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En Banc Sixth Circuit Reaffirms High Bar for Title IX “Deliberate Indifference”

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On December 11, 2020, the *en banc* U.S. Court of Appeals for the Sixth Circuit vacated a panel decision holding that plaintiff Rebecca Foster was entitled to a trial on her claim that the University of Michigan was deliberately indifferent to her sexual harassment by a classmate. The *en banc* majority decision in *Foster v. The Board of Regents of the University of Michigan*, written by Judge Jeffrey S. Sutton, who dissented from the panel decision, reaffirms that deliberate indifference remains a high bar for plaintiffs to clear.

Overview of the Case

Troutman Pepper’s Higher Education practice discussed the panel decision in an [earlier advisory](#).

Foster was a student in the University of Michigan’s executive MBA program, based in Los Angeles. As part of the program, students would engage in once-a-month, weekend-long educational “residencies” at a hotel in Beverly Hills. Foster became friends with the respondent, a fellow student in the program also living in Los Angeles. In May 2013, the respondent began pursuing a romantic interest in Foster, giving her unsolicited gifts, expressing his desire to date or marry her, and, eventually, escalating to non-consensual physical contact with Foster. This contact included groping Foster in an elevator, kissing her without consent while on a hike with two other classmates, and attempting to force himself on, and exposing himself to, Foster in her hotel room during two residencies.

Foster reported the respondent’s conduct to Michigan’s Office of Institutional Equity and the business school in March 2014. Michigan instituted a no-contact order, directing the respondent not to contact her directly or indirectly, or to retaliate against her. The respondent immediately violated the no-contact order by sending Foster a single-word text message: “Really.” In response, he was given a verbal warning.

Of concern to Foster and Michigan was how to deal with the upcoming April 2014 residency. The respondent was told he’d be staying in a different hotel than Foster, and that he was not to eat meals in the same room as her, attend social activities where she was present, or interact with her in class. During the residency, the respondent sent various university administrators a crude email that included sexist slurs against Foster. He also insulted her and threatened her boyfriend on Facebook.

After the April residency, the respondent sent several aggressive and demanding emails to various university administrators. In response, Michigan’s general counsel directed the respondent to stop and warned that any further harassment would put his “receipt of a degree in grave jeopardy.”

Because of the respondent's threatening emails, Michigan had a threat assessment conducted of him and ordered him not to attend commencement in May. Out of concern that he would show up to commencement anyway, the university had a plainclothes police officer stationed in Foster's hotel. When the respondent showed up, he was arrested and put on a plane back to California.

The Panel's Decision

The primary question was whether a reasonable jury could find that Michigan's response to Foster's complaint was clearly unreasonable, such that the conduct met the definition of "deliberate indifference" required to establish a Title IX claim. The district court had granted summary judgment to Michigan, finding that the university had acted reasonably as a matter of law.

The panel held that Michigan's response to the respondent's violation of the no-contact order could be deemed clearly unreasonable. The university did not take any immediate action to the respondent's text message to Foster beyond a verbal warning the next day. Following the respondent's threatening email to administrators, university administrators discussed whether to remove the respondent from class as it was happening, but decided they lacked the resources to do so. According to the panel, a juror could conclude that "these two incidents manifested a clear intention [by respondent] to subject Foster to further harassment, warranting a swift and severe response from the University as a means of deterring future misconduct." The panel also concluded that Michigan's response to the respondent's Facebook harassment and to the respondent's threatening emails following the April residency could be deemed deliberately indifferent.

The *En Banc* Majority's Decision

Judge Sutton, who dissented from the panel decision, wrote for the *en banc* majority, holding that Michigan's response to the respondent's behavior could not constitute deliberate indifference as a matter of law. In response to each of Foster's five reports of harassment, Michigan "adopted escalating measures proportionate to the misconduct," he wrote. The court rejected Foster's suggestion that "whenever harassment continues after a school receives notice, a reasonable jury can find that the school remained deliberately indifferent." For each of Foster's suggested actions that Michigan could have taken—such as suspending the harasser, banning him from campus, or immediately expelling him—the university either had effectively done it, did not have sufficient reason to do it, or would have risked incurring a lawsuit for violating the respondent's Title IX and due process rights.

Importantly, the *en banc* majority recognized that context matters. Universities differ from grade schools in the amount of control they have over students, which is even more true for off-site, executive graduate programs designed "for mid-career executives with an average age of 40." What constitutes deliberate indifference in these different settings will necessarily differ.

Judge Moore, who authored the panel decision, dissented. She described the deliberate indifference standard as contemplating a spectrum of responses by the school. One extreme of the spectrum, doing nothing at all, "would be clearly unreasonable no matter the circumstances, a straightforward case of deliberate indifference." At the other end is an immediate expulsion of the respondent, "almost certainly" not deliberately indifferent. In her view, for "many if not most" responses falling in between these two extremes, whether the school's actions constitute deliberate indifference is a fact-intensive question for a jury to resolve.

Implications

The panel decision in *Foster* warranted careful consideration by schools both within and without the Sixth Circuit. It suggested that seemingly reasonable responses, particularly compared to some cases in which schools were found deliberately indifferent, might nevertheless be deemed deliberately indifferent. The *en banc* court's decision, however, reaffirms that deliberate indifference is a "high bar" that does not require schools to purge themselves of actionable harassment. It suggests that schools can comply with Title IX by undertaking proportional responses to escalating acts of harassment.

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