

## Chapter X

# PEER SEXUAL HARASSMENT

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## I. Overview

Sexual harassment doesn't just happen in the workplace, it occurs on college campuses as well. A recent survey found that between 20 percent and 30 percent of all female undergraduates have experienced some form of sexual harassment from faculty or staff. This percentage increases significantly when peer harassment is considered. A 1993 American Association of University Women report documented that 85 percent of all females and 76 percent of all males have been sexually harassed (defined as sexual contact or sexually explicit language) during their academic life. Of these students, "four in five have been targeted by a current or former student at school."

The presence of peer sexual harassment on college campuses increases the possibility of institutional liability. Prior to the U.S. Supreme Court decision in *Davis v. Monroe County* (1999) the courts were split on whether Title IX provides a remedy for peer sexual harassment and on the standard for institutional liability. Legal trends prior to *Davis* suggested courts would read Title IX broadly, finding liability under a Title VII standard (Title VII was enacted as part of the Civil Rights Act of 1964; it prohibits discrimination in employment). Applied to the collegiate setting, Title VII would find the college liable in peer harassment

cases if it can be proven that the college knew or should have known of the hostile environment created by sexual harassment, yet failed to take sufficient remedial steps. Guidelines by the Office of Civil Rights (OCR), which are usually followed by courts when dealing with a vague statute, support the Title VII standard.

Although most cases involve claims against secondary schools and school boards, several recent cases have been brought against colleges and universities. The ramifications are significant even though no institution has yet been held liable for a peer harassment claim. Besides the negative media attention which is likely to occur (e.g., recent cases have made prime time news broadcasts and major national newspapers), the college or university will incur significant litigation costs in defending the suit. Moreover, if the college should lose its defense, the U.S. Supreme Court has provided a monetary damage remedy under Title IX. This chapter will help colleges address these consequences by providing an overview of Title IX, the OCR guidelines, recent case law, and the *Davis* Supreme Court decision.

## **II. Application**

### **TITLE IX AND ITS APPLICABILITY**

Title IX provides that “No person in the United States shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving federal financial assistance.*” *Education program or activity* includes all school operations: student academics, and all educational or athletic extracurricular activities which take place in school facilities or elsewhere. Under previous decisions of the U.S. Supreme Court, an institution can be liable for damages for violating Title IX. Thus, if Title IX applies to peer sexual harassment, institutional liability could result from a range of activities either on or off campus.

The dispute over whether Title IX affords a remedy for peer sexual harassment hinges on the meaning of the terms *under* and *discrimination*. Proponents of a Title IX violation argue that *under* means “in” rather than “by.” By interpreting the statute in this way, proponents suggest that it encompasses harassment both by a school employee and by a peer attending an institution because both occur in an educational program. According to the proponents, *discrimination* includes hostile environment harassment as defined by Title VII. The argument follows that peer harassment in colleges creates a hostile environment that prohibits a student from learning just as harassment in the workplace inhibits the employee’s work performance.

The statutory language, however, is unclear and an argument could be made that the statute only applies to intentional discrimination by the college or one of its employees. Under this interpretation, the college or one of its agents must be the source of sexual harassment for liability to attach.

## THE SUPREME COURT RESPONDS

LaShonda, a fifth grade student in Monroe County, Georgia, alleged in a complaint filed by her mother that for a period of months another fifth grader continued to sexually harass LaShonda. The boy’s behavior included physical touching, sexual language, sexual innuendo and apparently was expanded to other students in the fifth grade. At various points, LaShonda informed teachers and the principal about the fifth grade boy’s behavior who was never disciplined by the school. Ultimately the boy pleaded guilty to sexual battery for his misconduct.

LaShonda’s mother filed suit in district court in Georgia which dismissed the Title IX claim for sex discrimination on the basis that Title IX did not provide a basis for liability absent an allegation “that the board or employee of the board had any role in the harassment.” (Davis, 1999) Since the harassment all

occurred by a fifth grade peer, the court did not find the institution or its employees involved in the harassment.

On appeal to the Court of Appeals for the Eleventh Circuit the initial three judge panel reversed that decision. However, the entire court *en banc* reviewed the case and ruled that since an institution or recipient could lose federal funds, there must be “unambiguous notice” of any condition involving the acceptance of those funds. In essence, recipients of federal funds must be provided adequate notice in order to take appropriate remedial action. In the case of student on student harassment, there did not appear to be notice so an institution could prevent such harassment.

The Supreme Court granted review “in order to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student on student sexual harassment.”

Justice O’Connor writing for the five member majority ruled on several key points:

1. Peer harassment could amount to sexual discrimination protected under Title IX.
2. An institution is not liable under agency principles for actions of its employees but its liable for its own misconduct based on its “deliberate indifference” to known peer harassment.
3. An institution must have actual knowledge of the harassment.
4. The institution must be deliberately indifferent in responding to that actual knowledge.
5. The discriminating conduct must be “severe, pervasive, and objectively offensive.”

The case follows an earlier decision of the Supreme Court in *Gebser v. Lago Vista Independent School District* (1998) when the court ruled that educational institutions could be liable for acts of faculty in harassment of students if an official who has authority to address the alleged discrimination has actual

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knowledge of the harassment and was “deliberately indifferent” to the alleged harassment. If such indifference existed, then the institution is the party perpetrating the discrimination.

As the court stated in *Gebser*, the deliberately indifferent standard was imposed in order to eliminate any “risk that the recipient would be liable in damages not for its own official decision but instead for its employees’ independent actions.”

In *Monroe*, the court attempted to identify the conditions under which a college covered by Title IX and its prohibition against gender discrimination could be liable. The institution must have some control over both the harasser and the context in which the known harassment occurs. This ruling is very critical to colleges since in many cases, the ability of a college to control its students and/or the environments in which they operate is much more limited than students in a school house. As the court detailed in *Monroe*, a school has a great deal of control over the context and harasser during school hours on school grounds. And the court reemphasized that the relationship of elementary and secondary students is custodial which carries with it a great deal of control over the third party student harasser.

The question of what behaviors are covered by the prohibition must involve “overt, physical deprivation of access to the school resources.” A plaintiff must establish sexual harassment that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim’s educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”

The court acknowledged that young children did not necessarily understand the full thrust of their behaviors and therefore, some behaviors must be tolerated that might not be tolerated among those who were capable of understanding the consequences of what they did.

The court noted: “damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.” Although the court is not willing to reject that a single instance of

some severe peer on peer harassment could trigger liability, it tends to minimize this possibility when it emphasizes its indifference standards and the requirement that the behavior have a “systemic effect on educational programs or activities.”

A stinging dissent by Justice Kennedy challenged many of the assumptions on which the majority had determined liability and its conclusion that its decision was “limited,” which Kennedy characterized as “illusory.” Kennedy argued that this cause of action “will embroil schools and courts in endless litigation over what qualifies as peer harassment and what constitutes a reasonable response.” Further, he expressed concern about the notice provision and who must actually have notice for liability to ensue when he asked “known to whom?”

At least two issues will continue to confront the courts and cause substantial litigation. First, what does actual notice mean? Based on the court’s analysis, it must be given to an official who is in a position to address the harassment claim. So colleges will be confronted with claims that a report to a faculty member is sufficient even though the faculty member may not have any direct authority over the legal harasser. The second area for ongoing litigation, will be the constant challenges that whatever the institution did or whatever action it took in response to peer harassment complaints, according to the plaintiff, the action was inadequate and therefore the institution was deliberately indifferent.

Several courts have recently addressed the deliberate indifference standard in the context of faculty and peer harassment of students. For example, a federal appeals court found that the University of Colorado could be liable for actions of student ROTC students against other ROTC students if the university failed to investigate the complaint and take appropriate action. (*Morse and Handley v. Regents of the University of Colorado*, 1998).

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A recent federal court of appeals points to the balancing act:

*School officials faced with knowledge of sexual harassment must decide how to respond, but their choice is not a binary one between an obviously appropriate solution and no action at all. Rather, officials must choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit. (Doe v. University of Illinois, 1998).*

*Monroe* lays the framework for the analyses of peer to peer harassment and clarifies the Title IX standards to be applied. The OCR Policy Guidance still has a force of validity as regulation in those areas that the Supreme Court did not address.

### THE OCR GUIDELINES

Although courts tend to follow administrative guidelines, particularly in statutory interpretation, it is not mandatory. Nevertheless, since the OCR responds and investigates complaints of sexual harassment, institutions of higher education should consider responding to OCR standards. In doing so, the college or university will reduce the number of OCR investigations and provide the college with persuasive authority of compliance should a dispute end up in court (persuasive authority because courts usually give significant weight to a defendant's compliance with administrative regulations). For this reason, the following

sections provide an overview of the Department of Education's 1977 policy guidance which applies to students at every level of education. These sections will concentrate exclusively on peer sexual harassment liability and reflect those guidelines related to prevention and investigation that are still viable given the Supreme Court's *Davis* opinion.

### **The OCR Liability Standard**

The OCR uses a facts and circumstances approach to determine whether particular conduct should be deemed unwelcome. Factors such as the relationship between the parties, the relative ages of the students, statements made by witnesses to the incident, statements made to friends or in a letter or diary, and other relevant items should be considered. The student's acquiescence in the conduct or a failure to complain immediately should not be determinative of whether the conduct was unwelcome because a student may decide not to resist or complain out of fear.

The OCR policy guidance is consistent with *Davis* when it suggests that the peer harassment must be sufficiently severe, persistent, or pervasive to limit the student's participation in an education program for a hostile environment to exist. The inquiry is both subjective and objective. Thus, the OCR will use the facts and circumstances approach to determine whether both the victim and a reasonable student would find the harassing behavior to be sufficiently severe or pervasive to create a hostile environment.

In making this assessment, the OCR typically will look at the degree to which the conduct affected one or more students and the type, frequency, and duration of the conduct. Conduct such as a male's grabbing a female's breasts, genital area, or buttocks will be severe even if it occurred only once. Less severe conduct, usually conduct not involving physical touching, would create a hostile environment only if it occurred on several different occasions.

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The guidelines provide little direction as to what constitutes an appropriate response once the college receives notice of the harassing environment. Indeed much will depend on the particular facts and circumstances of the case—e.g., the nature of the allegation, source of the complaint, number of students involved, and age of students.

In each case, college officials should conduct a prompt investigation to determine what occurred and then take appropriate steps to resolve the situation. These steps may include separating the harassed student from the hostile environment; giving the student the opportunity to withdraw from a class in which the hostile environment occurred; or disseminating information, policy statements, or other messages to the student body that the college does not tolerate sexual harassment. The student engaging in the harassing activity should also be reprimanded based on the severity of the conduct. Counseling and a series of escalating consequences for additional acts of harassment should be considered part of the punishment.

### **Policy on Sexual Discrimination**

Besides analyzing the promptness in investigating and eliminating the harassment, the OCR will consider whether the college or university has a policy prohibiting sex discrimination under Title IX. All schools are required to adopt and publish such a policy and to provide grievance procedures for prompt and equitable resolution of sexual harassment complaints.

The policy must specifically address the kind of conduct that constitutes sexual harassment in order to promote student awareness. It should clearly provide grievance procedures for students to follow in filing a complaint. In the absence of such a policy, the OCR states that it will be more inclined to find a Title IX violation. As it explains, “this is because without a policy and procedure, a student does not know either of the school’s interest in preventing this form of discrimination or how to report harassment so that it can be remedied.” OCR suggests the absence of

a policy implicitly suggests sexually harassing behavior is tolerated.

## **SAME-SEX PEER HARASSMENT**

Independent colleges should also consider the implications of *Oncale v. Sundowner Offshore Services, Inc.* (1998), a U.S. Supreme Court case that assesses potential liability from same-sex peer sexual harassment. Although *Oncale* is a Title VII case, it is important because several federal courts have applied its reasoning to Title IX claims.

In *Oncale*, a male employee brought a hostile environment claim for sexually harassing conduct by two male supervisors on a Chevron oil platform in the Gulf of Mexico. The evidence stated that Oncale had been forcibly subjected to sex-related humiliating actions by the supervisors in the presence of the crew. Oncale's complaints to supervisory personnel fell on deaf ears and Oncale eventually quit.

Oncale later brought a claim for sexual harassment under Title VII which prohibits discrimination because of sex. The district and appellate courts both held that a male has no cause of action under Title VII for harassment by male co-workers. The Supreme Court, however, reversed that decision. In a unanimous holding, the court ruled that same-sex sexual harassment is actionable under Title VII. The court reasoned that even though same-sex sexual harassment was not "the principal evil" Congress was concerned with, the many "facets of human motivation" suggest that same-sex harassment is likely to occur and a remedy should be provided. The court rejected arguments that the rule would transform Title VII into a general civility code for the American workplace.

It explained that Title VII does not prohibit all harassment, just that which occurs on the basis of sex. Furthermore, the court reiterated that successful hostile environment sexual

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harassment claims must show that a reasonable person would find the harassment severe or pervasive. This analysis involves the court's consideration of the "social context in which the harassment occurs." "Common sense and appropriate sensitivity" to this context, moreover, would allow a court to distinguish simple teasing from an abusive environment.

The court remains confident that social context and common sense are enough, but the vagueness of the reasonable person standard opens the gates for lawsuits, and fact intensive inquiries lead to high discovery costs. A football player's slap on a teammate's behind obviously will not constitute sexual harassment, but peer-to-peer behavior in the athletic, academic, and fraternity and sorority atmosphere could easily become much more offensive and humiliating.

Justice Scalia, writing for the unanimous court, noted that the "statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," and suggested that courts and juries should "not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation" as forms of discriminatory conduct. Colleges and universities, however, must be willing to investigate promptly and remedy same-sex sexually harassing behavior in order to avoid litigation.

While same-sex peer harassment is an emerging legal issue in the context of higher education, several courts have addressed the issue in the context of secondary education. In *Frazier v. Fairhaven School Committee* (2002), Kate Frazier, a high school student, complained of an incident that occurred while she was relieving herself in a bathroom stall. Apparently while she was using the restroom the school's female discipline matron peered into the stall through a crack between the door and the wall. Frazier claimed the incident "caused Kate profound distress," and although her parents reported it to the school psychologist, school officials took no action. Moreover, Frazier claimed the discipline matron stalked her, continually leered, scowled, and pointed at her.

Frazier brought a Title IX action against the school and the discipline matron claiming the schools actions were harassing and created a hostile environment. The First Circuit Court of Appeals found that Frazier did not allege facts that the discipline matron's conduct was of a sexual nature. The matron was authorized to access the restrooms used by female students in order to ensure that nothing was amiss. Although the court dismissed the Title IX claim, it noted "the reasoning of *Oncale* is fully transferable to Title IX cases."

Colleges should consider same-sex harassment when implementing and revising sexual harassment policy statements and investigation procedures. *Oncale* presents significant dilemmas for colleges and employers in this area because it provides very little guidance as to what constitutes wrongful harassment in the same-sex environment.

### III. Preventive Measures

The widespread presence of peer sexual harassment on college campuses presents dilemmas for universities and colleges. As *Davis* suggests, once colleges know of peer harassment, they could be liable for a failure to promptly remedy a hostile environment that they knew existed. The Supreme Court's recent decision in *Oncale*, indicates that a same-sex hostile harassment claim may also apply.

To limit liability, colleges and universities should develop sexual harassment policies that include peer to peer harassment and include the potential for same-sex claims. The OCR guidelines and case law suggest that the key for avoiding liability remains prompt and adequate responses to complaints of hostile student environment. Thus, sexual harassment policies must provide a specific procedure for the investigation of any claims that may arise and particular guidelines for the remediation of these claims. The OCR guidance statement provides some details for appropriate procedures which should be followed as

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closely as possible. OCR investigations of colleges will consider the colleges' sexual harassment policy when determining whether a violation exists. Furthermore, once policies are established, the institution should consistently implement them.

Sexual harassment policies must be disseminated throughout campus. Faculty, staff, and students should be familiar with what constitutes harassing behavior, including same-sex and peer harassment, and they must have an understanding of the severity of the offense. The education of faculty and staff members is essential.

Sexual harassment remains a major societal problem which courts and legislatures are only beginning to confront. The pervasiveness of the problem suggests that institutions must proceed cautiously if they are to avoid legal liability.

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**Administrative Guidelines:**

Department of Education; Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice. Federal Register, Vol. 62, No. 49 (March 13, 1997).