

Ninth Circuit Rules University Not Liable Under Title IX for Football Player's Off-Campus Assault

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On January 25, the Ninth Circuit Court of Appeals affirmed a district court order in *Brown v. State of Arizona et al.*, granting the University of Arizona summary judgment to dismiss Title IX claims asserted against the university by a plaintiff female student. The plaintiff claimed the university was liable where a football player assaulted her in an off-campus apartment. Even though the university allegedly had notice of the football player's prior misconduct against two other women, the Ninth Circuit found that there was no evidence in the record to support a finding that the university exercised substantial control of the football player's conduct toward the plaintiff at a private, off-campus apartment.

Case Overview

In *Brown*, University of Arizona football player Orlando Bradford began dating fellow student Mackenzie Brown in the spring 2016. Prior to their dating relationship, university administrators received reports that Bradford had violently and repeatedly assaulted two other female students. Both women refused to move forward with a Title IX complaint, even though they were observed by other students and a resident assistant with bruises and scratches from their interactions with Bradford. On one occasion, a resident assistant filed an incident report after observing Bradford engaged in a dorm room altercation with one of the women. On another, Bradford arrived drunk at a woman's residence and banged loudly on her locked door for nearly two hours. In response to this latter incident, the university issued a "no-contact order" that prohibited Bradford from contacting the woman and reassigned him to a different residence hall. Bradford's football coach was informed of the door-banging incident and disciplined him for underage drinking, but the university did not inform the football staff of Bradford's violent assaults on either woman.

Bradford ultimately moved to an off-campus apartment with some football teammates. Brown claimed that it was at this off-campus apartment that Bradford assaulted her as many as 10 times. The assaults culminated in September 2016 when, over a two-day period, Bradford locked Brown in his bedroom and choked, hit, scratched, kicked, and dragged her by the hair. Bradford was arrested and later criminally charged in connection with his assaults on Brown and prior assaults on one of the other women. He pleaded guilty to felony aggravated assault and domestic violence and was sentenced to five years in prison.

Brown filed a complaint against the University of Arizona in the U.S. District Court for the District of Arizona, claiming it was liable for Bradford's actions because the university exercised substantial control over Bradford, who was a scholarship athlete at the time of the assaults, and over the context in which the assaults occurred because the university failed to adequately address the prior assaults against two other women. Brown claimed

that the university's failure to address the prior assaults made it possible for Bradford to assault her.

The District Court granted the university's motion for summary judgment, finding that although the university had substantial control over Bradford, Brown failed to offer evidence demonstrating that the university exercised control over the context in which she was assaulted.

The Ninth Circuit Decision

The Ninth Circuit affirmed the District Court's order. The court reiterated that under the Supreme Court's *Davis* test for Title IX liability, the plaintiff must show that a school has substantial control over both the conduct of the harasser and the specific context in which the harassment occurred. The court then addressed Brown's argument that the District Court erred because "she does not have to show that the University controlled the context of her abuse, only that the University controlled the context in which it improperly failed to act." In this regard, Brown contended that the university's deliberate indifference toward Bradford's prior assaults on other female students made it possible for him to assault her.

The Ninth Circuit rejected this argument. It found that "*Davis* requires that Brown prove the University controlled the context in which her abuse occurred — not just the context of Bradford's other assaults." Citing a recent Sixth Circuit decision in *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 621–22 (6th Cir. 2019) the court also suggested that a Title IX plaintiff cannot establish deliberate indifference based on harassment against other victims. The court further noted that Brown was assaulted in a private, off-campus residence unconnected to any school activity, and therefore, the university lacked control over the context of the harassment. In making this ruling, the court recognized that even though the assault may not have occurred "absent Bradford and Brown's shared connection to the University, not everything that happens between fellow students occurs" under the university's control. Indeed, it found that "[i]t would be unreasonable to conclude that Title IX imposes liability for what happens between students off campus, unconnected to any school event or activity."

The Dissent

One member of the court dissented from the majority's opinion that there was insufficient evidence in the record to satisfy the control over context element of the *Davis* test. The dissent noted that this element was satisfied by evidence that (1) Bradford's apartment was paid for with university scholarship dollars, and (2) under the football team's express policy, Bradford would not have been permitted to live in the apartment had the university's Title IX officials properly informed his coaches of the earlier assaults.

The majority addressed the dissent in its opinion. First, it found the cases on which the dissent relied inapposite because the assaults did not occur during any school-related activity (as in *Roe ex rel. Callahan v. Gustine Unified School District*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009)); the off-campus apartment was not used for a school-related purpose (as in *Simpson v. University of Colorado Boulder*, 500 F.3d 1172 (10th Cir. 2007)); and the university lacked regulatory control over the off-campus apartment (as in *Weckhorst v. Kansas State University*, 241 F. Supp. 3d 1154 (D. Kan. 2017), *aff'd* 918 F.3d 1094 (10th Cir. 2019)). Moreover, while acknowledging it was a "closer question," the majority ruled that the football team's policies pertaining to off-campus living were insufficient to establish control because they merely allowed coaches to deny players permission to live off campus as a disciplinary measure. The court noted the university lacked control over the off-campus living

arrangement because it was not granted the right to enter or inspect players' off-campus residences or control the activities therein. In short, the majority concluded, "Any control that the University had related to Bradford's residence arose only from its control over him."

Implications

The Ninth Circuit's decision in *Brown v. State of Arizona* appears to establish a fairly bright-line test for a school's liability for student misconduct that take place off campus, in a private environment.

While other circuit courts have sought to expand the scope of the control over harasser and context test, as was the case in the Third Circuit's decision in *Hall v. Millersville*, the Ninth Circuit recognized the significant implications of expanding liability to situations where a school does not have actual control over the environment in which the harassment occurs. Moreover, the Ninth Circuit's decision that other acts of harassment by the same perpetrator is insufficient to establish liability — at least for conduct that occurs on campus — may have implications for Title IX claims based on a "policy of indifference" in the Ninth Circuit, which had previously been recognized in the *Karasek* case. The *Brown* case is yet another recent, significant ruling on the reach of the Supreme Court's *Davis* decision, which is all the more reason to watch whether the Supreme Court grants certiorari in the case of *Doe v. Fairfax Cnty. Sch. Bd.*, 10 F.4th 406 (4th Cir. 2021), which could substantially clarify the scope of the private right of action under Title IX.

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