Cir. 1999)

Wills, a graduate of Brown University, filed suit against the university and a professor alleging "hostile environment sexual harassment" and "quid pro quo sex harassment." The professor had allegedly pulled Wills on to his lap, rubbed her stomach, and twice touched or rubbed her breasts. She filed a complaint with Brown and the professor was reprimanded and put on probation. In March of 1994, after repeated complaints against the professor were filed, his employment was terminated. Wills' harassment claims were disposed of by a directed verdict in federal district court. Wills appealed the district court's ruling. Wills specifically appealed the district court's decision that disallowed into evidence any mention of sexual harassment of other students after the professor's reprimand and probation in December of 1992. The court ultimately held that although Brown's handling of the harassment claims was arguably inept, Wills could not prove that, in her case, the probation and reprimand did not stop the professor's harassment.

of her personally. Because Brown had taken a timely and reasonable measure to end the harassment, Wills Title IX claim failed and evidence of further harassment committed against other students was not relevant to her case.

Kinman v. Omaha Public School Dist., 171 F.3d 607 (8th Cir. 1999)

Kinman brought a Title IX hostile environment sexual harassment suit against the school district, several school officials, and a high school teacher with whom Kinman had a homosexual relationship. After bouncing between the district and appeals courts, the Eighth Circuit was again called upon to render a decision in light of Gebser. In its previous decision, the appeals court had used the standard for school district liability under Title IX of whether the district knew or should have known of the harassing behavior. In light of Gebser, the court found there was actual knowledge but that the district and its personnel had investigated the allegations and initiated termination proceedings once they obtained conclusive proof of the relationship between Kinman and the teacher. Thus there was no deliberate indifference and Kinman's Title IX claim failed.

Morse v. Regents of University of Colorado, 154 F.3d 1124 (10th Cir. 1998)

Angela Morse and Stacey Handley claimed that while enrolled as students in the University of Colorado's ROTC program, they were subjected to acts of gender bias and harassment that created a sexually hostile educational environment. They filed suit under Title IX against the University. The University denied liability, stating that they were not liable for acts of members of the ROTC because the members were not agents of the University subject to University control. The district court, in dismissing the claim, had analyzed it before Gebser was decided and adopted the view that institutional liability under Title IX was governed by agency principles. The appeals court, which issued its decision post-Gebser, stated that Gebser clearly rejected the theories of vicarious liability and agency liability. In this case, the court decided that an ROTC instructor and a senior cadet, the ones accused of the harassment, were under University control because the ROTC program was offered by the University. The appeals court reversed the dismissal of the Title IX claim, holding that it could be reasonably inferred that the University was responsible for the acts of the two ROTC members. The students had also reported the incidents to a University dean and the University Affirmative Action Officer, both of whom presumably had the authority to address the alleged discrimination and to institute corrective measures.

Crandell v. New York College, Osteopathic Medicine, 87 F. Supp.2d 304 (S.D.N.Y. 2000)

Colleen Crandell sued the New York College of Osteopathic Medicine and the New York Institute of Technology, alleging that she was subject to sexual harassment throughout much of her training and during her internship at St.

Barnabas Hospital. The court viewed the harassment as ranging from "tasteless and insensitive to egregious." In all, the court reviewed eight specific instances of harassment. Only one of the incidents, however, was reported by Crandell. She reported that incident to an attending physician in charge of all medical students at the hospital where the harassment occurred, and to NYCOM's Associate Dean of Clinical Affairs. Fearing for her career, she did not disclose any of the other harassment incidents. That course of action, according to the court, proved fatal to all claims under Title IX with the exception of the one she had reported. Under Gebser, actual notice is a requirement under a Title IX claim and even though Crandell's reticence may have been understandable, the court had no choice but to dismiss the bulk of her claims.

Warren ex rel. Orlando v. Reading School District, 82 F. Supp.2d 395 (E.D.Pa. 2000)

A student's mother discovered that he was engaging in inappropriate physical contact with a teacher and reported it to Berks County Children and Youth Services. The teacher was suspended with pay and ultimately resigned his position. The student brought a Title IX claim against the school district and won a \$400,000 jury verdict. The district appealed, claiming no actual knowledge of the events as required under Gebser. The court found that the jury was presented with ample evidence to find that the school's principal had actual notice of, and was deliberately indifferent to the teacher's misconduct. Another boy's father had reported some inappropriate contact between his son and the teacher to the principal and to the school's guidance counselor. There were also two supervisory conference memoranda that detailed discussions with the teacher concerning "physical contact" and "horseplay" within the classroom during recess. This was enough, the court decided, to impute actual knowledge to the school district through the principal. The principal had enough authority to take action to remedy the situation, but did not.

Turner v. McQuarter, 79 F Supp.2d 911 (N.D.Ill. 1999)

Meredith Turner sued her former basketball coach and Chicago State University alleging she was coerced into pursuing a sexual relationship with the coach. Chicago State argued that it had no actual notice of the relationship. Turner put forth that Chicago State knew of the inappropriate relationship because official college records indicated that both Turner's and the coach's home addresses were identical. No other notice to school officials was given. The court looked at two possibilities for actual notice: the athletic director or board of trustees via the school records, or the coach herself as an official in charge of the scholarship program. The court disposed of the former by stating that identical addresses did not provide actual notice of misconduct, and that it was hard to imagine under what circumstances the addresses would have come to the attention of school officials. The court also found no actual notice imputed to Chicago State via the coach. If the coach was not the harasser, she certainly could have served to

satisfy the notice requirement if her assistants, trainers, or players were committing harassment. As in *Gebser*, the argument that a harasser having actual knowledge of the conduct would fulfill the requirement did not fly. Turner's complaint was dismissed in accordance with the Supreme Court's decision in *Gebser*.

Sherman ex rel. Sherman v. Helms, 80 F. Supp.2d 1365 (M.D.Ga. 2000)

Middle school student LaKisha Sherman and her mother sued the board of education, among others, following her alleged rape by a custodian in October 1996. The incident was not reported or discovered before the middle school uncovered it during its own investigation. Also in October 1996, several other students reported that the custodian was making sexual advances toward them. A subsequent investigation uncovered the Sherman incident. The school board claimed no actual knowledge of any incident. Sherman disputed that by pointing out that the first report of sexual harassment by the custodian came about one week prior to the alleged rape. The court stated that the school had taken appropriate measures with the custodian after the first reports came in by warning him of termination if the harassment continued. The custodian denied any harassment on his part, and was not fired at that time. The court held that complaints of harassment from students other than LaKisha Sherman did not amount to actual knowledge by school district officials that the custodian would sexually assault another student not involved or mentioned in the complaint. After becoming aware of the Sherman situation, the principal of the school took immediate action and the school superintendent terminated the custodian's employment. Sherman's Title IX action was dismissed.

Doe v. Dallas Independent School District, 220 F.3d 380 (5th Cir. 2000)

A summary judgment handed down in favor of the defendant school district in a lower court was affirmed by the Fifth Circuit. Plaintiffs had alleged "deliberate indifference" on the part of a school principal who had been informed of a fondling incident between a teacher (John McGrew) and a pupil. The principal investigated by interviewing the student, speaking with his mother, teacher, and the one accused of fondling. She also warned McGrew that if the allegation proved true, he would be "dealt with." The principal then concluded, incorrectly as it turned out, that the allegation was untrue. The court held that the principal's response was adequate and did not constitute deliberate indifference. This was so even though McGrew was later convicted in state court on one count of aggravated sexual assault and two counts of indecency with a child. He was sentenced to one life sentence and two twenty-year sentences.

Gant v. Wallingford Board of Education, 195 F.3d 134 (2nd Cir. 1999)

This case involved an allegation of intentional race discrimination against a six-

year-old child. The student was initially placed in a first-grade class after transferring to his new school. Two weeks later, he was transferred to a kindergarten class. The student was African-American, and the school was 1-2% African-American. The student was also subjected to racial name calling by other students. The student's father complained, and the school superintendent investigated the racial insults as well as the kindergarten transfer. The superintendent found that there was no "persuasive evidence" that the student had been subjected to constant abuse of a racial nature, and that the transfer was appropriate. A lawsuit was commenced, naming the school district and various school officials and teachers as defendants. The district court granted summary judgment in favor of the defendants, holding that the response to the racial incidents did not amount to deliberate indifference. The transfer was also found to be justified based on the records, reports, and assessments performed by school officials prior to the transfer. The appeals court affirmed the judgment, borrowing the Davis court's reasoning on deliberate indifference.

Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999)

Annette Litman alleged that a professor (Eugene Norris) became infatuated with her, routinely telling her that he loved her and asking about her sex life. She also accused Norris of stalking her on campus, as well as via e-mail. Litman eventually filed a sexual harassment complaint against Norris with George Mason University's (GMU) Equity Office. The Equity Office ordered Norris to avoid contact with Litman, but refused to investigate the complaint further, characterizing Litman's allegations as a "fishing expedition." Litman then sought intervention by GMU's president. GMU failed to undertake any investigation.

Unable to locate a professor to supervise her senior research project, Litman alleged that GMU's faculty refused to interact with her once the sexual harassment complaint became known. Litman then sent "suggestive and hostile e-mail" messages to certain faculty members that resulted in sexual harassment charges being lodged against her. She was tried before GMU's Judicial Board, found guilty, and expelled. Her complaint against Norris was also tried, with the result being a finding that Norris had not violated GMU's sexual harassment policy. Litman then filed a Title IX action against GMU for discrimination and retaliation. GMU moved to dismiss by invoking Eleventh Amendment immunity. The district court denied GMU's motion, saying it had waived the immunity by accepting Title IX funding. The funding was conditioned on an "unambiguous waiver of immunity" codified in 42 U.S.C. §2000d-7(a)(1). GMU appealed. The appeals court affirmed, looking to Gebser and Davis for guidance as to the spending power of the federal government. The court found that the government "conditions an offer of federal funding on the promise of the recipient not to discriminate" and "also conditions the funds on the recipient's consent to be sued in federal court for an alleged breach of the promise not to discriminate." It appears, at least in the 4th Circuit, 11th Amendment immunity is not available to

those receiving Title IX funds.

Adusumilli v. Illinois Institute of Technology, 1999 U.S. App. LEXIS 17954 (7th Cir. 1999)

Adusumilli alleged that on twelve separate occasions, four male professors and six male students (who were also police officers) had subjected her to sexual harassment. She also alleged that after complaining about the harassment, she was given "unfair grades." The district court ruled that she had failed to state a Title IX claim, and dismissed her complaint. She appealed.

The four alleged acts of harassment by the professors involved "ogling" and "unwanted touching" of her arm and back. Five of the eight student acts involved similar touching of the hand, shoulder, back and leg. One of the other three incidents involved a kiss on the cheek at graduation. The last two incidents involved touching of the top and bottom of Adusumilli's breast. She complained about only two of the incidents to school officials: the touching of her right shoulder by a student named "Sam," and the touching of her breast by another student. The court stated that Illinois Institute of Technology (ITT) could have known of the incidents only if Adusumilli had complained about them to school officials, as required under *Gebser* and *Davis*. Adusumilli never alleged that any of the professors were themselves school officials. The court then looked at the two incidents that were actually reported. The court saw those as single incidents of student misconduct. Each incident ceased as soon as it occurred, and was not repeated. The court stated that they were convinced that neither incident involved "pervasive" and "offensive" harassment of the type that would be actionable under Title IX.

The court also disposed of the retaliation claim by reviewing her complaint and deciding that Adusumilli herself recounted a "variety of grounds" for the poor grades. She had, in essence, pleaded "herself out of court." The district court's determination was affirmed.

Elgamil v. Syracuse University, 2000 U.S. Dist. LEXIS 12598 (N.D.N.Y. 2000)

Lisa Elgamil's odyssey started soon after entering Syracuse University's Child and Family Studies Department as a doctoral candidate. She completed the requisite course work, but continually failed to pass all of the written comprehensive exams required of all candidates to continue their pursuit of the doctoral degree. Dr. Jaipaul Roopnarine was her advisor, as well as serving as the exam coordinator for the entire department. On her first attempt at the exams, she passed two and failed two. The exams are independently graded by two evaluators. Roopnarine authored and graded two of her exams. She retook the two failed exams and failed one, despite being given the same questions. This time, Roopnarine was not one of the evaluators. Elgamil complained to the chair of the department, Norma Burgess, that she could no longer work with

Roopnarine because he yelled at her, was rude to her, and was not responsive or helpful. She gave no indication of sexual harassment. Elgamil was assigned a new advisor, Melissa Clawson. Roopnarine had no further contact with Elgamil. Elgamil complained further about Roopnarine for the purpose of ensuring that he would not be involved in her third attempt to pass the exams. For the first time she mentioned sexual harassment, but did not elaborate beyond her previous claims of rudeness and non-responsiveness. Clawson wrote the exam, and Burgess was responsible for overseeing the grading. Elgamil again failed the exam. Burgess notified Elgamil of the failure, and offered to let her take it a fourth time (against usual department procedure) or be recommended for a masters degree based on her graduate work. Elgamil rejected both offers. Six months later, she filed a sexual harassment complaint against Roopnarine with the University. Aside from her previous complaints, for the first time Elgamil alleged that Roopnarine had 1) talked to her about his sex life, and 2) told her about a dream he had in which he, Elgamil, and Elgamil's husband were present. The University concluded that even if the alleged conduct was true, it did not constitute sexual harassment. Elgamil then filed a Title IX suit that alleged a hostile educational environment. The University moved for a summary judgment.

The court analyzed Elgamil's hostile environment claim and decided that the incidents were neither severe nor pervasive. Even if they were, however, Elgamil's claim would still have failed. The court stated that by the time of the third exam, Roopnarine had no involvement with her educational experience. The court called that fact fatal to her claim.

Other Cases to Consider

Vaird v. School District of Philadelphia, 2000 U.S. Dist. LEXIS 6492 (E.D.Pa. 2000)

Female-on-female assault and sexual assault. Court held that school district was not deliberately indifferent to sexual harassment.

Morlock v. West Central Education District, 46 F.Supp.2d 892 (D.Minn. 1999)

Allegations of teacher-student and student-student sexual harassment. Summary judgment motion denied as court found that officials had notice and actual knowledge of harassment. Court also found that a reasonable jury could find that officials with authority to remedy the situation responded with deliberate indifference.

Massey v. Akron City Board of Education, 82 F.Supp.2d 735 (N.D.Ohio 2000)

Another summary judgment motion denied because the record contained sufficient evidence to raise an issue as to whether the Board had actual

knowledge of an employee's wrongful conduct and was deliberately indifferent.

Waters v. Metropolitan State University, 91 F.Supp.2d 1287 (D.Minn. 2000)

Summary judgment granted to University because plaintiff offered no evidence that her sexual relationship with professor was "unwelcome."

Manfredi v. Mount Vernon Board of Education, 94 F.Supp.2d 447 (S.D.N.Y. 2000)

Plaintiff's second-grade daughter was subjected to hitting, spitting, and pushing from a male classmate. Summary judgment granted to Board because the court found what took place between the youngsters did not amount to sexual harassment.