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Sixth Circuit splits in its interpretation of Title IX deliberate indifference

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As the United States Supreme Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), Title IX of the Education Amendments of 1972 (“Title IX”) affords victims of student-on-student sexual harassment a private right of action for damages against schools that receive federal funding. Under *Davis*, “funding recipients are properly held liable in damages only where they were deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Id.* at 650.

The United States Court of Appeals for the Sixth Circuit has been a leading federal circuit court in addressing *Davis*’ requirements to impose Title IX institutional liability. On March 11, 2020, a Sixth Circuit panel of three judges addressed whether a university acted with deliberate indifference, where the accused student committed further acts of harassment against the plaintiff after the school had implemented responsive measures. *Foster v. The Board of Regents of the University of Michigan*, 952 F.3d 765 (6th Cir. 2020). The evidentiary record did not present a dispute that the plaintiff endured sufficiently severe, pervasive, and objectively offensive sexual harassment, nor that the university had actual knowledge of it. The central question concerned *Davis*’ deliberate indifference element—whether the university’s responsive actions were clearly unreasonable in light of the known circumstances.

The three-judge panel split in its Title IX analysis. The majority’s opinion, written by Judge Karen Nelson Moore and joined by Judge Eric L. Clay, concluded that a jury trial should proceed to weigh factual questions whether the university’s Title IX response caused the complainant to be subjected to further harassment. In his dissent, Judge Jeffrey S. Sutton stressed that the university should not be held liable where it implemented proportionate responses, especially as it balanced the complainant’s concerns and the respondent’s rights during its investigation.

Shortly thereafter, the Sixth Circuit vacated the panel’s ruling and voted for a rehearing en banc (by the court’s full bench). 958 F.3d 540 (6th Cir. 2020). On December 11, 2020, the Sixth Circuit issued a split 8–6 determination, reaching an opposite result. Now, Judge Sutton’s analysis constitutes the court’s majority position, adjudicating that there was no deliberate indifference sufficient to impose Title IX liability upon the university. Judges Moore and Clay are among the minority of the court’s

judges, who believe that the case should proceed for a jury determination to weigh the sufficiency of the university's responsive measures. No. 19-1314, 2020 U.S. App. Lexis 38857 (6th Cir. Dec. 11, 2020).

Factual background

Plaintiff Rebecca Foster and a male respondent student were enrolled in the University of Michigan's executive MBA program, which was held off-campus at a hotel in Los Angeles over monthly weekend sessions. Foster and the respondent student became friends, but the respondent sought a romantic relationship with her while Foster wished their relationship to remain platonic. For several months, the respondent sent Foster unsolicited gifts and expressed a desire to marry her. The respondent's conduct escalated to unwanted touching of Foster and visits to her hotel room, where he attempted to force himself upon her.

In March 2014, as the program was nearing its completion, Foster reported that the respondent had sexually harassed her, and the university commenced a prompt investigation. As an interim measure, it imposed a no-contact order against respondent. Shortly thereafter, the respondent violated the order by sending Foster a text message that stated "Really." Regarding the upcoming and final weekend session in April, the university imposed accommodations, requiring the respondent to stay in a different hotel from the one where the residency would be held, eat in a separate location from Foster, avoid any social activities where Foster was in attendance, and refrain from interacting with Foster during the classes. When a university investigator confronted the respondent about his text message to Foster, the respondent claimed that he sent it to her in error and gave verbal assurance that he would refrain from any harassment.

During the first evening of the final weekend session, the respondent sent a crude email to various university administrators, complaining about the restrictions and disparaging Foster. Upon its receipt, the university considered removing the respondent from classes, but decided not to do so out of concern over escalating the situation and an administrator's belief that there was no imminent risk necessitating his removal. That same day, the respondent failed to adhere to the imposed boundaries, creating situations where he was near Foster and made her feel uncomfortable. That evening, he posted on Foster's Facebook wall disparaging comments about her and a threat against her boyfriend. The university prevented the respondent from attending the remaining weekend classes, which prompted him to send emails to classmates protesting his plight.

After the April residency session ended, the respondent sent several emails to university administrators and professors involved in the ongoing Title IX investigation into his conduct. His emails criticized the university's handling of the Title IX matter, used aggressive language, and conveyed various demands. The university's general counsel responded by informing the respondent that he was precluded from participating in the program's upcoming commencement activities and warned that any further harassment "will put your receipt of a degree in grave danger." In the interim, Foster obtained a restraining order in California against the respondent.

In late April, Foster informed the university that she learned through social media and conversations with friends that the respondent would be travelling to Ann Arbor for the commencement. The university took precautions in case the respondent attended, assigning plainclothes officers to stay near Foster and to protect her at the graduation ceremonies. During a graduation function, Foster saw the respondent from a distance and reported his presence to one of the officers, who told the respondent to leave. The next day, Michigan law enforcement officers arrested the respondent for violating the restraining order that Foster obtained. He was released

into the custody of the university's police department and taken to the airport to board a flight back to California.

Foster sued the university under Title IX, and the trial court entered summary judgment in the university's favor. The trial court held that, as a result of the university responding "promptly, compassionately, and effectively" to Foster's complaints and the respondent's actions, "it would be simply impossible" for a reasonable jury to conclude that the university was deliberately indifferent under Title IX. Foster appealed to the Sixth Circuit, which as noted above initially issued a split panel ruling vacating the lower court's judgment and concluding that the case should proceed to a jury trial. As analyzed below, the Sixth Circuit's closely split en banc adjudication reverses course, affirming the lower court's judgment in favor of the university.

The majority opinion

Writing for the eight-judge majority, Judge Sutton concluded that the university did not act with deliberate indifference, as evidenced by its proportionate responses: from a no-contact order at the outset to a requirement that the harasser stay in a separate hotel for the last three-day session to a removal from the third day of the program to an order that he not attend graduation. These actions could not be deemed "clearly unreasonable" to reach the "high bar" to prove deliberate indifference. "Whether examined incident by incident or in combination, the [u]niversity did its level best to protect Foster from this harassing classmate."

Foster argued that because the university had actual knowledge of continuing harassment, a reasonable jury can find that the school was deliberately indifferent in its responsive actions. The majority rejected her contention because it would equate to imposing a strict liability standard upon schools, essentially requiring them to always purge actionable peer harassment in its remedial measures, which is not what *Davis* mandates. Quoting *Davis*, the majority stressed: "We ask not whether the school's efforts were ineffective, but whether they amounted to 'an official decision . . . not to remedy the violation.'" The test is not what the school could have done differently, but whether its responsive measures were clearly unreasonable.

Particularly, the majority stressed the university's obligation to protect the rights of the respondent as it instituted its interim measures and Title IX procedures, noting that respondents have often sued schools for denying them educational opportunities without the requisite notice and process. The majority noted that the respondent threatened a lawsuit because he felt that he was denied due process, forcing the university "to hold the thin line between immediately protecting Foster and denying the harasser process before expelling him."

Finally, the majority emphasized that "[c]ontext, as in most things, tends to illuminate." The university did not have substantial control over many of the means and methods through which the respondent continued to harass Foster, such as his resorting to Facebook posts and usage of external email addresses. The university could and did control the harasser's physical presence at classes, social events, ceremonies, and the like. And it punished the harasser when he deployed his social media communications in harmful ways.

The dissent

Writing for the six dissenting judges, Judge Moore issued a strong rebuke of the majority's analysis, portraying it as conflating "deliberate indifference" with a "good faith" standard. The dissent asserted that *Davis* "does not stand for the proposition that any response to sexual harassment—no

matter how lacking—is enough to clear the deliberate indifference bar; if it was there would be no need to ask whether a response was ‘clearly unreasonable.’”

In considerable detail, the dissent concluded that a jury should weigh the university’s responsive measures, given that the harassment continued during the April residency and escalated through commencement. For example, before the commencement activities, the university “could have taken numerous further responses,” ranging from a no-trespass order relating to its campus facilities or an interim suspension. Of significance, while some of the respondent’s misconduct took place over the Internet, a jury could still find that its pervasiveness deprived Foster of educational opportunities and was enabled by the university’s alleged deliberate indifference.

Especially significant, the dissent was dissuaded by the majority’s express concern about the university’s potential concurrent liability to the parties based upon the same response: the complainant for alleged deliberate indifference and the respondent for alleged violations of procedural rights. In the dissent’s view, a college or university may appropriately face liability for independent wrongs committed against a complainant and a respondent during the implementation of responsive measures and disciplinary processes.

Takeaways

Given President-Elect Biden’s campaign promise to replace the Department of Education’s recently enacted amendments to its Title IX regulations, the regulatory landscape poses uncertainty regarding whether, when, and how amendments, adjustments or revocations will ensue (e.g., administrative rulemaking notice and process, interim guidance documents and/or shifting enforcement agendas). At the same time, colleges and universities must remain aware of the controlling Title IX judicial precedents in their jurisdictions, especially because there is not often uniformity among courts nationally (or even among judges presiding in a jurisdiction) regarding how to assess deliberate indifference, all the while balancing the rights of the complainant and respondent in the implementation of responsive measures.

Although differing in their conclusions, the Sixth Circuit’s panel and en banc rulings send a clear signal that colleges and universities must evaluate the effectiveness and proper scope of their remedial measures as a matter evolves, particularly through timely, updated threat assessments. All such actions must be carefully weighed and documented to defend the measures and protect the school in the event of future litigation (whether brought by the complainant or respondent). No single course of action will routinely apply. Schools face differing expectations, available resources, practical boundaries, and equitable balances as they evaluate, implement, and adjust their interim and responsive actions.

The challenges of conducting such assessments are especially difficult during the current national emergency conditions, with students participating in programs and activities on campus partially or remotely because of the pandemic. The paradigms to evaluate whether a school’s response was “clearly unreasonable in light of the known circumstances” and whether a student has been denied equal access to educational opportunities and benefits are subject to evolving considerations, as programs and activities transform into new modes of delivery (whether short-term or permanent) and redefine the parameters of the university-student relationship.

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