PUBLIC EDUCATION

D.T. v. Harter,
844 So. 2d 717 (Fla. 2d Dist. App. 2003)

When a school board's code of student conduct fails to define the term "possession," but the Florida Statutes and the school board's code contain plain language to indicate that "possession" should not include the element of "knowledge," it is unreasonable for the school board to include "knowledge" as an element of "possession."

FACTS AND PROCEDURAL HISTORY

A drug-sniffing dog alerted Lee County Sheriff's Department officers to high school student D.T.'s car in the Riverdale High School parking lot. Upon inspection, officers removed a small amount of marijuana from the passenger-side door compartment. D.T., a minor, denied that he owned or knew about the existence of the marijuana.

An administrative, school-based hearing was conducted, resulting in D.T.'s ten-day suspension. Ultimately, the superintendent referred the matter to an impartial hearing officer for the Lee County School Board, pursuant to Florida Statutes Section 230.33(8) (2000). The hearing officer was to determine whether D.T. should be "reassigned to an alternative learning center" in the Lee County school system. *D.T.*, 844 So. 2d at 719. The officer established "that D.T. had no knowledge of the presence of the marijuana and no reason to believe that it was likely to be present in the car." *Id.* at 718. Next, the hearing officer found that, under the Lee County Code of Conduct for Students, "possession" required D.T.'s "knowledge." Because D.T. had no knowledge of the marijuana's existence, the hearing officer recommended that D.T. be sent back to Riverdale High School.

Subsequently, the School Board adopted all of the hearing officer's factual findings, but rejected the officer's conclusions of law. The School Board found that the hearing officer incorrectly applied a criminal-law interpretation to "possession," which required "knowledge." Instead, the School Board stated that it had

discretion to define terms in the Code, and used that discretion to omit "knowledge" as a requirement for "possession." Accordingly, the School Board found that D.T. violated the Code, and reassigned him "to an alternative learning center as a sanction." *Id.* at 719.

D.T. appealed, arguing that "possession" under the Code included a "knowledge" requirement. In response, the School Board argued that its definition of the term, "possession," which was undefined in the Code, was reasonable, and did not require "knowledge."

ANALYSIS

The Second District Court of Appeal explained that courts usually give great deference to an agency's interpretations of its own rules, but courts need not defer to erroneous or unreasonable interpretations. In determining the reasonableness of the School Board's interpretation, the Second District looked to the language of the Code itself, and the source, Florida Statutes Section 230.23(6)(d). The court then looked to the controlling statutory law and administrative policies of the School Board. Florida Statutes Section 230(6)(d) requires school boards to adopt rules that provide disciplinary measures, possibly including criminal sanctions, for illegal possession of controlled substances by students on school property. The School Board incorporated language from Section 230.23(6)(d) into the Code. Accordingly, the Code provided, *inter alia*, that illegal possession of controlled substances on school property "is grounds for disciplinary action and may result in criminal penalties being imposed." *Id.* Additionally, the Code included a "zero tolerance policy," derived from Florida rules and law, which requires law-enforcement notification for possession of controlled substances. *Id.*

The court found that the plain language of Florida Statutes Section 230(6)(d) and the Code indicated that references to illegal activity in the Code supported the hearing officer's interpretation of "possession," which included the element of "knowledge." Accordingly, the court found that the School Board's definition of "possession," which did not include "knowledge," was unreasonable.

SIGNIFICANCE

Although courts usually defer to an agency's interpretation of its own rules, when the plain language of the statutory law and the rules themselves conflict with an agency's interpretation, the agency's erroneous interpretation is unreasonable. In *D.T.*, the School Board's interpretation of its Code, excluding "knowledge" as an element of "possession" even though the plain language of the Code indicated a contrary interpretation, was unreasonable.

RESEARCH REFERENCE

- 46 Fla. Jur. 2d *Schools, Universities and Colleges* § 249 (1999 & Supp. 2003).

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Public Education: Harassment & Misconduct

Hawkins v. Sarasota County School Board, 322 F.3d 1279 (11th Cir. 2003)

A private action for damages against a school board under Title IX of the Education Amendments Act of 1972 for "student-on-student sexual harassment" is available only in limited circumstances. *Hawkins*, 322 F.3d at 1280. Such a claim must be supported by evidence that: (1) school officials had actual knowledge of the offending behavior, and yet exhibited deliberate indifference, and (2) the harassment impaired the victim's equal access to educational resources in a tangible and demonstrable manner. Whether notice to a teacher constitutes knowledge on the part of a school board is an open question.

FACTS AND PROCEDURAL HISTORY

Parents and guardians of three female students (Jane Does I, II, and III) brought suit against the Sarasota County School Board, alleging that their second-grade classmate, John Doe, sexually harassed the girls. The complaint alleged a violation of Title IX of the Education Amendments Act of 1972, which provides, in relevant part, 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) (2000). The girls alleged that John Doe engaged in a pattern of sexually explicit comments and gestures over a period of several months. Numerous teachers and staff members "gave consistent reports of John Doe's bad behavior," but none identified any overtly sexual behavior. *Hawkins*, 322 F.3d at 1282. The parents argued that school officials, including teacher Barbara Cypher, failed to respond appropriately to the girls' complaints and thus denied them equal access to the school's educational opportunities.

The district court found that, even when viewed in a light most favorable to the plaintiffs, Jane Doe I and II's complaints did not provide actual knowledge of the harassment to Cypher because they did not convey the explicit sexual nature of John Doe's actions. However, the district court did find that, when it accepted Jane Doe III's deposition as true, her specific and repeated complaints to Cypher "constituted actual knowledge on the part of the [S]chool [B]oard." *Id.* at 1285. Despite the finding of actual knowledge, the district court granted summary judgment in favor of the School Board. It found that school officials, including Cypher, did not demonstrate deliberate indifference to the harassment, and the harassment did not impair the girls' access to the school's educational opportunities. The Eleventh Circuit Court of Appeals did not confirm the district court's finding with regard to actual knowledge because it considers the issue of whether notice to a single teacher imputes liability to a school board to be an open question. However, the Eleventh Circuit did affirm the district court's summary judgment because it found no "real and demonstrable" evidence that the harassment was so severe as to deny the girls equal access to education. *Id.* at 1289 n. 13.

ANALYSIS

Because a school board receives federal funding, it can be held liable in a private damages action when "deliberate indifference to known acts of harassment . . . amounts to an intentional violation of Title IX." *Id.* at 1283 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999)). In *Davis*, the United States Supreme Court extended the right of private action under Title IX to include "student-on-student," or peer, harassment. To establish liability, a plaintiff must satisfy both prongs of a two-

prong test (the *Davis* test). First, the plaintiff must establish that the funding recipient had actual knowledge of the sexual harassment, and the recipient acted with deliberate indifference in failing to respond adequately. Because Title IX attempts "to prevent recipients of federal financial assistance from using [the] funds in a discriminatory manner," liability will be found only when there "is an official decision by the recipient not to remedy the violation." *Id.* at 1284 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 292 (2000)). Under the second prong of the *Davis* test, the plaintiff must also establish that the harassment is "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652. The *Davis* Court specifically qualified this in the context of public education when it declared that "[d]amages are not available for simple acts of teasing and name-calling among school children, . . . even where these comments target differences in gender." *Id.* However, what is unclear under *Davis* and *Gebser* is whether actual knowledge by a single school teacher can be imputed to a school board, and thus establish liability under the first prong.

In applying the foregoing principles to the facts of *Hawkins*, the Eleventh Circuit found that the first prong of the *Davis* test could not be resolved as a matter of law. The court reasoned that, for the School Board's response to have been deliberately indifferent, it must have been "clearly unreasonable in light of the known circumstances." *Id.* at 648. Because unreasonableness can be measured only by what is known, and Cypher's knowledge could not necessarily be imputed to the School Board, the court refrained from ruling on the first prong. However, the court did find the second prong of the *Davis* test to be dispositive. In the court's view, John Doe's harassment was unwelcome and intimidating, and likely motivated the two girls to fake illnesses on four or five occasions to avoid school. However, none of the girls' grades declined, nor did they suffer an observable change in demeanor or classroom participation. Even when viewed in a light most favorable to the plaintiffs, the record did not show that John Doe's harassment had a "concrete, negative effect" on the girls' "ability to receive an education." *Hawkins*, 322 F.3d at 1289.

SIGNIFICANCE

Hawkins establishes that, although an action may be brought against a school board under Title IX for "student-on-student sexual harassment," only under limited circumstances will a plaintiff succeed in establishing liability. *Id.* at 1280. First, the plaintiff must establish actual—not constructive—knowledge on the part of a school official, preferably an official higher than a teacher. Second, the plaintiff must establish a deliberate and officially sanctioned decision on the part of a school official *not* to remedy the situation. Third, the plaintiff must demonstrate with real and concrete evidence that the sexual harassment was so severe and offensive as to physically deny the victim access to school resources, or at least undermine the victim's equal access to educational programs and opportunities. By definition, these stringent requirements severely limit the judicially implied right of private action under Title IX.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 16B, § 46.22.50 (3d rev. ed., West 2003).
- *Right of Action under Title IX of Education Amendments Act of 1972 (20 U.S.C.A. §§ 1681 et seq.) against School or School District for Sexual Harassment of Student by Student's Peer*, 141 A.L.R. Fed. 407, §§ 3-6 (1997).
- Jena Donofrio, *Recent Developments*, 29 Stetson L. Rev. 955 (2000) (discussing *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)).

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