UE on Appeal

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Fall 2020

Decisions Featured in This Issue:

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U.S. Court of Appeals for the Third Circuit

Title IX: Private University's Promise of "Fairness" Must Include a Live Hearing With Cross-Examination

Expanding other circuits' holdings, the Third Circuit concluded that if a university's Title IX policy promises students a "fair" process, as most do, the university must let students participate in some form of cross-examination and a live, adversarial hearing. This applies not only to public institutions, where constitutional due process guarantees are applicable, but also to private colleges and universities.

STUDENT EXPELLED FOLLOWING TWO TITLE IX COMPLAINTS

John Doe was a student at University of the Sciences, a private university, and close to completing the coursework required to earn his degree, when two students filed formal complaints alleging Doe committed sexual misconduct in violation of the university's sexual misconduct policy.

Jane Roe 1 and Jane Roe 2 previously engaged in sexual activity with Doe before making Title IX complaints.

Roe 1 alleged that on one evening, she and Doe engaged in intercourse multiple times, all of which were consensual except the last time, which she claimed was not consensual because Doe did not use a condom. Roe 1 reported the incident nine months after it occurred.

Doe alleged he had a "friends-with-benefits" relationship with Roe 2 throughout the fall 2017 semester. Roe 2 filed a Title IX complaint in August 2018 that, after a party in January 2018, she passed out in Doe's bedroom and woke to him having nonconsensual sex with her.

The Title IX Coordinator notified Doe about complaints against him, but the notice did not provide specifics about the allegations. An investigator interviewed Doe, Roe 1, Roe 2, and 10 witnesses before concluding Doe violated the misconduct policy by engaging in intercourse without Roe 1 or Roe 2's affirmative consent. Doe was expelled after his appeal was denied.

Doe sued the university, asserting it was improperly motivated by sex when it investigated and enforced the policy against him. He further contended the university breached its contract with him by failing to provide him the fairness promised to students accused of sexual misconduct under the policy.

The district court dismissed Doe's complaint, finding he did not state a claim based upon allegations in the complaint. Doe filed an appeal to the Third Circuit, which reversed the district court and remanded the case for further proceedings.

COURT STREAMLINES TITLE IX PLEADING STANDARD AND EXPANDS REQUIREMENTS FOR "FAIR" PROCESS

Certain circuits have articulated distinct theories of liability under Title IX, such as selective enforcement and erroneous outcome. However, in this case, the Third Circuit adopted a straightforward pleading standard adopted by the Seventh Circuit for Title IX claims, finding no reason to "superimpose doctrinal tests" on the statute. Therefore, to state a claim in the Third Circuit, a plaintiff must allege facts that, if true, support a plausible inference that a federally funded college or university discriminated against a person on the basis of sex.

Doe alleged in his complaint that, in its implementation and enforcement of the policy, the university succumbed to pressure from the federal government following the Department of Education (ED) Office for Civil Rights' issuance of the 2011 Dear Colleague Letter. The court, following three of its sister circuits (Second, Sixth, and Seventh), held that alleged university overreaction to the ED or other public pressure is relevant to alleging a plausible claim of Title IX discrimination. However, the court also recognized that these types of allegations standing alone cannot support a plausible Title IX claim.

Doe also claimed the university was improperly motivated by sex when it investigated him but chose not to investigate his complaints about three female students who allegedly violated the policy: Roe 1, Roe 2, and a witness.

With respect to Roe 2, he contended they both had been drinking on the night of the incident and were at comparable levels of intoxication, but the university identified him as the initiator of sexual activity rather than considering her alcohol consumption and whether she should have been charged with a policy violation since he was also intoxicated. Doe also contended the university was motivated by sex when it chose not to investigate Roe 1 and a witness despite having notice that both allegedly violated the policy by colluding about the investigation in breach of the policy's confidentiality provision.

The court found both these allegations supportive of a sex-motivated investigation and enforcement, and, when combined with Doe's allegations related to external pressures on the university, sufficient to state a claim under Title IX.

Doe also claimed the university violated the "fairness" promised in the policy and the student handbook, thereby breaching its contract with him. Rejecting the university's argument that the fairness promised in those documents was encompassed within the policy's procedural protections, the court noted that nowhere in the policy or handbook was fairness defined.

Following other cases involving private universities, the court reiterated that federal notions of fairness in student disciplinary proceedings are consistent with those recognized in Pennsylvania's jurisprudence, including providing the accused a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing. While recognizing that as a private university, University of the Sciences is not subject to constitutional due process guarantees, the court held that its promises of "fair" and "equitable" treatment to those accused of sexual misconduct required a live hearing and opportunity for cross-examination.

Doe alleged the claims against him hinged on credibility issues and so, without a hearing, he was deprived of fairness. The court declined to prescribe an exact method by which a college or university must implement procedures for a live hearing with cross-examination but held that, at least as it was implemented with respect to Doe, the university's single-investigator model violated the fairness that the university promised students accused of sexual misconduct.

The Bottom Line

With this decision, the Third Circuit joins a number of other circuits that explicitly rejected the single-investigator model and found that students accused of sexual misconduct must be afforded a "fair" process involving a live hearing with cross-examination. Although the court only was interpreting Pennsylvania contract law, the case should serve as a caution to public and private institutions of higher education in other states as to how the Third Circuit may apply their state's laws in interpreting sexual misconduct policies.

Doe v. Univ. of the Sciences, 961 F.3d 203 (3d Cir. May 29, 2020).

RELATED UE RESOURCES

- A Review of Student-Perpetrator Sexual Assault Claims with Losses
- Confronting Campus Sexual Assault — An Examination of Higher Education Claims
- ED Releases Final Title IX Regulations Governing Campus Sexual Misconduct: Guidance for Higher Education
- Webinar: Unpacking the Final Title IX Regulations, Part 1 — Q&A With An Expert
- Webinar: Unpacking the Final Title IX Regulations, Part 2 — More Q&A With Josh Richards

Superior Court of New Jersey, Appellate Division

No Breach of Contract or Lack of Good Faith in Tenure Denial

We've all heard the phrase "publish or perish." This recent New Jersey appellate case demonstrates the obstacles a faculty member faces in challenging his tenure denial for failure to satisfy applicable promotion and tenure guidelines for scholarly publications.

PROFESSOR DENIED TENURE AMID CONCERNS REGARDING HIS LACK OF SCHOLARLY PUBLICATIONS

In 2006, Raymond Capra joined Seton Hall University as a full-time instructor of classical studies in the Languages, Literatures, and Cultures Department. In 2010, after receiving his Ph.D. in classical philology, Capra was selected for a tenure-track position as an assistant professor, pursuant to the terms of annual full-time faculty member probationary contracts, which required him to apply for tenure not later than the fall semester of 2015.

In the event he was not granted tenure, his contracts provided for his employment to automatically terminate on June 30, 2017. The contracts further specified that tenure is conferred only by specific affirmative action by the university's Board of Regents and that Capra's position with Seton Hall was subject to the faculty guide.

In fall 2015, Capra applied for promotion to the position of associate professor with tenure. The department's policies and procedures regarding applications for promotion and tenure specified the following minimum scholarly performance requirements:

1. At least four articles published or accepted in peer-reviewed journals and at least one additional scholarly article published
2. A contract or manuscript pending publication
3. At least five conference papers given
4. A clear research program laid out

Pursuant to the faculty guide, three overarching factors would be applied in evaluating applications for promotion and tenure:

- Teaching effectiveness
- Scholarship
- Service to Seton Hall, the profession, and the community

At nearly every step in the promotion and tenure process, voters for and against Capra's application expressed concerns about his lack of scholarly publications in peer-reviewed journals. The rank and tenure committee for Capra's department recommended him for promotion and tenure by a 14-1 vote.

The department chair supported Capra's application, while noting that several voters wished Capra "had been able to publish a bit more."

The College of Arts and Sciences rank and tenure committee recommended Capra's application by a vote of 7-2. The College of Arts and Sciences dean separately recommended Capra's application, but also, like a few of his colleagues, lamented Capra's "limited publications, albeit in substantial presses." The university rank and tenure committee made an advisory recommendation to Seton Hall's provost that Capra be promoted and granted tenure by a vote of 8-3.

Capra's application was submitted to the then-provost, Larry Robinson, who was required to consider the application after the other advisory recommendations had been made. The provost could endorse the application — thereafter referring it to the university's board of regents for consideration and approval — or deny it. The denial would be final unless most of the university rank and tenure committee had endorsed the application, in which case the provost's decision could be appealed to the university president.

Robinson denied Capra's application in a March 2016 letter, which stated he had carefully considered the application, reviewed the application materials and recommendations made at the other levels, and evaluated Capra's performance against the criteria for teaching effectiveness, scholarship, and service.

Capra appealed Robinson's decision to the then-president, Gabriel Esteban, stating that Capra believed he had underrepresented his scholarship in his application, which might have been a factor in some negative evaluations and the provost's decision. In April 2016, Esteban notified Capra by letter that after careful consideration and reflection, he decided not to grant Capra's appeal.

Capra sued, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The motion court granted Seton Hall's motion for summary judgment, and Capra appealed.

PROVOST'S GENERIC LETTER OF DENIAL DOES NOT CONSTITUTE A BREACH OF CONTRACT OR THE COVENANT OF GOOD FAITH AND FAIR DEALING

Capra argued Seton Hall breached its contract with him because it could not demonstrate it evaluated his application for promotion and tenure against the criteria stated in the faculty guide. But unlike other reviewing individuals and bodies, the provost is only required by the guide to notify an applicant "of his action on the application," namely whether he endorsed or denied it. The provost was not required to provide reasons for his decision. Therefore, Robinson's cursory letter met the guide's requirements.

Capra also argued on appeal that Seton Hall breached his contract by not providing him with annual evaluations. But Capra failed to make that allegation in his complaint and did not raise the issue before the motion court, and thus it was not an appropriate question for appeal. The court also rejected Capra's argument that his employment contract was illusory, finding Robinson's discretion was not "unfettered." Instead, as provost, he was required to evaluate each application for tenure according to the guide criteria and Capra was given the opportunity to appeal to Esteban, who could have reversed the decision.

Finally, Capra argued Seton Hall breached the implied covenant of good faith and fair dealing by denying his application without stating facts, reasons, or analysis for the decision, which he argued was capricious. To succeed on his claim, Capra needed to demonstrate Seton Hall's bad motive or intention, which he was unable to do.

The trial court properly found that the contractual process and procedure were followed. And during discovery, Capra elected not to take any depositions, so he had no testimony or evidence to impeach Robinson's or Esteban's motives or lend credence to his bad faith claim. Bare allegations in a plaintiff's pleadings are insufficient to defeat a meritorious application for summary judgment.

The Bottom Line

A failed candidate for promotion and tenure needs more than self-serving representations regarding academic credentials to establish breach of contract, especially when the failure is based on the lack of scholarship. Universities typically have detailed promotion and tenure guidelines at the department, school, and university level that specify all criteria, including the quality and quantity of publications, and the process to be followed at each level of review.

Absent evidence as a whole that the university failed to substantially comply with its processes, apply the specified criteria to the decision, or engage in good faith in its decision-making, a candidate cannot prevail merely by disagreeing with the academic judgments underlying the tenure denial.

Capra v. Seton Hall Univ., Case No. A-4053-18T2 (N.J. App. June 4, 2020).

RELATED UE RESOURCES

- Problems Arising from Tenure Denials: A Review of Recent Claims
- Webinar: Tenure Evaluation Challenges

Massachusetts Supreme Judicial Court

Negligence and the Duty to Protect College Students from Alcohol-Related Harm

In a recent case arising from an allegedly nonconsensual sexual encounter between two underaged students who had been drinking, the Massachusetts Supreme Judicial Court held that a university has a duty to protect voluntarily intoxicated students from harms associated with alcohol-related emergencies, but only in a narrow set of circumstances.

FIRST-YEAR STUDENT ALLEGES SEXUAL ASSAULT AFTER NIGHT OF DRINKING

Northeastern University first-year student M.H., a female student, and A.G., a male student, attended a Halloween party at another dorm hosted by sophomore Sarah Smith (a pseudonym), who was a resident advisor (RA). Before leaving for the party, M.H. and A.G., who lived in the same dorm, drank alcohol in M.H.'s room and filled a plastic soda bottle with more alcohol to bring to the party. M.H. engaged in drinking games at the party and drank alcohol other guests provided. Smith and another RA, Paul Jones (also a pseudonym), saw underage students drink but didn't provide guests alcohol.

Shortly after arriving at the party, M.H. repeatedly vomited in Smith's bathroom. Some acquaintances gave her water and crackers to try to control the nausea and had her wait in Smith's room to drink more water because they were concerned that the proctor at M.H.'s dorm might stop her because she was too visibly intoxicated.

The students offered to walk M.H. home. She declined. Because he was returning anyway to attend a sports practice early the next morning, A.G., who was also intoxicated, volunteered to walk with M.H. back to their dorm.

On the walk back, M.H. and A.G. kissed several times and were dragged to the ground when M.H. stumbled and fell. At the dorm, M.H. leaned on the counter for support when the proctor checked their IDs; she then walked unsteadily from the proctor's desk to the elevator. When they arrived at A.G.'s room, A.G. initiated sex with M.H., who later explained to her roommate that if she had been sober, she would have said something to stop the encounter.

The roommate, with M.H.'s permission, reported the incident to an RA. Northeastern investigated. A.G. was charged with a code violation of sexual assault with penetration.

After a hearing, the disciplinary panel found A.G. had not committed the alleged offense.

M.H. appealed, but the original holding was affirmed. M.H. later filed suit against Northeastern and various administrators, alleging, among other things, that they were negligent for failing to protect her from A.G.'s sexual assault and that Northeastern was responsible for the unreasonable acts and omissions of its RAs and proctors.

AN INSTITUTION'S SCOPE OF DUTY TO STUDENTS

To establish negligence, a plaintiff must satisfy a four-part test, including that the defendant owed a legal duty to the plaintiff and committed a breach of that duty. Under Massachusetts law, a defendant does not owe a plaintiff a duty to act to rescue or protect the plaintiff from conditions the defendant has not created. Generally, this no-duty rule extends to criminal acts of third parties, subject to certain exceptions. The court, however, found that Northeastern owed M.H. a duty to protect her by virtue of the special relationship between a university and its students to protect its resident students against foreseeable harm, including criminal acts of third parties. Northeastern argued this relationship does not impose a duty to protect students from potentially harmful consequences of choosing to voluntarily drink alcohol, but the court disagreed.

While recognizing that college administrators no longer assume a role *in loco parentis* and that students are now regarded as adults in almost every phase of community life, the court noted that unlike courts in other states, Massachusetts courts have held that the fact that a college need not police the morals of its resident students does not make it immune from repercussions of student alcohol consumption.

The court next turned to the question of the scope of the duty to intoxicated students. It stated it is foreseeable that a student will reasonably rely on his or her college or university for aid in the event of an alcohol-related emergency and that such reliance is particularly foreseeable for first-year students who, like M.H., were required to live in dorms on campus. Accordingly, when an institution has "actual knowledge of conditions that would lead a reasonable person to conclude that a student on campus is in imminent danger of serious physical harm due to alcohol intoxication, and so intoxicated that the student is incapable of seeking help for him- or herself, the college or university has a duty to take reasonable measures to protect that student from harm." The duty only applies when a university is already aware that a student is at imminent risk of harm through a recognition that the student is dangerously intoxicated. Equipped with such knowledge, the university merely must act reasonably under the circumstances.

Applying this standard, the court found that Northeastern owed no duty to protect M.H. in this instance because Northeastern could not have reasonably foreseen that, absent some intervention on its part, M.H. would be subjected to a criminal act or other harm or that she was in imminent risk of physical harm due to alcohol intoxication. It had no indication that A.G. posed any risk to M.H.

Full-time staff were not aware of the events leading to the alleged assault and, even if the student RAs or proctors were agents whose knowledge could be imputed to Northeastern, they lacked sufficient information that would have led a reasonable person to conclude that M.H. was at risk of being assaulted, as they did not view A.G. acting inappropriately to her, and M.H. was capable of communicating with other students and seemed to be managing her intoxication with the help of other students.

While "by throwing, or tacitly permitting, this underage drinking party, the RAs hardly covered themselves with glory," the subsequent steps they took to protect M.H. were appropriate and they met any duty they owed to protect her.

The court specifically rejected M.H.'s argument that the recognized relationship between alcohol and sexual assault, standing alone, was sufficient to impose a duty on Northeastern here, stating that "[t]his is precisely the overreaching type of duty that we have never imposed on universities, and which we again expressly reject today."

The Bottom Line

This case makes clear that in Massachusetts, institutions with actual knowledge that would lead a reasonable person to conclude that a student on campus is in imminent danger of serious physical harm due to alcohol, and so intoxicated that the student is incapable of seeking help, have a duty to take reasonable measures to protect the student from harm.

Helfman v. Northeastern Univ. et al., 485 Mass. 308 (Mass. July 27, 2020).

RELATED UE RESOURCES

- Review of Student-Victim Sexual Assault Claims with Losses
- Confronting Campus Sexual Assault: An Examination of Higher Ed Claims

Qualified Immunity Not Waived for School Administrators When Allegedly Dangerous Condition Did Not Threaten Group of Similarly Situated Students

Upholding the application of qualified immunity to school officials, the Court of Appeals of New Mexico finds no waiver where the school was under no duty to enact a policy regarding the use of physical restraint and, therefore, cannot be liable for failing to train an officer on such a policy.

SPECIAL EDUCATION STUDENT PLACED IN HANDCUFFS AFTER REFUSING TO STOP KICKING AND THROWING ITEMS AT SCHOOL PERSONNEL

C.V., a seven-year-old elementary school student in the Albuquerque Public Schools (APS) system in fall 2011, was deemed eligible for special education services as both a "gifted" student and a student on the autism spectrum. The school developed a behavioral intervention plan, which included a crisis plan. The crisis plan indicated that in an emergency situation or behavioral crisis, C.V.'s parents would be notified and the "crisis team" would be called. The plan did not specify who was on the team, nor did it address the issue of physical restraint when responding.

In November 2011, an APS social worker received a report that C.V. was misbehaving in class. C.V. agreed to go to the social worker's office, where he threw his shoes at her. When he began grabbing other things to throw, she asked the school's administrative office for help. The principal instructed the social worker to contact C.V.'s parents, but she could not reach them. C.V. ran away several times and, each time, was found and escorted to the office. Officer Xiomara Sanchez, a school resource officer, arrived, having been dispatched in response to a reportedly "out-of-control" student.

Sanchez reached C.V.'s mother, identified herself as "school security," and asked for permission to restrain C.V. His mother responded "yes."

C.V. again ran from school personnel, this time into a classroom where he ran around the room, pulled at a computer and yanked electrical plugs from sockets, knocked over chairs, kicked, and hit school personnel with the plugs.

After Sanchez stood in the classroom doorway to prevent C.V. from running away, he pushed, kicked, and hit her. He then shot rubber bands at her face, connecting once. Sanchez warned C.V. twice that if he did not stop this behavior, she would put him in handcuffs. After this continued for 15 minutes, Sanchez escorted C.V. to a chair and placed him in handcuffs, double-locking them to prevent them from tightening and ensuring there was space between C.V.'s wrists and the handcuffs. She told C.V. she would remove them when he calmed down and stopped kicking.

C.V. finally calmed after another resource officer arrived, along with C.V.'s mother shortly thereafter. The handcuffs were removed. He spent about 15 minutes in handcuffs.

QUALIFIED IMMUNITY: SCHOOL HAD NO DUTY TO ENACT POLICY REGARDING PHYSICAL RESTRAINT OF STUDENTS

Plaintiffs filed suit pursuant to the New Mexico Tort Claims Act (TCA) against numerous APS administrators alleging they negligently operated a public building by creating a dangerous condition on the premises due to defendants' failure to establish a policy or practice regarding the use of handcuffs on students with disabilities and to train personnel that students should not be handcuffed. The district court ultimately granted defendants' motion for summary judgment on all counts.

C.V. also had filed suit against Sanchez in federal court; the suit was dismissed on qualified immunity grounds.

Plaintiffs claimed APS was under a duty to implement a policy regarding the use of physical restraint, citing a 2006 memorandum from the state director of special education regarding physical restraint as a behavioral intervention for students with disabilities. Based upon the memorandum's language, the court found it was "guidance" only and it urged, but did not mandate, districts to adopt policies on the use of physical restraint.

Likewise, while plaintiffs argued that defendants had a duty to enact a policy expressly prohibiting the use of handcuffs on special education students, they failed to point to any statute, regulation, or case requiring APS to do so. Accordingly, the

court concluded that no genuine issue of material fact existed as to whether the defendants created a dangerous condition on the premises through a failure to enact a policy regarding the use of handcuffs on students.

Additionally, under the TCA, governmental entities acting within the scope of their duties are granted immunity from tort liability unless immunity is waived. A waiver may be found when the negligent operation or maintenance of a dangerous condition threatens the general public or a class of users in the building.

Because C.V.'s behavior was uncharacteristic for him and fell outside his behavioral intervention plan, the court found the resource officer's response to the student's unprecedented behavior did not create a dangerous condition to other students. Instead, the response to C.V.'s misbehavior was more like a discrete administrative act affecting one person, for which the TCA does not waive immunity.

The plaintiffs' primary reliance on a New Mexico Supreme Court case actually bolstered the defendants' position in the eyes of the court, providing a contrasting example of where qualified immunity may be waived. In that case, school officials failed to follow existing policies established for students at risk of medical emergencies, thereby putting all similarly situated students at risk and creating a dangerous condition on the premises.

Here, because the plaintiffs could not show the defendants had a duty to enact policies and procedures regarding the use of handcuffs, or that the lack of a written policy created a dangerous condition, the court found no issue of fact regarding whether any negligent training or supervision by the defendants created a dangerous condition threatening all the school's students. The court also found the plaintiffs' vague assertion that training was warranted yet not administered, and assumption that such training would have definitively incorporated a ban on the use of handcuffs in this instance, unsupported by the record even when viewed in the light most favorable to the plaintiffs. Accordingly, the court found no waiver of immunity under the TCA.

A law enforcement officer's immunity also may be waived under the TCA when a supervising law enforcement officer's negligent training or supervision results in a subordinate officer's commission of an enumerated tort. While Sanchez was not a defendant in this case, the plaintiffs argued that the defendants failed to train her on policies regarding use of handcuffs on students and this failure caused her to commit battery.

Because the plaintiffs' sole basis for this contention was predicated upon the defendants' alleged creation of a dangerous condition due to a lack of policy regarding handcuff usage, the court similarly rejected their claim for negligent failure to train or supervise. Without a duty to enact or enforce a policy on handcuffs, APS had no duty to train a subordinate officer on such a policy.

The Bottom Line

In the absence of a broader danger to similarly situated students, qualified immunity applies to school administrators and law enforcement officers under the TCA. However, this decision also reminds schools that when a policy, or failure to follow it, impacts a broader group of students, there may be liability for creating a dangerous condition on school premises.

J.V., et al. v. Brooks, et al., Case No. A-1-CA-36350 (N.M. App. May 4, 2020), petition for cert. denied.

RELATED UE RESOURCE

- Using Physical Restraint on Students

Texas Supreme Court

No Sovereign Immunity for Private University Police Department Activities

A private university does not have sovereign immunity when it is sued in connection with its law-enforcement activities.

TEXAS SUPREME COURT AFFIRMS NO GOVERNMENTAL IMMUNITY

On May 22, 2020, the Texas Supreme Court affirmed the judgment of the Texas Court of Appeals holding that the University of the Incarnate Word does not have governmental immunity when it is sued in connection with its law-enforcement activities. The Supreme Court held that neither the doctrine's purposes nor the operative state legislation supports extending sovereign immunity to the university as a private entity.

The Supreme Court previously held in 2018 that the University of the Incarnate Word had the right to appeal from an adverse ruling on its jurisdictional plea of governmental immunity, but remanded to the Court of Appeals to consider whether the state's sovereign immunity extended to the university. The Court of Appeals declined to hold that the university possessed sovereign immunity.

The Supreme Court affirmed, holding:

1. Private universities do not operate as an arm of the state government through their police departments.
2. Extending sovereign immunity to the university does not comport with the doctrine's purposes, nor is it consistent with enabling legislation that extends immunity to peace officers engaged in law enforcement activities.

As Texas Supreme Court Justice Jane Bland wrote, "Although the university obtained state approval to form its police department, the university's governing board is in charge."

The case stemmed from the fatal shooting of a student by a university peace officer after a traffic stop in 2013. In 2014, the student's parents brought a wrongful death case against the university and its peace officer.

The case will now proceed in the District Court of Bexar County, Texas.

The Bottom Line

In a dissenting opinion, Chief Justice Nathan Hecht reasoned the majority was wrong when it held that while a public police department has governmental immunity from suit, a private university police department does not. When it comes to immunity, he saw no meaningful distinction between private university police departments and other municipal police departments.

Courts examining immunity issues in other states also will look at legislative intent behind operative statutes. But in the absence of clear intent, Chief Justice Hecht reasoned that "Law enforcement and public safety are core government responsibilities, just as public education is." When the legislature chooses "to enlist private resources in those functions [such as] university police departments . . . the actors should be treated the same. I would hold that private university police departments have the same immunity from suit and liability as public police departments."

University of Incarnate Word v. Redus, 602 S.W.3d 398 (Tex. May 22, 2020). (majority); (dissent)

RELATED UE RESOURCES

- Excessive Force by Campus Security
- Webinar: Use of Force by Campus Police — Risk Management Lessons

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IN THE NEXT UE ON APPEAL

Title IX: The plaintiff students in *Kollaritsch v. Michigan State Univ.*, have filed a petition for cert. to the U.S. Supreme Court, challenging the Sixth Circuit decision, which held that in a case of student-on-student sexual harassment, a plaintiff must plead, and ultimately prove, that the university had actual knowledge of actionable sexual harassment and that its deliberate indifference to it resulted in further actional sexual harassment that caused the victim to suffer Title IX injuries, rejecting the students' argument that they need only show that a school's "clearly unreasonable" response made them more "vulnerable to harassment." To date, two amicus briefs have been filed in support of the students' petitions. United Educators will continue to monitor and report on any further developments in the Supreme Court.

Kollaritsch v. Michigan State Univ. Board of Trustees, 944 F.3d 613 (6th Cir. Dec. 12, 2019), petition for cert. filed (July 2, 2020).

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