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ABSTRACT

This paper sets out the legal grounds for sexual harassment claims in education settings, and notes a number of pertinent cases that are illustrative of common legal and factual issues. Sexual harassment, including sexual abuse, is prohibited by federal and state statutes. Sexual harassment in the context of employment constitutes employment discrimination that violates Title VII of the Civil Rights Act of 1964. Several court cases define the employer's responsibility when employees are sexually harassed or become objects of sexual discrimination. Another issue that arises is the sexual abuse of students by teachers and other employees. A teacher's sexual molestation of a student is an intrusion of the child's bodily integrity, which is protected by the Constitution. Cases are cited that define sexual abuse in such cases and establish students' constitutional rights. Sexual harassment of students by school employees is also a violation of Title IX of the Education Amendments of 1972, as court judgments have upheld. In some cases, claims may be both constitutional and statutory, in that they are based on specific state or federal law. The weight of judicial authority seems to be that student-on-student sexual harassment is not actionable under Title IX. Educational administrators need to be cognizant of sexual harassment issues from both legal and practical perspectives, protecting individuals from the consequences of harassment and themselves and their institutions from the consequences of civil rights investigations and litigation. (SLD)

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Sexual Harassment

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Sexual Harassment in Education

Introduction

This paper sets out the legal grounds for sexual harassment claims in education settings and notes a number of pertinent cases that are illustrative of common legal and factual issues.

Sexual Harassment

Sexual harassment is prohibited by two federal statutes, as well as by state statute.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The Equal Employment Opportunity Commission "Guidelines on Discrimination because of Sex" provide a definition of sexual harassment.

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 CFR § 1604.11.

Title IX of the Education Amendments of 1972, as amended, provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

The Nebraska Fair Employment Practices Act (which is patterned after Title VII) makes it an unlawful employment practice "To fail or refuse to hire, to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin . . . ." Neb. Rev. Stat. § 48-1104.

The Nebraska Act also includes a definition of sexual harassment.

> Harass because of sex shall include making unwelcome sexual advances, requesting sexual favors, and engaging in other verbal or physical conduct of a sexual nature if (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; . . . . Neb. Rev. Stat. § 48-1102(14).

Sexual Abuse

Sexual harassment includes sexual abuse. Nebraska law requires that suspected sexual abuse be reported. The pertinent provisions are found at §§ 28-710 to 28-727.

Sexual Harassment in the Context of Employment

Sexual harassment in the context of employment constitutes employment discrimination that violates Title VII of the Civil Rights Act of 1964.

There is a split of authority on whether same-sex harassment is actionable under Title VII. *See, e.g., Quick v. Donaldson Co., Inc.*, 90 F.3d 1872 (8th Cir. 1996) (Male employees' harassment of another male employee is actionable under Title VII); *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, - S.Ct. - (Same-sex harassment by a supervisor and by co-workers is not cognizable under Title VII).

Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir. 1996) explained that Title VII's protection against sex discrimination reaches harassment that is directly linked to the grant or denial of an economic quid pro quo. Quid pro quo harassment occurs in situations where submission to sexual demands is made a condition of tangible employment benefits. To analyze quid pro quo sexual harassment claims, many courts of appeals have used a five-part test, asking whether the plaintiff has shown that (1) she or he is a member of a protected group, (2) the sexual advances were unwelcome, (3) the harassment was sexually motivated, (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment, and (5) respondeat superior has been established.

In this case, a tenured full professor lost her administrative title of "Special Assistant to the Dean" and both her job description and her duties were diminished when she refused to submit to sexual overtures made to her by the Provost and Vice-President for Academic Affairs. The court of appeals held that she had raised disputed issues of fact regarding the loss of tangible employment benefits and

reversed the summary judgment for the University.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), held that (a) a claim of "hostile environment" sex discrimination is actionable under Title VII and (b) employers are not always automatically liable for the acts of their supervisors, regardless of the circumstances of the case. The Court cited with favor the EEOC Guidelines, taking the view that harassment leading to non-economic injury can violate Title VII; however, such harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Furthermore, the gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome"; the correct inquiry in this case was not whether the victim's participation in sexual intercourse was voluntary, but whether the alleged sexual advances were unwelcome.

Also, the Court noted that an employer is absolutely liable for quid pro quo sexual harassment of employees, whether or not it knew, should have known, or approved of a supervisor's actions.

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), held that conduct actionable as "abusive work environment" sexual harassment need not seriously affect an employee's psychological well being or lead to an injury; rather, when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment, Title VII is violated. However, conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is not a violation. Also, if the victim does not subjectively perceive the environment to be abuse or hostile, then the conduct has not actually altered the conditions of employment, and there is no violation.

The Court noted that whether an environment is objectively "hostile" or "abusive" can be determined only by looking at all the circumstances surrounding the discriminatory conduct: its frequency and severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

In *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997), the court explained that while liability for quid pro quo harassment is always imputed to the employer, a plaintiff seeking to recover from an employer for hostile work environment must demonstrate some specific basis to hold the employer liable for the conduct of its employees, generally by looking to common law principles of agency. Based on agency principles, an employer will be held liable for harassment perpetrated by one of its supervisors if: (a) the supervisor was at a sufficiently high level in the company, or (b) the supervisory used his actual or apparent authority to further the

harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or (c) the employer provided no reasonable avenue for complaint, or (d) the employer knew or should have known of the harassment but unreasonably failed to stop it.

In this case, a Puerto Rican woman employed at the New York University Dental Center made a primae facie showing of hostile environment sexual harassment, alleging that she was constantly harassed by her male supervisor on the basis of her sex and race. She was intimidated and embarrassed, but finally gathered the strength to complain to her supervisor's superior; however, she specifically asked him to keep the matter confidential until a later date. The facts showed that her supervisor's hostile environment harassment could not be imputed automatically to the employer because the supervisor was a low-level employee, but that the superior's knowledge of the harassment could be because the superior was a sufficiently high-level employee; in other words, NYU knew of the harassment, but failed to stop it. Nevertheless, the court of appeals held that NYU, acting through its agent, did not act unreasonably in honoring her request to keep the matter confidential, rather than taking immediate steps to stop the harassment, and that her hostile work environment claim, along with her retaliation and negligence claims, must accordingly fail.

Smith v. St. Louis Univ., 109 F.3d 1261 (8th Cir. 1997) involved allegations of both hostile environment harassment and retaliation for filing a complaint about it. An anesthesiology resident at a university hospital was subjected to repeated derogatory comments by the chairman of the anesthesiology department, most of which were directed at the fact that she was a woman, but were not sexually explicit per se. She finally complained to the dean of student affairs, who spoke to the chair about the matter. Then, after her residency had ended, the chair gave negative reviews of her to two prospective employers; in neither instance was she hired.

She filed suit, claiming both hostile environment harassment and retaliation. The district court granted the university's motion for summary on both claims, explaining that the conduct was not sufficiently severe or pervasive, in part because of the absence of sexually explicit comments, that the university's response to her complaint was adequate, and that the six-month time period between her complaint and the chair's negative references was too long to establish a causal connection for retaliation. The court of appeals reversed and remanded, finding that she had raised triable issues of fact on each claim.

Both quid pro quo and hostile environment harassment were found in *Karibian v. Columbia University*, 14 F.3d 773 (2nd Cir. 1994), *cert. denied* 114 S.Ct. 2693. A woman who worked in a university office while a student at the university brought suit against the university, alleging that sexual harassment committed by her supervisor in the form of a coerced sexual relationship constituted sex

discrimination in violation of Title VII.

In reversing the district court's grant of summary judgment, the circuit court of appeals held that a plaintiff need not show an actual economic loss to proceed with a quid pro quo sexual harassment suit, for if the employee submits to unwelcome advances there may be no economic loss; the relevant inquiry in simply whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances.

The court also held that an employer is liable for the discriminatorily abusive work environment created by a supervisor who uses his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship. "It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment." *Id.* at 78. On the other hand, if harassment is perpetrated by low-level supervisors or co-workers, then the employer would not be liable unless the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.

Sexual Abuse of Students by Teachers and Other Employees

Constitutional Claims

A teacher's sexual molestation of a student is an intrusion of the school child's bodily integrity, which is protected by the Constitution. Thus, a student has a constitutional right, grounded in substantive due process, to be free from sexual abuse by school staff. *Stoneking v. Bradford area School Dist.*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

School children have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right. Although local governments and supervisory personnel are not subject to § 1983 liability under a vicarious liability or respondeat superior theory, such defendants could be held liable under a "deliberate indifference" standard, if they demonstrated deliberate indifference toward the constitutional rights of the student. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc) *cert. denied*, 115 S.Ct. 70.

Abeyta by Martinez v. Chama Valley Independ. Sch., 77 F.3d 1253 (10th Cir. 1996), involved a constitutional claim based on an alleged violation of substantive due process rights. A teacher had read to class a note from sixth grade girl to fifth grade boy. Note said "You're cute . . . I like you," and was signed "Always, Stephanie."

Defendant asked class if they thought plaintiff was a prostitute. The class laughed and later taunted plaintiff, calling her a prostitute. Defendant and class continued the taunting for some months, until plaintiff left the school. The district court had allowed the suit to go forward, but the court of appeals reversed.

The court of appeals noted that sexual assault or molestation by a school teacher violates a student's substantive due process rights. A teacher's sexual molestation of a student is an intrusion of the student's bodily integrity. In this case, however, while the teacher's conduct as alleged was certainly harassing, there were no allegations of sexual assault, molestation, or touching, only allegations of emotional harm.

The court of appeals found no case in a school context holding that conduct falling shy of sexual molestation or assault constitutes constitutionally actionable sexual harassment and went on to hold that plaintiff's allegation of sexual harassment and abuse, in the form of psychological abuse, did not state an actionable substantive due process claim.

In *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997) (en banc), a school district custodian raped a 14-year-old girl in an empty classroom. She sued under 42 U.S.C. § 1983 asserting deprivation of constitutional rights and seeking money damages from the school district, as well as its trustees and superintendent as individuals. The court of appeals held that no claim was stated under § 1983 and that the individuals' motions to dismiss should have been granted by the district court. The Texas compulsory school attendance law did not create the kind of special custodial relationship giving rise to a constitutionally rooted duty of school officials to protect students from private actors; there was no state-created danger, because the custodian was not know to have any dangerous propensities and there were teachers in the same building; and there was no breach of a constitutional duty in failing to protect the child from the rape, because the janitor was not acting under color of state law and a background hiring check would have revealed no history of relevant misconduct.

Becerra v. Asher, 105 F.3d 1042 (5th Cir. 1997) involved a male music teacher who sexually molested an eleven-year-old former student at the boy's home. Because the assaults occurred at the boy's home, more than five months after the boy withdrew from the school where the teacher had first met the boy, the court held that there was no real nexus between the activity out of which the violation occurred and the teacher's duties and obligations as a teacher and concluded that the teacher's physical sexual abuse of the boy did not occur under color of state law. Because there was no state action, there was no violation of the boy's constitutional rights; thus, no § 1983 liability could be imposed on either the school district or the individual supervisors.

Title IX Claims

Sexual harassment of students by school employees is a violation of Title IX of the Education Amendments of 1972.

As the court noted in *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (Title IX case involving teacher-on-student harassment), courts have generally separated sexual harassment claims into two categories: quid pro quo harassment, which arises when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances; and hostile environment sexual harassment, which occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive environment. Also, the court held in this case that same-sex harassment of a student by a teacher is actionable under Title IX.

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) involved a high school girl who sued a school district, asserting a cause of action under Title IX. She alleged that a teacher and coach had engaged her in sexually-oriented conversations, called her at home, forcibly kissed her on the mouth in the school parking lot, and on three occasions had her excused from classes and took her to a private office where he subjected her to coercive intercourse. She further alleged that although teachers and administrators became aware of and investigated the teacher's sexual harassment of her, as well as other female students, they took no action to halt it and discouraged her from pressing charges against him. The teacher resigned on condition that all matters pending against him be dropped; the school thereupon closed its investigation.

The district court dismissed the complaint on the ground that Title IX does not authorize an award of damages, and the court of appeals affirmed. The Supreme Court reversed and remanded.

> Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisory sexually harasses a subordinated because of the subordinate's sex, that supervisory 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.

112 S. Ct. at 1037.

The Supreme Court held that when a teacher sexually harasses and abuses a student, that teacher 'discriminates on the basis of sex' in violation of Title IX. When the discrimination is intentional, a damages remedy against the school system is available under Title IX, at least where the school officials knew about the

discrimination but failed to take action to halt it.

In an early Title IX suit, *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *affirmed in pertinent part*, 631 F.2d 178 (2nd Cir. 1980), the court noted that

> [I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education . . . . *Id.* at 4.

The court of appeals agreed that, on the basis of these allegations, the plaintiff had presented a justiciable claim for relief under Title IX.

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), a female participant in a surgical residency program, who was both a student and an employee, sued under Title IX and § 1983 (Equal Protection), alleging unlawful sex discrimination in employment. The court of appeals, reversing a district court grant of summary judgment, held that she had made out prima facie cases for both quid pro quo harassment and hostile environment harassment.

> To make out a prima facie case of quid pro quo harassment, under either the equal protection clause or Title IX, the plaintiff must show that (1) he or she was subject to unwelcome sexual advances by a supervisor or teacher and (2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training. In rebuttal, the defendant may show that the behavior complained of either did not take place or that it did not affect a tangible aspect of the plaintiff's employment or education. To make out a prima facie case of hostile environment harassment, the plaintiff must show that he or she was subjected to unwelcome sexual advances so "severe or pervasive" that it altered his or her working or educational environment. And in response, the defendant may show that the events did not take place or that they were isolated or genuinely trivial. [citations deleted] *Id.* at 898.

> We ... hold ... that in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employee *if* an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it. ... We further hold that this standard also applies to situations in which the hostile environment harassment is perpetrated by the plaintiff's coworkers. *Id.* at 901.

In *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied* - S.Ct. - , a male physical education/health teacher had sexually molested a second-grade

girl during showings of movies in a darkened classroom. The girl and her mother told the girl's regular classroom teacher about the other teacher's misconduct, but neither the girl, her mother, or the regular teacher notified anyone higher in the line of authority, such as the principal or the superintendent. The court of appeals (treating this as a hostile environment case, rather than a quid pro quo case) held that under Title IX of the Education Amendments of 1972, (1) a school district is not strictly liable for its teacher's sexual abuse of a student, and (2) another teacher's being told about the abuse is not sufficient notice to the school district for possible liability under some other standard. The court opined that before a school district can be held liable under Title IX for a teacher's hostile environment sexual abuse, someone in a management-level position must be advised about the misconduct and that person must fail to take remedial action.

In *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997), a male karate instructor had a sustained sexual relationship with a high school girl. On behalf of her daughter, the mother sued the school district in federal district court, asserting violations of both Title IX and 42 U.S.C. § 1983; the school district appealed a jury verdict on the Title IX claim. The district court, following principles of agency law and *respondeat superior*, had instructed the jury that Title IX imposed a duty not to act negligently in failing to act with respect to what it knew or should have known; the court of appeals reversed and remanded for further proceedings. The court of appeals concluded that Title IX does not contemplate a theory of recovery based on agency law, constructive notice, and vicarious liability for negligence, but required a showing of actual, intentional discrimination by the school district.

The court held that a school district can be liable for teacher-student "hostile environment" sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so. In this case, however, the plaintiff could prevail by establishing that the school district failed to act even though it knew that the teacher posed a substantial risk of harassing students in general, not necessarily the plaintiff in particular. The court rested much of its intentional discrimination requirement on the fact that Title IX is Spending Clause legislation and the receiving entity lacks notice that it would be liable for unintentional violations; however, the court also noted that the Department of Education's Office of Civil Rights had recently issued proposed guidelines that conflicted with the court's analysis of tort liability under Title IX, but that these guidelines would not apply retroactively to this case.

Constitutional Claims and Title IX Claims Compared

Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996) involved a female teacher who engaged a high school girl in a homosexual relationship. When school officials became aware of potential problems, they initiated investigation, but the

results were inconclusive and no action was taken; then, two years after the student had graduated school officials obtained sufficient evidence to dismiss the teacher. A former student brought § 1983 action and Title IX hostile environment claim against both the school district and individual school officials. A comparison of the analyses applied by the court of appeals to the two claims is instructive.

To establish a §1983 claim against the school district, the plaintiff must show that an official policy or custom caused her to suffer a constitutional harm; such a showing requires proof of the existence of a continuing widespread, persistent pattern of unconstitutional conduct, as well as deliberate indifference or tacit authorization and causation. For individual defendants to be liable under § 1983, the plaintiff must prove: (1) that they received notice of a pattern of unconstitutional acts committed by subordinates; (2) that they demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) that they failed to take sufficient remedial action; and (4) that such failure proximately caused injury to the plaintiff. The evidence did not support a finding of either deliberate indifference or tacit authorization on the part of school officials, or of a pattern of persistent and widespread unconstitutional practice of ignoring complaints of student-teacher sexual relationships; perhaps school officials could have or should have acted sooner or done more to ensure the end of the relationship, but their failure to do so did not constitute deliberate indifference or tacit authorization. Summary judgment on the §1983 claim was affirmed.

But, for the Title IX claim the result was different. Plaintiff's Title IX claim was based on a hostile environment theory. First, the court rejected the defendant's assertion that, as a matter of law, sexual harassment between members of the same gender was not actionable. The court then noted that a relevant question was not whether the girl voluntarily participated in sexual relations, but rather whether the teacher's sexual advances were unwelcome, and found that a genuine factual dispute remained on this issue. The court then went on to extend the Title VII "knew or should have known" standard of institutional liability to a Title IX hostile environment sexual harassment case involving a teacher's harassment of a student, and found that there was a factual dispute regarding exactly when the defendants obtained knowledge of the relationship and whether once they obtained this knowledge they took reasonable steps to remedy the situation. Because of the factual disputes, summary judgment on the Title IX claim was reversed and the case remanded for trial.

Doe v. Claiborne County, Tenn., 103 F.3d 495 (6th Cir. 1996) involved a male coach of a high school boys' baseball team who sexually abused a female student who served as scorekeeper for the team. The abuse began in the spring of 1991 when he fondled her breasts on a school bus during a road trip, later involved sexual intercourse, and ended in December 1992 when she was discovered at his house while his wife was away giving birth to their child. She brought suit against the

county, the school board, and various school officials, asserting claims under both 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972. The court of appeals affirmed summary judgment of the § 1983 claim, but reversed and remanded on the Title IX claim.

As to the § 1983 claim, the court held that this schoolchild had a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity, that such right is fundamental, and that the teacher's sexual abuse of her violated that right; however, the court went on to hold that the evidence presented simply did not show that the school board engaged in a custom of tacit authorization of sexual abuse or obvious deliberate indifference to her constitutional rights and that individual school officials had satisfied the supervisory liability standard to supervise the teacher and to take independent action for reported acts of misconduct.

As to the Title IX claim, the court noted that the student had a private right of action under Title IX and that the "discrimination" prohibited by Title IX encompassed the sexual harassment of a student by a teacher. The court remanded the case to the district court for an application of Title VII standards to this sexual harassment claim, clarifying the following guiding principles: first, a "hostile environment" sexual harassment claim is cognizable under Title IX; second the elements to state a supervisory hostile environment claim under Title VII equally apply under Title IX; and third, whether conduct about which a plaintiff complains created a "hostile environment" under Title IX, and whether the educational entity took appropriate action after knowing of inappropriate conduct, are factual questions for the jury to resolve. Finally, the court of appeals held that it was an abuse of discretion for the district court to exclude the "notice" evidence that the plaintiff sought to introduce, noting that what the defendants knew, and when they knew it, was evidence upon which a material issue in this case hinged.

Constitutional and State Statutory Claims

Larson by Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996) involved both constitutional and statutory claims. The case arose when a school van driver sexually abused an 8-year-old girl, who had a severe visual disability. She sued three school officials and the school district, alleging a violation of constitutional rights, a conspiracy prohibited by federal statute, and a pendent state law negligence claim.

After a trial on the plaintiff's constitutional claims, the jury returned a verdict in their favor, awarding $80,002 in compensatory damages and $395,001 in punitive damages. The district court granted defendant's motion for judgment not withstanding the verdict, and also entered judgement for defendants on the pendant state law claim. The court of appeals affirmed.

The court of appeals set out the elements that plaintiffs must plead and prove in a § 1983 case alleging violations of constitutional rights to recover damages from individual school officials and the school district.

Individual defendants are subject to personal liability under § 1983 for failure to adequately respond to the known risk of physical and emotional harm caused by sexual abuse if plaintiffs can prove that defendants:

(1) Received notice of a pattern of unconstitutional acts committed by subordinates;
(2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;
(3) Failed to take sufficient remedial action; and
(4) That such failure proximately caused injury to the child.

The school district may be found liable for "a governmental custom of failing to receive, investigate and act upon complaints of sexual misconduct of its employee" if plaintiffs prove the existence of an official custom of such conduct and if that custom cause them constitutional harm. To prove such a custom, plaintiffs must show:

(1) The existence of a continuing, wide-spread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
(2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
(3) That plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

To establish liability on the part of the school district for failing to adequately train its employees to report and to prevent the sexual abuse of handicapped children the plaintiffs must prove that the school district's failure to train its employees evidences a 'deliberate indifference' to the rights of the students. Plaintiffs must prove that school district officials had notice that its procedures were inadequate and likely to result in a violation of constitutional rights; however, notice of a patten of unconstitutional behavior need not be shown where the failure to train employees is so likely to result in a violation of constitutional rights that the need for training is patently obvious.

In this case, the court of appeals found no widespread pattern of unconstitutional behavior and no evidence that school district employees received inadequate training.

The Nebraska Political Subdivision Tort Claims Act provides a limited waiver of governmental immunity that allows a plaintiff to recover for injuries caused by the

negligence of a subdivisions's officers, agents, and employees. A plaintiff may not recover, however, for a claim based upon the exercise or performance of discretionary functions; this discretionary function exception extends only to basic policy decisions and not to ministerial acts arising therefrom. An element of judgment or choice is essential and indispensable for discretionary conduct to be exempted from liability. Thus, the Act protects the discretion of a governmental executive or administrator to act according to one's judgment as to the best course to be taken. A ministerial act, on the other hand, is one that a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.

In regard to the state law tort claims, the court of appeals concluded that the district court properly relied on the discretionary function exception to the Political Subdivision Tort Claims Act in this case. Decisions to investigate, hire, fire, and retain employees are generally discretionary; thus, such decisions fall within the discretionary function exception and cannot be the basis for liability on the part of the school district.

Common Law Tort Claims

P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996) involved a female high school teacher who enticed a male student into an intimate relationship, which included sexual contact but not intercourse. Many of the intimate activities were carried on at school, but both the teacher and student worked successfully to conceal the relationship. The administrator had conducted a standard background check when the teacher was hired and had conducted normal supervision and evaluation activities during the time the relationship was going on. The student finally ended the relationship and then brought suit against the school district, the administrator, and the teacher, alleging battery, intentional infliction of emotional distress, sexual harassment, breach of fiduciary duty, negligent supervision, negligent infliction of emotional distress, and negligent hiring. On appeal of summary judgment granted to the school district and administrator, the supreme court held that the employer is not liable for the intentional torts of its employee even though the acts occurred within work-related limits of time and place, where such acts were unforeseeable and were unrelated to the duties of the employee.

Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997) held that school administrators' letters of recommendation prepared for a college placement service, which contained unreserved and unconditional praise for former employee despite knowledge of complaints or charges of his sexual misconduct with students, constituted misleading statements that could form the basis for tort liability for fraud or negligent misrepresentation. Although policy considerations dictate that ordinarily a recommending employer should not be held accountable just for failing

to disclose negative information regarding a former employee, nonetheless liability may be imposed if the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a prospective employer or third person.

Sexual Harassment of Students by their Peers

The weight of judicial authority seems to be that student-on-student sexual harassment is not actionable under Title IX.

A number of courts have spoken to this issue. *See Davis v. Monroe County Bd. of Educ.*, No. 94-9121 (11th Cir. 1997) (en banc) (holding that plaintiff failed to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996) (holding that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, absent proof that the school district itself directly discriminated based on sex); *but see Oona v. McCaffrey*, No. 9516046v2 (9th Cir. 1997) (holding that in a § 1983 suit alleging violations of federal rights secured under Title IX, the duty of school officials to take reasonable steps to prevent sexual harassment of a student by other students is clearly established, thus they could not claim qualified immunity).

Also to be noted, however, is "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," issued by Office for Civil Rights, U.S. Department of Education on March 13, 1997, which specifically provides that peer sexual harassment is a violation of Title IX.

Conclusion

Sexual harassment and abuse has long been a problem in educational institutions. Fortunately, the law now provides protection and redress for those who may be victims of such misbehavior.

Educational administrators need to be cognizant of the issues, from both legal and practical perspectives, thus protecting potential victims by minimizing the incidence of sexual harassment and protecting themselves and their institutions from the consequences of civil rights investigations and litigation.

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