PEER HARASSMENT IN THE UNIVERSITY SETTING

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I. Introduction

Title IX of the Education Amendments of 1972, 20 U.S.C.A. Section 1681 (hereinafter referred to as "Title IX") and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e (hereinafter referred to as "Title VII") are the two federal statutes under which causes of action for hostile environment sexual harassment in the university setting are most often brought. The factor which usually determines which law will be at issue is whether the harassment occurs between co-workers, or whether the harassment occurs between students. Title IX is the applicable statute when the issue of student to student sexual harassment is raised, while Title VII serves as the basis for lawsuits which are based on conduct which occurs between co-workers.[1]

Title IX states the following:

> 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.A. Section 1681.

Title VII states that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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.A. Section 2000e-2.

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[1] Although Title IX is the exclusive statute for claims brought by students, employees of academic institutions may bring causes of action under both Title IX and Title VII. *See, Pinkney v. Robinson, et al.*, 913 F. Supp. 25 (D.D.C. 1996).

As is evident from the statutory language, as well as from the legislative history of both acts, Title IX was specifically tailored for the protection of women, while Title VII merely included women as one of the many protected classes of individuals protected by that legislation. It is also apparent from the language of both statutes that "hostile environment" sexual harassment, as it is known today, was not specifically prohibited by these laws, and it did not become actively litigated under either statute until the United States Supreme Court delivered three critical decisions.

II. *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986)

Although Title VII was enacted in 1964, "hostile environment" sexual harassment was not recognized as a legal cause of action by the United States Supreme Court until 1986. The case which conclusively established that "hostile environment" sexual harassment at the workplace was actionable under Title VII was *Meritor Savings Bank, FSB v. Vinson,* 106 S.Ct. 2399 (1986). In that case, the plaintiff filed suit against her employer alleging that her supervisor made repeated demands upon her for sexual favors, fondled her in front of other employees, followed her into the ladies' restroom on several occasions, exposed himself to her, and forcibly raped the plaintiff on numerous occasions. The Court specifically rejected the defendant's argument that Title VII only prohibited conduct which resulted in tangible, economic losses, and did not address situations in which a plaintiff suffers only psychological effects. The Court based its decision on guidelines promulgated by the Equal Employment Opportunity Commission and on other lower court decisions which had acknowledged that "hostile environment" sexual harassment under Title VII included the type of behavior which the plaintiff

alleged occurred in her complaint. The Court concluded that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* At 2405. The Court further stated that "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' ", indicating that even a plaintiff's engaging in "voluntary" sexual activity was not a defense to a hostile environment claim if such advances were unwelcome. *Id.* At 2406.

Since the *Meritor* decision, courts have been refining the elements of a cause of action for "hostile environment" sexual harassment in the workplace. The specific elements of such a cause of action will be addressed in Section IV of this memorandum.

III. The Supreme Court's Handling of Title IX

Similar to the history of Title VII, there was a significant passage of time between Title IX's passage and a Supreme Court decision which opened up the courthouse to plaintiffs seeking damages for a "hostile environment." Although Title IX was part of the Education Amendments of 1972, many years elapsed before it became clear that an individual could maintain a cause of action under that statute. Furthermore, the Supreme Court did not rule that an individual plaintiff could receive an award of monetary damages until 1992.

The Supreme Court decided two cases which paved the way for "hostile environment" sexual harassment litigation under Title IX. In *Cannon v. University of Chicago,* 99 S. Ct. 1946 (1979), the Court concluded that an individual does have a private cause of action under Title IX. In *Cannon,* a female applicant to medical school brought suit against the University of Chicago, alleging that she was denied admission

because of her sex. She alleged that this was a violation of Title IX, and that she had a private cause of action under the statute. The district court granted the defendant's motion to dismiss on the grounds that the statute did not provide for a private cause of action. The court of appeals affirmed on the same grounds. The Supreme Court granted certiorari, and eventually reversed the decision of the court of appeals. The Court acknowledged that the statute did not expressly authorize a private cause of action by a person injured by a violation of Title IX, however, the Court determined that an implied cause of action did exist under the statute. This decision was the first of two decisions which the Supreme Court made which cleared the way for "hostile environment" litigation under Title IX.

The next critical Title IX issue which the Supreme Court answered was whether or not such a private cause of action allowed for an award of monetary damages. This issue was answered in the affirmative in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992). In *Gwinnett*, a high school student brought an action against her school district after a teacher had sexually harassed her. Among the allegations in the complaint were that the teacher kissed the student, forced her to have sex with him, had sexually explicit conversations with the plaintiff, and telephoned the plaintiff at her home in order to ask her out on a social basis. The district court dismissed the action on the grounds that Title IX did not authorize an award of damages, and the Court of Appeals for the Eleventh Circuit affirmed.

The Supreme Court referred back to its decision in *Cannon*, which held that there was an implied cause of action under Title IX. The Court then noted that it would "presume the availability of all appropriate remedies unless Congress has expressly

indicated otherwise." *Id.* at 1032. After looking at the legislative history of Title IX, and at other factors deemed relevant by the Court, the Court concluded that "[I]n sum, we conclude that a damages remedy is available for an action brought to enforce Title IX." *Id.* at 1038. Therefore, the Court's decisions in *Cannon* and *Gwinnett* have paved the way for lower courts to conclude that "hostile environment" sexual harassment is actionable under Title IX, and that damages are an appropriate remedy.

IV. Title VII Case Law Establishing the Elements of a Hostile Environment

As was previously indicated, since the *Meritor* decision, the lower courts, as well as the Supreme Court, have been "ironing out" the elements which a plaintiff must prove in order to prevail under a "hostile environment" cause of action under Title VII. Under current Title VII jurisprudence, in order for a plaintiff to prevail in a case of "hostile environment" sexual harassment, she must demonstrate that she is a member of the protected class, that she was subjected to unwelcome, sexual harassment, that the harassment occurred because of the plaintiff's sex, that the harassment was sufficiently pervasive or severe as to alter the terms and conditions of employment, and that the employer knew or should have known about the harassment and failed to take prompt remedial action. *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539 (S.D. Fla. 1995). The most frequently litigated issue in this type of litigation is whether the complained-of behavior was sufficiently severe or pervasive as to alter the plaintiff's terms and conditions of employment. This determination is made on a case by case basis, and the plaintiff must satisfy both a subjective and an objective standard. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). The factors which go into this determination are

whether the conduct was physically threatening, the severity of the conduct, and the frequency of the conduct. *Balletti,* at 1546. Although the contours of a "hostile environment" claim under Title VII have been ironed out over the past ten years since *Meritor,* the contours of a cause of action for a "hostile environment" sexual harassment under Title IX have not yet been made so clear.

V. Title IX Case Law Establishing the Elements of a Hostile Environment.

Although the elements of a cause of action under the "hostile environment" theory of Title VII are well established among the various federal circuits, there is no such uniformity among the circuits on the issue of what a plaintiff must demonstrate in order to prevail under a Title IX cause of action based on a "hostile environment." Although the case law from the various circuits does have some common elements, there is wide disagreement with respect to the issue of when an educational institution should face Title IX liability when the "hostile environment" is created by students rather than by agents of the educational institution.

Most courts agree that in order to present a viable Title IX cause of action, a plaintiff, similar to a Title VII plaintiff, must demonstrate that she was a member of the protected class, that she was the victim of unwelcome sexual harassment, that the harassment was based on sex, and that the harassment was sufficiently severe or pervasive as to alter the conditions of the plaintiff's education and create an abusive learning environment. The disagreement, however, arises over the final element of a plaintiff's case, that being the basis for institutional liability. Not every circuit court of appeals has answered the question of when an educational institution may be held liable

under Title IX in a case of peer sexual harassment, and there are various theories of liability which these courts have articulated.

The Eleventh Circuit applied strict Title V II principles t a case of peer sexual harassment and concluded that an educational institution can be held liable in a case of peer sexual harassment when the institution knew or should have known of the harassment and failed to take appropriate remedial measures. *See,* Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996). This was the most pro-plaintiff approach taken by any court of appeals; however, the recent decision of the Eleventh Circuit to vacate this decision in Davis v. Monroe County Board of Education, 91 F.3d 1418 (11th Cir. 1996), suggests that a Title IX plaintiff in the Eleventh Circuit may now have to meet a higher standard in order to prevail in a "hostile environment" Title IX case.

In *Davis,* a plaintiff brought suit against the school board, alleging that the board failed to protect the student from sexual harassment carried out by fellow students, despite having actual knowledge of the harassment. The *Davis* court applied Title VII principles, and stated that "if sexual harassment is carried out by non-agent students, an educational institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." *Id.* at 1192. Therefore, under the Eleventh Circuit's approach in *Davis I,* a Title IX plaintiff could prevail if she was able to prove the four previously mentioned elements of a Title IX cause of action, in addition to showing that the educational institution knew or should have known of the harassment and failed to take appropriate remedial measures.

Unlike the Eleventh Circuit in *Davis I,* the Fifth Circuit in *Rowinsky v. Bryan Indep. School District,* 80 F.3d 1006 (5th Cir. 1996), held the plaintiff to a much higher standard of proof in order to prevail in a case of peer sexual harassment brought under Title IX, and forced the plaintiff to demonstrate an intent to discriminate on the basis of sex on behalf of the educational institution. According to the Fifth Circuit, a Title IX hostile environment plaintiff must prove the four previously mentioned elements, and then must prove that the defendant responded to claims of sexual harassment differently, based on sex. The court concluded that ". . . a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys . . ." *Id.* at 1016. Therefore, the courts which follow the *Rowinsky* rationale will force a plaintiff to present a much stronger case in order to prevail.

Because the Supreme Court has not answered this question, district courts have been forced to choose between the approaches followed by the Eleventh and Fifth Circuits.[2] Of course, the fact that the Eleventh Circuit recently has vacated its prior *Davis* decision suggests that these lower courts could follow the extreme approach articulated by the Fifth Circuit. However, some district courts have reached more of a middle ground between the approaches taken by the Fifth and Eleventh Circuits.

This "middle of the road" approach was articulated in the case of *Burrow v. Postville Community School District,* 929 F. Supp. 1193 (N.D. Iowa 1996). In *Burrow,*

[2] The Second Circuit has tangentially addressed this issue in *Murray v. New York University College of Dentistry,* 57 F.3d 243 (2nd Cir. 1995), when, in dicta, the court stated that "in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied under Title VII" *Id.* at 249.

an action was brought under Title IX as a result of a high school student being both verbally and physically harassed by fellow students for a period of almost two years. The plaintiff alleged that the defendant was liable under Title IX for its failure to stop the harassment, despite being made aware of it on numerous occasions. The defendants argued that in order for the plaintiff to prevail, she would have to allege and prove that by their inaction, the defendants intended to discriminate against the plaintiff because of her sex. After a lengthy discussion of the holdings in *Davis I* and *Rowinsky*, the *Burrow* court reached a decision in which a standard incorporating both prior decisions was enunciated.

Specifically, the court held that in order for a plaintiff to prevail in a "hostile environment" claim under Title IX, she must demonstrate that she was a member of the protected class, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, that the harassment was sufficiently pervasive or severe as to alter the conditions of the plaintiff's education and create an abusive education environment, ***and that the educational institution knew of the harassment and intentionally failed to take proper remedial measures because of the plaintiff's sex.*** *Burrow* at 1205-1206. However, "an intent to discriminate on the part of the school district may be inferred by the finder of fact from the totality of the relevant evidence, including the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of the students over whom the school exercised some degree of control." *Id.* at 1205. Therefore, a plaintiff could possibly prevail under *Burrow* by demonstrating the four previously mentioned elements, and by demonstrating that the defendant knew of the harassing conduct and failed to take

appropriate remedial measures. *See also, Wright v. Mason City Community School District,* 940 F. Supp. 1412 (N.D. Iowa 1996) ("[T]he court finds that the test set forth in *Burrow* is the appropriate test for an actionable claim of peer sexual harassment under Title IX."); *Doe v. Petaluma City School District,* 830 F. Supp. 1860 (N.D. Cal. 1993).

Other district courts have also addressed the issue of institutional liability under Title IX in a case of peer sexual harassment. Specifically, in *Bruneau v. South Kortright Central School District,* 935 F. Supp. 162 (N.D.N.Y. 1996), the court acknowledged that although Title VII principles do apply to a hostile environment claim brought under Title IX, the court cautioned that ***not all*** such Title VII principles are applicable. The court relied on the Second Circuit's decision in *Murray v. New York University College of Dentistry,* 57 F. 3d 243 (2nd Cir. 1995) for the proposition that Title VII principles are applicable to a Title IX action, however, the court also noted that *Murray* involved harassment between a student and a faculty member, rather than harassment between students.[3] As a result of that distinction, *Murray* was not directly on point with the case at issue.

The *Bruneau* Court then discussed *Davis* and *Rowinsky.* After analyzing these decisions, the court in *Bruneau* concluded that in order to prevail, a Title IX plaintiff must demonstrate the four previously mentioned elements, and then must demonstrate that the educational institution had actual, rather than actual or constructive, notice of the harassment and failed to take appropriate remedial measures. "Liability will not lie if the

[3] The harassment in *Murray, supra,* was actually carried out by a patient of the dental clinic where the plaintiff was completing her dental training. The court in *Bruneau* was apparently mistaken with respect to this issue.

Plaintiff can show only constructive notice." *Bruneau* at 173. This decision was based on the premise that unlike an employer-employee "agency" relationship, no such agency relationship exists in the usual student-educational institution relationship. The court later noted that "an educational institution will not be held liable for alleged peer-on-peer sexual harassment ***unless*** the school provided no reasonable avenue of complaint ***or*** knew of the harassment but did nothing about it. *Bruneau* at 177 (emphasis added). In *Bruneau,* the court held that there were material issues of fact which were in dispute, and therefore denied the defendant's motion for summary judgment.

The different approaches taken by the courts of appeals and the various district courts illustrate that it is not yet certain what a plaintiff must demonstrate in order to prevail in a "hostile environment" cause of action brought under Title IX. However, it is clear that at the very least, a plaintiff must demonstrate that she was a member of the protected class, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment was sufficiently pervasive or severe as to alter the conditions of the plaintiff's education and create a hostile learning environment. The final element, the basis for institutional inability, is where the various courts have not yet reached agreement.

VI. Statute of Limitations

An issue which is often litigated under cases brought under either Title VII or Title IX is whether the plaintiff has brought her claim in a timely fashion. Unlike Title VII, which contains a statute of limitations for administrative filings, Title IX contains no

such provisions.[4] As a result of this ambiguity, there has been some dispute as to what statute of limitations applies to actions brought under Title IX. Most recently, the Sixth Circuit, in *Lillard v. Shelby County Board of Education,* 76 F. 3d 716 (6th Cir. 1996) held that the appropriate statute of limitations for such an action was the one year period found in the state personal injury statute of limitations. The defendant had argued that the 180 day limitation period found in the Federal Regulations covering administrative complaints brought under Title VI should apply, however, the Sixth Circuit followed the majority of cases which held that the state statute of limitations for a personal injury case was the applicable statute of limitations for a Title IX action. The *Lillard* court relied most heavily on *Bougher v. University of Pittsburgh,* 882 F. 2d 74 (3rd Cir. 1989), for this proposition, as *Bougher* was the first appellate court to decide this issue.

The *Bougher* court conceded that they would "borrow" the state statute of limitations which was most similar to a cause of action under Title IX, and in the opinion of the court, that was the statute of limitations which applied to personal injury cases. This line of reasoning has been followed by the majority of courts. *See, Egerdahl v. Hibbing Community College,* 72 F. 3d 615 (8th Cir. 1995) (Title VI and Title IX claims are covered by Minnesota six year personal injury statute of limitations); *Nelson v. University of Maine System,* 914 F. Supp. 643 (D. Maine 1996) (Maine personal injury statute of limitations is most appropriate in actions brought under Title IX); and *Linville v. State of Hawaii,* 874 F. Supp. 1095 (D. Hawaii 1994) (Hawaii two year personal injury

[4] Pursuant to 42 U.S.C.A. Section 2000e-5 (e)(1), a plaintiff must file a charge of discrimination with the Equal Employment Opportunity Commission within either 180 or 300 days (depending on whether a charge is filed with a state or local civil rights agency) after the alleged discriminatory conduct. This time provision is often extended when a plaintiff alleges a "continuing violation," a theory which may revive "state" claims.

statute of limitations applicable to plaintiff's Title IX claims). Therefore, one must look at the applicable state law statute of limitations (usually personal injury statute of limitations) in order to determine whether a plaintiff's Title IX claim was timely.

VII. Damages Available Under Title VII and Title IX

One of the most important elements of any cause of action brought under either Title IX or Title VII is the amount of damages which a plaintiff may possibly recover. This is obviously important for the plaintiff to know, as these potential caps will undoubtedly affect decisions regarding settlement possibilities. A defendant will also be concerned about any caps on damages in order to better analyze any settlement offers. Title VII has placed a monetary cap on the amount of monetary damage which a plaintiff may recover, that cap being on a sliding scale depending on the number of employees employed by the defendant. These caps are the total amount of monetary damages, including compensatory and punitive damages. The damage caps range from $50,000 to $300,000. 42 U.S.C.A. Section 1981a(b)(3). Despite these limits, creative plaintiff attorneys will almost always add state law claims to a Title VII action (either tort claims or state civil rights claims with higher statutory caps) which can, and do, raise jury verdicts to amounts much higher than the statutory caps provided for by Title VII.

Unlike Title VII, Title IX does not address the issue of whether a plaintiff may receive punitive damages under an action brought under Title IX. This is undoubtedly because, until the Supreme Court decision in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), a damages remedy was not conclusively available under Title IX. However, the language from that decision, in addition to a recent district court

opinion interpreting that decision, suggest that a plaintiff could receive an award of punitive damages under Title IX. Specifically, in *DeLeo v. City of Stamford,* 919 F. Supp. 70 (D. Conn. 1995), the court, in dicta, expressed its opinion that both compensatory and punitive damages were available under Title IX. Although this case was brought under the Rehabilitation Act, the court relied on Title IX case law to reach the conclusion that punitive damages were available under both acts. Relying on *Franklin,* for the proposition that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done," *DeLeo*, at 72, the court then ruled that punitive damages are available. The court concluded "although *Franklin* did not address specifically the availability of punitive damages under Title IX, there is no adequate basis, in the *Franklin* opinion or elsewhere, for exempting punitive damages from the full spectrum of remedies available for violation of a federal statute such as Title IX . . ." *Id.* at 74. If future courts follow the reasoning in *LeLeo,* defendants in Title IX "hostile environment" causes of action may be forced to pay out large damages awards. Furthermore, plaintiffs attorneys will undoubtedly add state law claims to Title IX actions in order to raise the possible amount of damages, and in order to increase the chances for a favorable settlement.

VIII. Conclusion

Courts have now recognized a "hostile environment" cause of action under both Title VII and Title IX. Although the elements required for a plaintiff to prevail under Title VII are clearly established, no such clarity exists under Title IX. However, if a

plaintiff is the victim of sexual harassment either by fellow students or by co-workers, a plaintiff must at least be able to demonstrate that her employer or academic institution knew of the harassment and failed to take proper remedial measures to correct it. Although this is no guarantee of success under Title IX, it should at least provide the plaintiff with an opportunity to prevail.

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