

PODCAST: A Discussion on the *Kollaritsch v. Michigan State University Board of Trustees* Decision

12/16/2019

Categories: Education

[Kristin H. Jones]

I am Kris Jones from Pepper Hamilton. Welcome to our Pepper podcast. I am interviewing my partner, Mike Baughman, today about the Sixth Circuit's December 12 decision in the *Kollaritsch v. Michigan State University* case. Mike represented Michigan State University and is going to start by telling us about the importance of that decision.

[Michael E. Baughman]

The case is important because it clarified a question that is then percolating in the courts of appeal about the scope of liability under Title IX and whether or not clubs and universities are liable for how they respond to a single instance of student on student sexual misconduct.

[Kristin H. Jones]

How did they resolve that issue?

[Michael E. Baughman]

The court found that a school can't be liable for damages under Title IX unless it's response to an incident of sexual misconduct is not only deliberately indifferent but its delivered indifference causes the student to suffer additional harassment.

[Kristin H. Jones]

Mike, if a student doesn't like how the school's Title IX process addressed their claim of sexual misconduct, do they have a cause of action under Title IX for damages?

[Michael E. Baughman]

Not unless the response caused them to suffer additional harassment. At least that is what the *Kollaritsch* case says.

[Kristin H. Jones]

Mike, how did the *Kollaritsch* case get to the Sixth Circuit?

[Michael E. Baughman]

We filed a motion to dismiss the complaint arguing that the plaintiff's had not pleaded that they suffered additional harassment and then the District Court denied that motion but we filed a motion to certify that decision for an immediate appeal to the Sixth Circuit which the District Court granted and then the Sixth Circuit agreed to hear the case and then we brief the case on whether or not the District Court was right or wrong in denying our motion to dismiss.

[Kristin H. Jones]

What is the plaintiff alleging and why did Michigan State feel that was insufficient?

[Michael E. Baughman]

So, the allegations in the complaint, there were three plaintiffs who made the way out to the Court of Appeals. Each of them took issue with how the University responded to their reports of sexual assault. They argued that the University took too long, that the University didn't take sufficient steps to segregate the assailant and the complainant from each other on campus, and they took issue with the particulars of the process. What they didn't allege was that after they recorded the assault to the University that they suffered additional harassment. For example for two of the plaintiffs, they didn't actually see the assailant on campus again. They never saw the assailant again after they reported the incident to the University.

[Kristin H. Jones]

If they weren't alleging additional discrimination, what were they alleging? Were there concerns after they made their reports to Michigan State University?

[Michael E. Baughman]

Right, so their allegation was that by the continued presence of the assailants on campus, that in and of itself constituted discrimination and that by allowing the students to remain on campus and not more promptly addressing their complaints of sexual misconduct, that is what they said violated Title IX.

[Kristin H. Jones]

That they were vulnerable to further harassment?

[Michael E. Baughman]

Correct. And the decision goes off on. One of the reasons I think the decision is important is that all this started with a case in the U.S. Supreme Court called *Davis v. Monroe County*. That is the first and only time that the Supreme Court has talked about whether Title IX allows you to sue for damages when one student sexual harasses another student. And in that case, the Supreme Court was very clear they were creating a very narrow cause of action. But there was a specific dispute as to a particular portion of the decision that talked about causation and in particular the Supreme Court said that the school's delivered indifference has to subject the student to harassment. And in defining subject the Supreme Court said that has to either cause harassment or make the student more vulnerable to it.

[Kristin H. Jones]

What did the plaintiffs argue that the language meant?

[Michael E. Baughman]

Right. So they argued that by an unreasonable response to their report of sexual misconduct and not taking more prompt action, there were more vulnerable to harassment because their assailants were still on campus and they might see them again. And what the *Kollaritsch* court said. Let me back up. There are differing interpretations of what that sentence means. So some courts have said that's sufficient if there is a risk seeing the assailant on campus. That can make them more vulnerable to harassment. So the *Kollaritsch* court said that's not sufficient. In order to hold the

school liable for harassment the school itself has to subject the student to harassment. Meaning that the school's delivered indifference has to cause harassment after the school becomes aware of it.

[Kristin H. Jones]

So are we to understand now that at least in the Sixth Circuit there is a requirement that in order for a student to sue for damages under Title IX they have to suffer actual additional harassment after reporting sexual misconduct to the school?

[Michael E. Baughman]

Correct. I think the take away point on the case is you can't sue a school simply because you are dissatisfied with the way the school responded to a report of sexual misconduct. Instead, you can't argue it took too long or you didn't do things I wanted you to do during the course of the investigation. Instead you have to show that the school's conduct is what subjected you to harassment. Meaning the school did something either by act or omission which caused you to suffer harassment.

[Kristin H. Jones]

What would be an example of additional harassment that might state a claim under the *Kollaritsch* standard in the Sixth Circuit?

[Michael E. Baughman]

I think the best example is the facts of that *Davis* case from the Supreme Court itself. And that involved an ongoing course of conduct by a student where over many months one student was making repeated sexually harassing comments to another student engaging in all sorts of misconduct over a long period of time. The parents repeatedly told the school about it but the school did almost nothing about it. So in that situation the school had knowledge that there was harassment that was ongoing, didn't do anything to stop it, and allowed it to continue. So that is what we argued in the *Kollaritsch* case. That's what the Supreme Court had in mind when they issued the *Davis* case is ongoing harassment that the school is aware of that it doesn't take measures reasonably calculated to stop. Not how a response to a single incident of past misconduct.

[Kristin H. Jones]

Wouldn't it be fair to characterize the Sixth Circuit's holding as a narrow interpretation of what will constitute a private cause of action for damages under Title IX.

[Michael E. Baughman]

One could interpret it as narrow or one could interpret it as that's what the Supreme Court had in mind in *Davis*. And in *Davis* the Supreme Court said the cause of action that they were creating was narrow. And in fact one of the judges in the current opinion, Judge Thapar, emphasized that. If you actually read the *Davis* case, they were very careful to make clear that they were not creating a broad cause of action under Title IX.

[Kristin H. Jones]

So Mike how does this Sixth Circuit decision fit into the overall national landscape of Title IX jurisprudence? Where are we at?

[Michael E. Baughman]

I think there is a circuit split right now. The Sixth Circuit specifically rejected another decision that came out earlier this year from the Tenth Circuit, *Farmer v. Kansas State University*, which had agreed that vulnerability to harassment, meaning that you might see an assailant on campus is sufficient to state a claim under Title IX. So I think it creates a circuit split.

[Kristin H. Jones]

For colleges and universities, Mike, what is the upshot of the *Kollaritsch* decision? Both within the Sixth Circuit and outside of the Sixth Circuit?

[Michael E. Baughman]

So I really think it's a question of what schools may be liable for in damages. That's really the only question that was decided in *Kollaritsch*. The question was whether or not there is a damage claim meaning that schools can be sued in court for how they respond to allegations of sexual misconduct. I don't think it should change the way schools handle Title IX matters on a day to day basis. I don't think schools should change what they are doing. But what it does establish is that schools cannot be liable simply for the way that they might respond to an allegation of sexual misconduct.

[Kristin H. Jones]

So Mike if people listening to this podcast want to learn more about the *Kollaritsch* decision, where can they look?

[Michael E. Baughman]

You can read the entire decision or we have done a summary of it which is available on Pepper's Insight Center.

[Kristin H. Jones]

Great, thank you.

The material in this document was created as of the date set forth above and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this document is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship.

Attorney Advertising

© 2019 Pepper Hamilton LLP. All Rights Reserved.

Berwyn | Boston | Detroit | Harrisburg | Los Angeles | New York | Orange County | Philadelphia
Pittsburgh | Princeton | Rochester | Silicon Valley | Washington | Wilmington | pepper.law