



Eighth Circuit upholds the dismissal of a non-student's Title IX claim

By Steven M. Richard

A plaintiff identified as “K.T.” filed a lawsuit against Culver-Stockton College (the “College”), alleging that she was sexually assaulted at age 16 when she visited the campus as a high school junior and a potential recruit for the College’s women’s soccer team. K.T., who did not enroll at the College, alleged Title IX violations, which a federal district court dismissed. On August 1, the United States Court of Appeals for the Eighth Circuit affirmed the judgment in the College’s favor. The Eighth Circuit did not address whether a plaintiff’s non-student status precludes a Title IX claim against a college or university. Instead, the court ruled that K.T.’s allegations regarding the College’s actions failed to state a plausible Title IX claim upon which relief may be granted. In this alert, we analyze the Eighth Circuit’s ruling, focusing on pleading requirements in a Title IX student-on-student harassment claim. *K.T. v. Culver-Stockton College*, No. 16-3617 (8th Cir. 8/1/17).

Background

During her visit to the College, K.T. attended an on-campus fraternity party, where she was served alcohol and allegedly sexually assaulted by a fraternity member who was enrolled at the College. In her complaint filed in the United States District Court for the Eastern District of Missouri, K.T. alleged that the incident was reported to the College during the same weekend as the party and that the College did nothing in response other than cancel a scheduled conference with K.T. and her parents. She asserted that the College acted with deliberate indifference by failing to (1) take reasonable preventative measures such as supervising K.T. during the visit and (2) investigate and provide treatment for K.T. once the College learned of the incident.

In granting the College’s motion to dismiss, the district court concluded that K.T. did not have the right, or the standing, to bring a Title IX claim as a non-student of the College. Additionally, the court ruled that, even accepting the truth of the complaint’s allegations, K.T. failed to allege that (1) an appropriate person at the College had actual knowledge of previous incidents of similar harassment to alert it to a substantial risk of further abuse, and (2) the College’s response to K.T.’s allegations was deliberately indifferent and caused her to undergo harassment, made her vulnerable to it or subjected her to further discrimination. Upon the entry of a judgment in the College’s favor, K.T. appealed to the Eighth Circuit.

Can a non-student bring a Title IX claim?

The standard for holding a funding recipient liable in damages under Title IX was established in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). *Gebser* held that a school may be held liable for damages under Title IX only where a school official “with authority to institute corrective measures” had “actual knowledge” of the harasser’s sexual misconduct, and the school acted in response with “deliberate indifference.” *Gebser*, which involved teacher-on-student sexual harassment, described “deliberate indifference” as akin to “an official decision by the [institution] not to remedy the violation.” One year later, in *Davis ex rel. LaShonda D v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court extended *Gebser*’s Title IX liability analysis to student-on-student harassment.

In K.T.’s lawsuit against the College, the district court analyzed *Davis* to determine whether the plaintiff’s status as a non-student precludes her Title IX claim. Particularly, the district court reviewed *Davis*’s holding that “in the context of student-on-student harassment, damages are only available where the behavior is so severe, pervasive and objectively offensive that it *denies its victims the equal access to education that Title IX is designed to protect.*” See *Davis*, 526 U.S. at 652 (italics added). It also cited to *Davis*’s conclusion limiting “private damages actions to cases *having a systematic effect on educational programs or activities,*” necessitating that a systematic effect at the defendant school was a prerequisite to a Title IX claim. *Id.* at 652-53. Because K.T. did not encounter a systematic effect on any educational programs or activities at the College, the district court concluded that she cannot assert a private action for damages against the College under Title IX.

The district court also relied upon a related rationale—statutory standing—to conclude that K.T. cannot sue the College. This analysis focused on the question of whether Congress afforded this plaintiff the right to sue the College under Title IX’s text. The district court analyzed whether Congress, in enacting Title IX, or the Supreme Court, in recognizing an implied private right of action for damages under Title IX, intended to grant legal standing to a plaintiff to sue a school that he or she has not attended. The district court concluded that the answer is “no,” noting that the plaintiff’s argument would result in any person invited to visit a college campus having standing to sue for student-on-student harassment under Title IX.

On appeal before the Eighth Circuit, K.T. challenged the district court’s conclusions that a non-student may not assert a Title IX harassment claim, and the College responded that no federal court has extended *Davis*’s holding to allow such a claim. (Our research confirms the same conclusion.) Thus, the Eighth Circuit had before it a question of precedential significance. The Eighth Circuit, however, determined that it was unnecessary to answer the question. Instead, the court assumed, solely for the sake of argument, that K.T.’s status as a non-student did not preclude her Title IX claim. In doing so, it found that her Title IX allegations fail to plead any plausible allegations to hold the College liable under Title IX. We address below the Eighth Circuit’s analysis of the deficiencies in K.T.’s pleading, which the court undertook through a *de novo* standard of review and by assuming all of her well-pled allegations to be true.

No plausible allegations of deliberate indifference

K.T. alleged that the College was deliberately indifferent by failing to adopt practices to prevent sexual assault and also failing to investigate and offer her medical services after receiving reports of the alleged incident. In rejecting her claims of deliberate indifference, the Eighth Circuit ruled that K.T.'s complaint fails to identify any causal nexus between the College's inaction and her experiencing sexual harassment. At most, her allegations link the College's inaction with her emotional trauma experiences after the incident. Her complaint, however, does not plead that the College's purported indifference subjected her to harassment. While K.T. is clearly dissatisfied with the College's response, her allegations cannot be characterized as deliberate indifference *that caused the assault*.

No plausible allegations of actual notice

K.T. contended that she satisfied the actual notice element by notifying the College that she was subjected to sexual assault within days of its occurrence. The Eighth Circuit disagreed and concluded that "the actual notice element requires schools to have more than after-the-fact notice of a single instance in which the plaintiff experienced sexual assault." Rather, a plaintiff must allege that the institution had *prior notice* of a substantial risk of peer harassment in its educational programs or activities. K.T.'s complaint lacks any assertion that the College knew—prior to the alleged assault—that individuals in its soccer recruiting program faced a substantial risk of sexual harassment.

No plausible allegations of pervasive discrimination

Finally, the Eighth Circuit addressed *Davis's* requirement that "the behavior be serious enough to have a systematic effect of denying the victim equal access to an educational program or activity." In *Davis*, the Supreme Court explained that "a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, [but] we think it unlikely that Congress would have thought such behavior to rise to this level in light of the . . . amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." See *Davis*, 526 U.S. at 652-53. While sympathetic to K.T.'s circumstances, the Eighth Circuit concluded that her allegations of a single sexual assault fail to state pervasive discrimination.

Takeaways

As we have noted in our recent alerts, with the proliferation of Title IX lawsuits, the exact parameters of plausible claims and liability are evolving at the trial court levels and reaching federal appellate courts (such as the Eighth Circuit here) with increasing frequency. The Eighth Circuit left unresolved what may have been the most watched aspect of this case—whether a non-student may sue a college or university in a Title IX lawsuit. Still, the ruling is significant in its review of the plaintiff's complaint, stressing necessary allegations for a private Title IX litigant to state a plausible claim based upon peer sexual harassment. At the pleading stage, colleges and universities should carefully analyze the complaint to determine whether the allegations, when assumed to be true, can plausibly show actual knowledge, deliberate indifference and severity of the alleged discrimination. Here, the College defeated Title IX claims at the outset, which allowed it to avoid the expansive and extensive inquiries that can ensue during the discovery phases of a Title IX lawsuit.

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