

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

December 2023

Decisions Featured in This Issue:

Title IX Bars Sexual Harassment on the Basis of Perceived Sexual Orientation

1

Retirement Comments Alone Are Insufficient to Establish Age Discrimination

3

Eighth Circuit Overturns Jury Verdict Against College in Title IX Action Brought by Student-Employee

6

Warning: This newsletter contains references to graphic content.

Ninth Circuit Court of Appeals

Title IX Bars Sexual Harassment on the Basis of Perceived Sexual Orientation

A University of Arizona track runner adequately alleged discrimination on the basis of sex under Title IX when he alleged harassment based on his perceived sexual orientation. The student's complaint, however, insufficiently alleged a link between the harassment and his educational experience, so the court affirmed dismissal of his Title IX claim.

TITLE IX BARS HARASSMENT ON THE BASIS OF PERCEIVED SEXUAL ORIENTATION

Plaintiff Michael Grabowski alleged when he was a first-year student-athlete on the University of Arizona's track team, his teammates believed he was gay and subjected him to bullying and homophobic slurs almost daily. Grabowski complained directly to the Coach and Director of the cross-country and track and field teams. They dismissed his concerns, saying he needed "to adjust."

In January 2018, an assistant coach promised the student's father he would speak to Grabowski about the bullying. Meanwhile, Grabowski's mother contacted the team's Sports Psychologist to raise concerns about his "increasing sadness."

Grabowski alleged that at an August 2018 meeting, his coaches asked him about the bullying as if they hadn't previously been told about it. When asked to name teammates bullying him, Grabowski gave two names. In response, the assistant coach declared Grabowski "can't single out the two top runners on the team."

Following this conversation, coaches allegedly made a concerted effort to demoralize Grabowski, dismissing him from the team a few weeks later.

Grabowski sued, alleging the university sexually discriminated and retaliated against him in violation of Title IX and the individual coaches violated his rights under Section 1983 of the Civil Rights Act. The district court granted the defendants' motion to dismiss all claims except the retaliation claim and denied leave to amend.

Two months later, the district court granted a motion for judgment on the pleadings, dismissing the retaliation claim.

On appeal, the Ninth Circuit first examined whether discrimination on the basis of perceived sexual orientation qualifies as discrimination on the basis of sex for purposes of Title IX. The court noted the U.S. Supreme Court often has relied on interpretations of Title VII to interpret Title IX. Citing to the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County*, the Ninth Circuit concluded discrimination on the basis of sexual orientation is a form of sex discrimination not only under Title VII, but also under Title IX.

The court also relied on other U.S. Supreme Court precedents establishing discrimination or harassment rooted in a perceived failure to conform to traditional gender norms constitutes sex discrimination under Title VII. The court concluded the alleged harassment of Grabowski was motivated by a stereotype that men should be attracted to women instead of men, and therefore harassment based on perceived sexual orientation is also a form of impermissible sex discrimination under Title IX.

PLAINTIFF FAILED TO STATE A CLAIM FOR TITLE IX DISCRIMINATION, BUT LOWER COURT ERRED BY NOT GRANTING LEAVE TO AMEND

Having established the alleged discrimination is a type prohibited by Title IX, the court examined the adequacy of Grabowski's pleadings.

To establish a claim for student-on-student harassment, a plaintiff must prove each of the following:

1. The school had substantial control over the harasser and the context of the harassment.
2. The plaintiff suffered harassment so severe that it deprived the plaintiff of access to educational opportunities or benefits.
3. A school official who had authority to address the issue and institute corrective measures had actual knowledge of the harassment.
4. The school acted with "deliberate indifference" to the harassment such that the indifference subjected the plaintiff to harassment.

The court found Grabowski adequately alleged the university had substantial control over the harassers, the coaches had actual knowledge of bullying, and the university acted with "deliberate indifference."

Regarding the required severity, however, the court held that the alleged harassment was sufficiently severe but Grabowski didn't adequately allege a link between the alleged harassment and his education.

The only relevant allegation in the complaint was a conclusory statement that the court deemed insufficient because Grabowski alleged no facts to support it. For instance, Grabowski hadn't alleged a decline in grades or that the harassment stopped him from participating in classes, school activities, or even in team activities.

The court affirmed the district court's dismissal of the Title IX sex discrimination claim. At oral argument, Grabowski's lawyer stated additional facts existed that he could add to the complaint to address the court's concerns. The court instructed that on remand, Grabowski should seek leave to amend, and the district court should consider his request.

PLAINTIFF ADEQUATELY STATED A RETALIATION CLAIM UNDER TITLE IX BUT NOT A SECTION 1983 CLAIM AGAINST HIS COACHES

The Ninth Circuit reversed the lower court's decision to dismiss the Title IX retaliation claim.

The court noted the elements needed to sustain such a claim are:

1. Plaintiff participated in a protected activity
2. Plaintiff suffered an adverse action
3. There was a causal link between the protected activity and the adverse action

The court found Grabowski sufficiently alleged he participated in a protected activity when he reported the sex-based bullying to coaches and that he suffered an adverse action — removal from the team and cancellation of his scholarship.

Regarding the causal link between the two, the court explained circumstantial evidence including proximity in time between the protected activity and the adverse action may be sufficient.

Here, Grabowski alleged he or his parents complained about the harassment and bullying seven times between August 2017 and August 2018. Grabowski's conversation with the coaches in which he identified the two students who were bullying occurred Aug. 24, 2018, and he was dismissed from the team three weeks later.

The court concluded the proximity between Grabowski's final report of the bullying and his dismissal from the team supports a plausible inference he was removed in retaliation for complaining about bullying by the "two top runners on the team." The court also noted Grabowski's allegation that the coaches attempted to demoralize him after he named his bullies. The court concluded these allegations were sufficient to allege a causal link and reversed the lower court's decision granting judgment on the pleadings on the retaliation claim.

Finally, the court upheld the lower court's decision dismissing Grabowski's Section 1983 claim against the individual coaches because it agreed with the lower court's determination that the coaches were entitled to qualified immunity in part because Grabowski didn't allege their actions violated a "clearly established" constitutional right.

Grabowski claimed a property interest in both his place on the track team and his athletic scholarship, but the court held any contractual right to an athletic scholarship is too speculative to establish a protected constitutional right.

THE BOTTOM LINE

College athletes are increasingly complaining about bullying and harassment from teammates and/or coaches. Student-athlete complaints of harassment based on sex, sexual orientation, or perceived sexual orientation should trigger a careful review to determine whether a Title IX investigation is required. Institutions also should be mindful of potential retaliation claims when taking any adverse actions against students who have raised such concerns and provide compliance training to coaches covering these topics.

Grabowski v. Arizona Board of Regents, 69 F.4th 1110 (9th Cir. June 13, 2023).

RELATED UE RESOURCES

- [Training Supervisors to Prevent Workplace Harassment](#)
- [Title IX & Collegiate Athletics Under the Biden Administration](#)

Not a UE member?

Contact UESupport@ue.org to learn how your institution can access these resources.

Fourth Circuit Court of Appeals

Retirement Comments Alone Are Insufficient to Establish Age Discrimination

In this decision, the Fourth Circuit rejected an older professor's claims of age discrimination based on administrators' use of the words "retirement" and "resistance to change" while discussing her failure to meet the university's expectations to keep up with increased technology needs.

ART PROFESSOR PROMOTED A YEAR AND A HALF BEFORE NONRENEWAL OF HER TEACHING CONTRACT

Eva Palmer was an art professor in the Studio and Digital Arts department at Liberty University, a Christian university in Lynchburg, Va., from 1986 until her termination in 2018.

In 2013, Palmer applied for a promotion from Associate Professor to full Professor. Together with her supervisors, Palmer developed a promotion plan which, among other things, emphasized her need to:

- Substantially increase her scholarly output
- Work toward developing a digital art skillset
- Improve her technology skills

After finding Palmer substantially increased her scholarly output, Liberty promoted her to Professor in October 2016. At the time, Palmer's performance evaluation emphasized her continued need to improve her technology skills and digital art skills to teach digital art courses, which were increasingly in demand, and to incorporate technology into her existing courses. Palmer continued to receive "Below Expectations" ratings in this area. Despite her promise to increase her technology skills, Palmer wasn't qualified to teach a digital art course in fall 2017.

Because Palmer was the department's only teacher who wasn't able to teach digital art courses, and Liberty

was unable to staff the demand for these courses, the department's Chair and Dean began discussing whether to renew her contract for the 2018-19 school year and whether any nonrenewal could be characterized as a retirement.

They proposed a nonrenewal to the Provost, who ultimately agreed Palmer's lack of technology skills, along with her apparent resistance to change, supported a contract nonrenewal. However, the Provost advised he only would consider Palmer's departure from the school as a "retirement" if she requested it. In April 2018, Liberty advised Palmer, age 79 at the time, that her contract wouldn't be renewed.

ONE DISTRICT COURT, TWO RULINGS

After being fired, and after exhausting administrative remedies, Palmer filed suit in the Western District of Virginia alleging Liberty engaged in age discrimination in violation of the Age Discrimination in Employment Act.

Liberty moved for summary judgment on the ministerial exception — an affirmative defense to liability rooted in the First Amendment, which precludes the application of certain federal employment discrimination laws to claims brought against a religious institution by its "ministers," a term that can include "lay" teachers without religious credentials who perform certain "vital religious duties." In response, Palmer filed a cross-motion for summary judgment on the ministerial exception on the basis that she was not a "minister" while employed by Liberty.

Liberty filed a second motion for summary judgment on the merits of Palmer's discrimination claim. The district court granted Palmer's motion for summary judgment, concluding she wasn't a minister for purposes of the ministerial exception (the Constitutional Ruling). The district court also granted Liberty's motion for summary judgment on the merits (the Statutory Ruling).

In its Statutory Ruling, the district court held that Palmer failed to establish direct evidence or sufficient circumstantial evidence to support her age discrimination claim.

Palmer appealed the Statutory Ruling and Liberty appealed the Constitutional Ruling. The appeals went to the Fourth Circuit, which consolidated them.

EMPLOYEE MUST MEET EMPLOYER'S LEGITIMATE EXPECTATIONS TO ESTABLISH CASE OF EMPLOYMENT DISCRIMINATION

In its analysis on the Statutory Ruling, the court noted an employee must prove age discrimination by a preponderance of evidence, either direct or circumstantial, that age was the "but-for" cause for the employer's decision. In other words, showing age was one of many motivating factors in an employer's decision isn't enough — the employee must prove the employer wouldn't have made the decision in the absence of age discrimination.

On appeal, Palmer asserted that comments about retirement and Palmer's resistance to change and failure to learn technology were evidence of age discrimination.

The court agreed with the Statutory Ruling that Palmer failed to produce direct evidence of age discrimination. In doing so, the court concluded that mere comments or inquiries about retirement, without more, fail to constitute direct evidence of age discrimination.

The retirement comments took place during discussions between the Dean and Chair and weren't made directly to Palmer, and even if they were, the comments were devoid of reference to age. Also, the retirement comments were made after the Dean and Provost concluded Palmer wasn't meeting legitimate technology expectations. The court analyzed the Dean's comment about Palmer being resistant to change, which wasn't made with respect to her age but, rather, evidence that Palmer failed to develop digital skills after repeatedly being advised to do so.

The court looked to whether Palmer could establish age discrimination under a circumstantial evidence theory, which requires three steps to be satisfied:

1. The employee must first establish a *prima facie* case of age discrimination.
2. The burden then shifts to the employer to produce a non-discriminatory reason for the adverse action.
3. The burden then shifts back to the employee to prove by a preponderance of the evidence that the stated reason for the adverse employment action is a pretext for discrimination.

On the first step, to establish a *prima facie* case for age discrimination, a plaintiff must demonstrate each of the following:

- She is a member of a protected class.
- She suffered an adverse employment action.
- She performed her job duties at a level that met the employer's legitimate expectations at the time of the adverse action.
- Her position remained open or was filled by a similarly qualified applicant outside the protected class.

If a plaintiff fails to make out a *prima facie* case, the court ends the inquiry at the first step.

The parties' argument centered on whether Palmer could establish the element of the *prima facie* case that she was performing her job duties at a level that met Liberty's legitimate expectations at the time of her nonrenewal.

Palmer pointed to her October 2016 promotion as evidence she was meeting Liberty's expectations.

The court disagreed. It found Liberty documented repeated attempts to urge Palmer to develop technology and digital arts skills, but she inexplicably failed to do so. In fact, Palmer identified digital arts skills as her own self-imposed goal for improvement. The court also found Liberty presented sufficient evidence of the need for professors with digital art skills due to the increased demand for such classes and Liberty's inability to fully staff them in 2017 and 2018.

The court further determined Palmer's promotion in 2016, and any positive feedback on her scholarship skills at that time, wasn't connected to whether she was performing adequately and meeting Liberty's legitimate technology skills expectations in 2018.

Having found Palmer failed to demonstrate, through direct or circumstantial evidence, that age was the "but-for" cause of her nonrenewal, the Fourth Circuit affirmed the Statutory Ruling granting summary judgment to Liberty.

Having resolved the litigation in Liberty's favor by affirming the Statutory Ruling, the court declined to decide Liberty's appeal of the Constitutional Ruling on whether Palmer was a minister for purposes of the First Amendment's ministerial exception. In doing so, the court adhered to the well-established constitutional avoidance doctrine, which provides a federal court won't decide a constitutional question if there is some other ground upon which to dispose of the case.

THE BOTTOM LINE

This case demonstrates the importance of documenting all employee performance issues and areas of needed improvement. The more documentation shows an employee failed to meet a legitimate employment expectation, the less likely an employee can make a *prima facie* case of discrimination.

Many campuses are facing an aging faculty population, and some employees are resistant to the changing needs and demands of a more technologically oriented student population. Documenting all employees' need to keep up with changing technologies and the basis for that need not only encourages employees to increase skills to keep up with an ever-changing-world, but also protects institutions defending a discrimination lawsuit.

Palmer v. Liberty Univ., Inc., 72 F.4th 52 (4th Cir. June 30, 2023).

RELATED UE RESOURCES

- [Checklist: Assessing Your Employee Performance Evaluation System](#)
- [Avoid Age Discrimination Lawsuits: Lessons Learned From Claims](#)

Not a UE member?

Contact UESupport@ue.org to learn how your institution can access these resources.

Eighth Circuit Overturns Jury Verdict Against College in Title IX Action Brought by Student-Employee

In this decision, the Eighth Circuit overturned a jury verdict and held the district court should have granted the college's motion for directed verdict because the student worker failed to establish the college's responses to her report of sexual assault were "clearly unreasonable" or demonstrated a causal nexus between the college's responses and any further acts of harassment or sexual assault.

STUDENT-EMPLOYEE INITIATES TITLE IX PROCEEDINGS AFTER SEXUALLY ASSAULTED TWICE BY SAME STUDENT

As described by the court:

Jane Doe, a student at Chadron State College, was sexually assaulted twice by a male student, Anthony Ige.

The first assault occurred in May 2016, after Ige visited Doe while she worked as a Campus Security Officer at Andrews Hall, a dormitory adjoining his own. Doe followed Ige to his room after he stole her drink in Andrews Hall, where he groped her and tried preventing her from leaving. Doe returned to Ige's room later that night and was sexually assaulted.

Doe gave a vague account of the "incident" to Robin Bila, her counselor at Chadron, who complied with Doe's request not to report the incident.

The second assault occurred under similar circumstances in the Andrews Hall basement in September 2016. The next day Doe missed an appointment with Bila, who went to Doe's apartment and found her distressed and disheveled. Doe told her about the assault. Bila took Doe to the nurse's office and informed her she could file a Title IX complaint and go to the hospital for medical treatment. Doe reported the incident to police, met with an officer who reviewed security footage with her, and initiated Title IX proceedings.

After being told by police about the assault, Anne DeMersseman, Chadron's Title IX Coordinator, put interim measures in place, including a mutual no-contact order and banning Ige from Andrews Hall, and informed Doe about how the investigation would proceed and the resources available to her.

DeMersseman found the complainant and the respondent credible but concluded in her investigation report that Ige twice failed to get Doe's consent in violation of Chadron's policies.

DeMersseman forwarded the report to Chadron's Vice President, who initiated disciplinary proceedings against Ige. In the meantime, Chadron moved Doe's work assignment to Brooks Hall, a secure building with limited access and better visibility than Andrews Hall, and banned Ige from Brooks Hall.

Ige chose to admit he violated Chadron's Title IX policy and waive his due process rights. He was sanctioned but not removed from campus. Given that he hadn't violated the initial no-contact order and had cooperated with the investigation, the Vice President believed Chadron could keep Doe safe without suspending or expelling the other student.

Doe, however, objected to any sanctions short of his removal from campus. In response to questions from Doe, Chadron offered her the option to complete the term online or to be provided a security escort if she chose to remain on campus. Doe's attorney refused on Doe's behalf, claiming a security escort would draw unwanted attention to Doe. The attorney didn't respond to Chadron's offer to have Doe's security escort dress in plainclothes.

In July 2017, Doe sued Chadron, alleging it violated Title IX. Chadron filed a motion for summary judgment, which the district court denied. After trial but before jury deliberations, Chadron made a motion for judgment as a matter of law; the district court denied the motion.

The jury found in Doe's favor and awarded \$300,000 in damages. Chadron renewed its motion for judgment and, in the alternative, for a new trial, which the district court further denied. Chadron appealed, arguing Doe's Title IX claim failed as a matter of law.

NO DELIBERATE INDIFFERENCE WHEN COLLEGE TAKES SUBSTANTIVE STEPS THAT AREN'T "CLEARLY UNREASONABLE"

To prevail on her Title IX claim, Doe needed to establish through evidence in the record that Chadron (1) was deliberately indifferent (2) to known acts of discrimination (3) which occurred under its control.

A school is deliberately indifferent if it responds in a "clearly unreasonable" manner to harassment considering the circumstances known to it.

On appeal, Doe focused only on Chadron's response to the

September 2016 incident. Viewing uncontroverted evidence in a light most favorable to the jury's verdict, the Eighth Circuit found no deliberate indifference because Chadron:

- Acted promptly upon learning of the assault
- Issued a mutually binding no-contact order between Doe and Ige
- Verified the two students weren't in classes together
- Promptly began its investigation, while banning Ige from Andrews Hall and accommodating Doe academically
- Placed Doe in a more secure work location after the investigation ended and banned Ige from that building
- Sanctioned Ige by, among other things, placing him on behavioral probation, requiring him to attend weekly counseling sessions and complete an online consent and alcohol class
- Gave Doe options to help her feel safe and asked for Doe's suggestions regarding additional assistance or accommodations she might need

The Eighth Circuit held that these steps were "prompt, extensive, substantive, directed to protect and assist Doe, and not clearly unreasonable given the circumstances known to Chadron."

The court further found Doe couldn't show Chadron's actions "caused" her "to undergo harassment or make [her] vulnerable to it."

The court held Chadron only could be found liable under Title IX if it subjected Doe to abuse, meaning there was a causal nexus between Chadron's actions and the sexual assaults. After appropriate administrators were notified of the second sexual assault, Doe wasn't subjected to further incidents of harassment or abuse.

While Doe argued she was distraught by the events and the possibility of seeing Ige on campus, the court held that merely "[l]inking the college's actions or inactions to emotional trauma the plaintiff experienced in the wake of sexual harassment or assault, even if proven, is not enough." Thus, while it was understandable to want the student removed from campus, Doe didn't show that Chadron caused cognizable harm by failing to impose more extreme sanctions on Ige.

Ultimately, the Eighth Circuit found this is one of the "rare case[s]" in which reversal of a jury verdict is warranted because a reasonable jury, after examining uncontroverted facts presented at trial, couldn't find in Doe's favor. The court further

found the district court erred in denying Chadron's motion for judgment as a matter of law. Accordingly, the Eighth Circuit reversed the judgment and remanded the case to the district court with directions to enter judgment in favor of Chadron.

THE BOTTOM LINE

This case is one in which the courts continue to differ over the meaning of a phrase in the seminal 1999 U.S. Supreme Court decision, *Davis v. Monroe County Board of Education*. *Davis* defines the elements for a viable claim for damages in a case of peer sexual assault, requiring a plaintiff to allege, among other things, the school's deliberate indifference "subject[ed] [the student] to harassment by caus[ing] the [student] to undergo harassment or mak[ing] them liable or vulnerable to it."

With this decision, the Eighth Circuit adopts the same interpretation of *Davis* as the Sixth Circuit in a 2019 case, *Kollaritsch v. Michigan St. Univ.*, namely that "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. 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."

By contrast, the Tenth Circuit in a 2019 decision, *Farmer v. Kansas State Univ.*, reached the opposite conclusion, holding "a Title IX plaintiff must allege, at a minimum, that the funding recipient's deliberate indifference caused her to be vulnerable to further harassment. Plaintiffs have met that pleading requirement here by alleging, among other things, that KSU's deliberate indifference caused them objectively to fear encountering their unchecked assailants on campus, which in turn caused Plaintiffs to stop participating in the educational opportunities KSU offered its students."

Time will tell how other circuits will address this question and whether the U.S. Supreme Court will choose to resolve the circuit split.

Doe v. Board of Trustees of the Nebraska State Colleges, 78 F.4th 419 (8th Cir. Aug. 15, 2023).

RELATED UE RESOURCES

- [Title IX and VAWA-Campus SaVE Act Resource Collection](#)

Get Coverage for Risks Other Insurers Avoid

With over 35 years dedicated to understanding the needs of colleges and universities, our policies cover the risks other insurance carriers limit or avoid, such as traumatic brain injury and sexual misconduct.



Visit www.ue.org/discover-ue to learn more about our comprehensive coverage and the full benefits of being a UE member.

When claims occur, you can rely on UE for effective claims resolution.

[Resolutions Philosophy](#)

[Claims Handling](#)

[How to Report a Claim](#)



United Educators (UE), a reciprocal risk retention group, is a licensed insurance company owned and governed by about 1,600 members representing thousands of K-12 schools, colleges, and universities throughout the United States. Our members range from small independent schools to multicampus public universities. UE was created in 1987 on the recommendation of a national task force organized by the National Association of College and University Business Officers. Our mandate is to provide K-12 schools, colleges, and universities with a long-term, stable alternative to commercial liability insurance.



United Educators has been Rated A (Excellent) by AM Best every year since 1998.

For more information, visit www.ue.org or call (301) 907-4908.