

Sixth Circuit Requires Proof of Actual Further Harassment in Title IX Deliberate Indifference Claims



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On December 12, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Kollaritsch v. Michigan State University Board of Trustees*, holding that, in order to be liable for deliberate indifference under Title IX, a school's response must have failed to protect a plaintiff against actual further harassment. It is not enough for plaintiffs to plead that an institution's actions or inactions left them vulnerable to harassment that never materialized. In the words of the court, "a student-victim plaintiff must plead, and ultimately prove, that the school had actual knowledge of actionable sexual harassment and that the school's deliberate indifference to it resulted in further actionable sexual harassment against the student-victim, which caused the Title IX injuries."

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Overview of the Case

The plaintiffs in *Kollaritsch* were three students who claimed to have been sexually assaulted by other students, and who took issue with how the university responded to those reports. Among other claims, the plaintiffs asserted that the school took too long to resolve their complaints and failed to take adequate steps to protect them from encountering — or potentially encountering — their alleged assailants on campus. The plaintiffs did not allege that they experienced additional harassment after reporting their assaults to the university, and two of the plaintiffs never saw their alleged assailants again. Regardless, the plaintiffs claimed that the university's response left them "more vulnerable" to harassment because they feared seeing their assailants on campus, which, in turn, interfered with their educational experience. The district court agreed that the plaintiffs' claim of vulnerability to potential harassment was sufficient to survive the university's motion to dismiss.

The *Kollaritsch* court disagreed. The court carefully analyzed the U.S. Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), which was the first — and only — time the Supreme Court discussed the contours of a Title IX damages claim for peer-on-peer sexual harassment. In *Davis*, the Supreme Court held that, although Title IX itself does not provide for a civil claim for damages, a plaintiff may sue for damages in "limited circumstances" and "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of known circumstances." *Davis*, 526 U.S. at 648.

Quoting the *Davis* Court, *Kollaritsch* noted that "[t]he school is 'properly held liable in damages only where [it is] deliberately indifferent to sexual harassment, of which [it] had actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.'" *Kollaritsch*, slip op. at 4.

Critical to the *Kollaritsch* decision, the *Davis* Court also articulated a causation requirement that the school's deliberate indifference must "subject" students to harassment. In defining "subject," *Davis* said that the school's "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645.

The plaintiffs in *Kollaritsch* argued that they did not need to show that the university's deliberate indifference caused them "to undergo harassment," but only that its alleged "clearly unreasonable" response made them "more vulnerable" to harassment. A number of courts have agreed with this interpretation, including the Tenth Circuit in *Farmer v. Kansas State University*, 918 F.3d 1094 (10th Cir. 2019), where the court held that a university's failure to take any action in response to a reported rape made the plaintiff sufficiently vulnerable to harassment by subjecting her to the possibility of encountering her alleged assailant. In *Kollaritsch*, the Sixth Circuit specifically rejected such a broad reading of *Davis* and held that, instead, a school cannot "subject" a student to harassment unless the student actually suffers harassment as a result of the school's alleged unreasonable response to the reported misconduct.

Implications

The *Kollaritsch* decision is important because it makes clear that "[a] student-victim's subjective dissatisfaction with the school's response is immaterial to whether the school's response caused the claimed Title IX violation." *Kollaritsch*, slip op. at 2. Since *Davis*, plaintiffs have filed many cases against colleges and universities seeking damages under Title IX not because the school engaged in conduct that caused one student to harass another, but instead because the plaintiff believed that the school's response to a report of sexual misconduct was deficient. *Kollaritsch* rejects this line of cases, making clear that *Davis* intended to create a claim for damages under Title IX only when the school can be said to have caused the harassment, generally by ignoring **ongoing** harassment in a way that allows it to continue. As Judge Thapar noted in his concurrence, this interpretation aligns with the language of the *Davis* opinion, where the Supreme Court "went to great lengths to emphasize the narrowness of its decision." *Kollaritsch*, slip op. at 19.

It will be interesting to see how courts address the split in the circuits — particularly the Sixth and Tenth — as it relates to the vulnerability argument. In the meantime, the decision does not mean that schools should change what they are currently doing. The Department of Education still expects schools to provide for the prompt and equitable resolution of complaints of sex discrimination, including forms of sexual misconduct. This landscape may be further impacted by the Department's issuance of new final regulations on this topic, perhaps as soon as in early 2020. Pepper Hamilton will provide further updates as these developments unfold.

Note: Pepper Hamilton served as counsel to the defendants in *Kollaritsch*.

The authors are members of Pepper Hamilton's Higher Education Practice Group, which embraces the mission and business of higher education, while providing comprehensive legal services to colleges, universities and other educational institutions as they navigate the myriad issues impacting their campuses each day.