



Cat's paw liability does not reach a student's Title IX retaliation claim

By Steven M. Richard

The United States Court of Appeals for the Sixth Circuit has held that an expelled student failed to assert a viable Title IX retaliation claim against her college when she sought to impute to the institution a professor's alleged retaliatory motive after she rebuffed his advances. The student relied upon the "cat's paw" theory of causation, which links the discriminatory motive of one actor (her professor) to the adverse action of another (the college that expelled her). In its opinion dated January 28, 2020, the Sixth Circuit affirmed a judgment in the college's favor because the student failed to proffer evidence of its discriminatory motive; therefore, she could not establish Title IX institutional liability solely based upon the professor's independent actions. *Prianka Bose v. Roberto De La Salud Bea and Rhodes College*, No. 18-5936 (6th Cir. Jan. 28, 2020).¹

Background

During the spring semester of her sophomore year, Prianka Bose completed Organic Chemistry I, taught by Professor Bea. Over the summer, Bea approached Bose, asked her personal questions, and invited her to dinner (which the student declined). During the next semester, Bose enrolled in Bea's section of Organic Chemistry II and was subjected to his comments about her appearance and clothing. Bose took a corresponding lab course with a different professor, and Bea regularly visited the lab and interacted with Bose closely.

Bea allowed his students the option of taking tests and quizzes early in his office, which Bose often exercised. On such one occasion, Bea left Bose alone in the office and claimed that upon his return, he noticed that the test's answer key was opened on his laptop in a larger view than he typically used. Subsequently, Bea approached Bose on campus and asked her personal questions. Bose confronted the professor and demanded that he keep their interactions strictly professional.

Bose noticed changes in Bea's behavior toward her. Bose claimed that Bea wrongly documented one of her test scores and refused her requests for academic help. Concurrently, Bea told a colleague

¹ As the Sixth Circuit stated, "[t]he term 'cat's paw' derives from a fable conceived by Aesop . . . In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing."

that he suspected that Bose had cheated while taking tests and quizzes in his office. When Bose next took a quiz in Bea's office, he displayed a fake answer key on his computer and left Bose alone. Bea claimed that Bose's answers on the quiz matched the fake answer key precisely. When confronted, Bose maintained that Bea created the fake answer key to match her actual answers, rather than the other way around. After an investigation and hearing regarding the cheating allegations, the Honor Council voted to expel Bose. She filed an appeal to the Faculty Appeals Committee, which was denied. Bose also filed a Title IX complaint alleging sexual harassment by Bea, which a Title IX investigator determined could not be sustained.

Bose sued the college under Title IX, contending that it engaged in unlawful retaliation by expelling her. Bose sought to attribute Bea's alleged retaliatory motive to the college under the cat's paw theory of causation. The trial court entered a judgment in the college's favor, ruling that the cat's paw theory depends on principles of imputed liability and constructive notice that are inapplicable to a private cause of action under Title IX. Bose appealed to the Sixth Circuit.

The Sixth Circuit's Title IX analysis

Regarding Bose's burden of proof for her Title IX retaliation claim, the Sixth Circuit held that she must show (i) she engaged in a protected activity, (ii) the college knew of the protected activity, (iii) she suffered an adverse school-related action, and (iv) a causal connection existed between the protected activity and the adverse action. The Sixth Circuit focused on the causation element, stressing that Bea's alleged retaliatory motive for taking Bose to the Honor Council is insufficient alone to sue the college for Title IX retaliation. "Moreover, the 'adverse school-related action' she alleges is her expulsion, and Rhodes itself did that, not Bea. Yet there is no evidence that Rhodes itself (or the Honor Council or the Faculty Advisory Committee) harbored any discriminatory motive against Bose."

The Sixth Circuit noted that the cat's paw theory has been applied to claims asserted against employers under the Family and Medical Leave Act, Title VII, and Age Discrimination in Employment Act. But, Title IX differs from such employment statutes in material respects, making the cat's paw a misplaced theory under its liability analysis. The Sixth Circuit applied the Supreme Court's precedent established in *Gebser v. Lago Vista Independent School District*, 523 U.S. 275 (1998). *Gebser* addressed whether a school district could be held liable under Title IX for failing to stop a teacher's sexual harassment of a high school student. The student argued that Title IX should be read to impose liability on the school for an employee's actions under theories of respondeat superior and constructive notice. The Supreme Court disagreed and held Title IX imposes liability only for a federal funding recipient's own official actions, not for an employee's independent actions. Accordingly, *Gebser* prescribes that "a damages remedy will not lie under Title IX unless an official who at a minimum has the authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination" and responds "with deliberate indifference." *Id.* at 290.

Applying *Gebser*, the Sixth Circuit held that the rejection of Bose's cat's paw theory was an easy decision. "Under a cat's paw theory, the decisionmaker need not have notice of the subordinate's discriminatory purpose. The cat's paw theory, rather, imputes knowledge and discriminatory intent—the cat's paw is the 'unwitting tool' of those with the retaliatory motive." Extending cat's paw liability to the college would negate *Gebser* and wrongfully invoke agency principles into a Title IX cause of action, which must focus on the college's own actions as the funding recipient. Bose

improperly sought to hold the college liable for an employee's independent actions, precisely what *Gebser* forbids.

Takeaways

In addition to her cat's paw argument, Bose attempted belatedly to raise a more direct "deliberate indifference" claim against the college, asserting that it failed to respond properly after she reported Bea's alleged retaliation. The Sixth Circuit deemed that Bose did not properly raise her deliberate indifference claim on appeal, so it declined to address it. However, the analysis would have posed interesting Title IX liability questions. For example, were the Honor Council, the Faculty Advisory Committee, and the Title IX investigator (all of whom became aware of Bose's contention that Bea targeted her for declining his advances) "appropriate persons" to notify, within the meaning of the Title IX's liability paradigm, thereby requiring an institutional response subject to the deliberate indifference analysis? If so, were the college's investigations and proceedings sufficiently conducted to avoid being deemed "clearly unreasonable" and withstand deliberate indifference liability? Finally, as an overriding legal issue, the Sixth Circuit noted in *dicta*, it is unclear in judicial decisions whether deliberate indifference to retaliation is an actionable claim under Title IX.

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